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ALLAHABAD SERIES

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(2022) 12 ILRA 6
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.12.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.

Civil Misc. Arbitration Application No. 65 of 2021

Torrent Power Ltd. ...Applicant
Versus
Dakshinanchal Vidyut Vitaran Nigam Ltd. ...Respondent

Counsel for the Applicant:
Mr. J.N. Mathur, Senior Advocate, with Ms. Mahima Pahwa and Mr. Shivam Shukla, Advocates

Counsel for the Respondents:
Mr. Amarjeet Singh Rakhra, Advocate

Civil Law - Arbitration and Conciliation Application Act, 1996 _ Section 11(6) - Appointment of an Arbitrator - Jurisdiction of Court to entertain application for appointment of an arbitrator - Held - in the agreement the "venue" of the arbitration is stipulated to be Lucknow, whereas the Courts at Agra and Allahabad are given exclusive jurisdiction in case of any dispute arising out of compliance/non compliance of the agreement - From the jurisdictional perspective, Lucknow is only a venue or location for conducting the Arbitral Proceedings - Exclusive jurisdiction clause contained in the agreement constitutes "significant contrary indica" as per Shashoua principle and only the Courts at Agra/Allahabad will have jurisdiction to decide the disputes between the parties arising out of agreement in question - Court at Lucknow has no jurisdiction to entertain the application for appointment of an arbitrator and as per the exclusive jurisdiction clause contained in the agreement, the Courts at Allahabad will have jurisdiction to entertain it (Para 19, 20)

Dismissed. (E-5)

List of Cases cited:

1. Brahmani River Pellets Ltd. Vs Kamachi Industries Ltd. (2020) 5 SCC 462

2. Duro Felguera Vs Gangavaram Port Ltd. 4 C.M. Arbitration Application No. 65 of 2021 (2017) 9 SCC 729

3. M/s Icomm Tele Ltd. Vs Punjab State Water Supply & Sewerage Board (2019) 4 SCC 401

4. BGS SGS SOMA JV Vs NHPC Ltd. (2020) 4 SCC 234

5. Ravi Ranjan Developers Pvt. Ltd. Vs Aditya Kumar Chatterjee (Civil Appeal No. 2394-2395 of 2022) decided on March 24, 2022

6. Mankastu Impex Pvt. Ltd. Vs Airvisual Ltd. (2020) 5 SCC 399

7. Hasmukh Prajapati Vs Jai Prakash Associates Ltd. through its Managing Director AIR 2022 All 121

8. Meenakshi Nehra Bhat & ors. Vs Wave Meghacity Centre Pvt. Ltd. (Arbitration Petition No. 706 of 2020) decided on November 9, 2022 by the Delhi High Court

9. Kush Raj Bhatia Vs DLF Power and Services Ltd. (Arbitration Petition No. 869 of 2022) decided on December 6, 2022 by the Delhi High Court

(Delivered by Hon'ble Rajesh Bindal, C.J.)

ORDER

1. The prayer made in the present application filed under Section 11(6) of the Arbitration and Conciliation Application Act, 1996 (hereinafter referred to as the "Act") is for appointment of an Arbitrator

for resolution of dispute between the parties.

2. Mr. Mathur, learned Senior Advocate, appearing for the applicant, submitted that an agreement was signed between the applicant and respondent-Dakshinanchal Vidyut Vitaran Nigam Limited (hereinafter referred to "DVVNL") on May 18, 2009 for distribution of electricity in urban areas of Agra for which the respondent was a Distribution Licensee. Clause 17 of the agreement provides for resolution of disputes between the parties. Clause 17.2.5. provides for arbitration. Clause 17.1.2 provides for jurisdiction of the Court for entertaining all the disputes between the parties. It has been mentioned as Agra/Allahabad. The venue of arbitration has been provided under Clause 17.2.8 to be at Lucknow.

3. From the aforesaid clauses, it is evident that for all routine disputes, the Clause 17.1.2 may be relevant. However, for arbitration point of view, the seat being at Lucknow, the proceedings will be at Lucknow. Even if the proceedings could be at Allahabad, in fact the dispute falls within the jurisdiction of Allahabad High Court, hence it can be at either of the places. In support of his argument, reliance is placed on **Brahmani River Pellets Limited Vs. Kamachi Industries Limited (2020) 5 SCC 462.**

4. Referring to the procedure provided in the agreement for resolution of disputes, he submitted that in terms of Clause 17.2.3, a Permanent Dispute Resolution Body, having equal representation from each of the parties is to be constituted. The disputes or differences arising under the agreement shall be referred for resolution to this body which shall communicate its decision within thirty days and thereafter the matter is to be considered in terms of Clause 17.2.4 which provides that in case of non-settlement of dispute by the Permanent Dispute Resolution Body, such dispute or differences shall be referred for decision to a body constituting of MD, DVVNL and Head, Distribution Franchisee (by whatever name called) which shall communicate its decision within a period of fifteen days. Primarily, there are three disputes; (1) Regulatory Surcharge, (2) Electricity Duty, and (3) Tariff Indexation Ratio.

5. Vide letter dated October 21, 2020, the applicant requested for constitution of Permanent Dispute Resolution Body for resolution of the dispute, detailed as that applicant is making payment of Regulatory Surcharge to DVVNL as per TIRn mechanism, but DVVNL is asking for full payment of regulatory surcharge recovered by the applicant. However, no response was received. On October 28, 2020 a committee constituted by MD considered the issues. However, no resolution could be passed. All the three issues were discussed in the aforesaid meeting. Hence, to state that the applicant has not exhausted the remedies available in the agreement for resolution of dispute before invoking the jurisdiction of the Court is not made out.

6. To put the records straight, Mr. Mathur, learned senior counsel, appearing for the applicant, submitted that an application was filed under Section 9 of the Act for interim relief before the Commercial Court, Lucknow. Status-quo was granted on March 16, 2021.

7. The respondent challenged the aforesaid order dated March 16, 2021 passed by Commercial Court, Lucknow by filing FAFO No. 335 of 2021 at Allahabad,

which is still pending. The issue of jurisdiction is also under consideration. In terms of the interim order dated July 13, 2021 passed in the aforesaid appeal, again the efforts were made for settlement of the dispute. However, no positive result could be there.

8. Meanwhile, on May 31, 2021, the applicant issued notice seeking appointment of an Arbitrator to which reply was received refusing to appoint Arbitrator raising preliminary objection that the applicant had not exhausted the remedies as provided under the agreement. Huge claim was sought to be made by the respondent against the applicant, deposit thereof was sought before consideration of request of the applicant for appointment of Arbitrator. Clause 17.2.12 of the agreement provides that both the parties shall continue to perform their respective obligations during the currency of the Dispute Settlement Procedure. Deposit of money is not a pre-condition for appointment of an Arbitrator for resolution of any dispute. Reliance was placed on judgment of Supreme Court in **Duro Felguera Vs. Gangavaram Port Limited (2017) 9 SCC 729** to submit that only the arbitration clause is to be seen. He further referred to the judgment of Supreme Court in **M/s Icomm Tele Ltd. Vs. Punjab State Water Supply and Sewerage Board (2019) 4 SCC 401** to submit that even a clause contained in the agreement providing for pre-deposit of certain amount for invoking arbitration proceedings was held to be bad. In the case in hand, there is no such clause. The respondent just want to add words in the clauses in the agreement, which is not permissible.

9. On the other hand, learned counsel for the respondent submitted that the jurisdiction for invoking the arbitration clause is well defined in the agreement. Clause 17.1.2 clearly provides the jurisdiction of the Court at Agra and Allahabad. The District Court at Agra will have jurisdiction for the dispute for which the jurisdiction of District Court is to be invoked and the correspondingly the High Court at Allahabad will have jurisdiction. Merely because in the agreement venue of arbitration has been given at Lucknow, it will not confer jurisdiction to the Court at Lucknow for filing application under Section 11(6) of the Act. In fact, the applicant had wrongly invoked jurisdiction of Commercial Court at Lucknow while filing the application under Section 9 of the Act. While referring to Clause 17.2.12, it was submitted that it is agreed between the parties that both the parties shall continue to perform their respective obligations during the conduct of the Dispute Settlement Procedure.

10. The respondent is engaged in supply of electricity which is an essential service. More than ₹100 crore are due from the applicant which it has failed to pay despite repeated notices. The dispute arose from the year 2013 onwards. In case, the the applicant was not liable to pay the amount, it could have invoked the arbitration clause then and there. He further submitted that the meeting, as is sought to be referred by the applicant on October 28, 2020, was not held by the Managing Director, as is the requirement of Clause 17.2.4. Once it is admitted case of the applicant that the Court at Agra and Allahabad had jurisdiction, why the application under Section 9 of the Act was filed at Lucknow needs to be explained. Unless the applicant deposits the amount due from him, as provided in Clause 17.2.12 of the agreement in terms of which both the parties shall continue to perform

their respective obligations during the conduct of the Dispute Settlement Procedure, he cannot seek appointment of an Arbitrator.

11. Heard learned counsel for the parties and perused the paper book.

12. To appreciate the contention raised by learned counsel for the parties, it would be appropriate to reproduce certain relevant clauses of the agreement.

17.1 Governing Law

17.1.1 This Agreement has been executed and delivered in India and its interpretations, validity and performance shall be construed and enforced in accordance with the laws of India and also the laws applicable to the State of Uttar Pradesh.

17.1.2 Any dispute arising out of compliance/non- compliance of this Agreement shall be exclusively under the jurisdiction of court at Agra/Allahabad.

X X X X

17.2 Amicable Settlement

X X X X

17.2.5 Any dispute arising out of, in connection with or with respect to this agreement, the subject matter hereof, the performance or nonperformance of any obligation hereunder, which cannot be resolved by negotiation between the Parties and the Dispute Resolution procedure as stated in the foregoing Articles, shall be exclusively submitted to arbitration at the request of either party upon written notice to that effect to the other party and the proceedings shall be conducted subject to the provisions of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) by a panel consisting of three arbitrators.

X X X X

17.2.8 The language of the arbitration shall be English. The venue of Arbitration shall be Lucknow."

13. While dealing with the issue of seat and venue in arbitral proceedings, Hon'ble the Supreme Court in **BGS SGS SOMA JV Vs. NHPC Ltd. (2020) 4 SCC 234** observed as under:

"59. ..... Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings."

14. The Court further held:

"61. It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding."

"82. ..... Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral

proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings."

(emphasis supplied)

15. In **Ravi Ranjan Developers Pvt. Ltd. Vs. Aditya Kumar Chatterjee (Civil Appeal No. 2394-2395 of 2022)** decided on March 24, 2022, a development agreement was executed between the parties for development of property situated at Muzaffarpur, Bihar which contained an arbitration clause providing for resolution of disputes between the parties through Arbitration. The place of sitting of Arbitral Tribunal was stipulated to be at Kolkata. The Supreme Court set aside the order of appointment of an Arbitrator by Kolkata High Court on the ground that the appointment was without jurisdiction, observing that:

"43. This Court has perused the Development Agreement. The contention of the Respondent in the Affidavit in Opposition, that the parties to the arbitration agreement had agreed to submit to the jurisdiction of Calcutta High Court, is not correct. The parties to the arbitration agreement only agreed that the sittings of the Arbitral Tribunal would be in Kolkata. Kolkata was the venue for holding the sittings of the Arbitral Tribunal."

"45. In **Mankastu Impex Private Limited v. Airvisual Limited (2020) 5 SCC 399,** a three Judge Bench of which one of us (Hon. A.S. Bopanna, J) was a member, held:

"19. The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which court would have the supervisory power over the arbitration proceedings. In Enercon (India) Ltd. v. Enercon GmbH [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1, the Supreme Court held that:

"The location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law."

20. It is well settled that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties."

46. In this case, the Development Agreement provided that the sittings of the Arbitral Tribunal would be conducted in Kolkata. As observed above, the parties never agreed to submit to the jurisdiction of Calcutta High Court in respect of disputes, nor did the parties agree upon Kolkata as the seat of arbitration. Kolkata was only the venue for sittings of the Arbitral Tribunal."

"48. In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings."

16. In **Hasmukh Prajapati Vs. Jai Prakash Associates Ltd. through its Managing Director AIR 2022 All 121**, in the agreement executed between the parties the resolution of dispute between the parties was provided by way of arbitration. The venue of the Arbitration was to be New Delhi. However, the agreement provided exclusive jurisdiction of Courts at Gautambudh Nagar over the disputes arising between the parties. This Court placing reliance on various authorities on the issue, referred to above, held:

"33. In the present case, the arbitration agreement clearly shows that the parties agreed as per Clause 10.6 that the governing law and the jurisdiction of the courts would be the courts of Gautam Buddh Nagar, U.P., India and it shall have jurisdiction over all matters arising out of or relating to the allotment/provisional allotment subject to the provisions of Clause 10.9 of the standard terms and conditions. This exception regarding Clause 10.9 constitutes "significant contrary indica" as per Shashoua principle in agreement regarding treating the "venue" of arbitration (New Delhi) as "seat" of arbitration proceedings (Gautam Buddh Nagar) where the cause of action arose. In Clause 10.9 regarding dispute resolution, it was agreed that the "venue" of arbitration shall be New Delhi, India. Accordingly, the sole arbitrator conducted the arbitration proceedings at the agreed venue of New Delhi and passed the award. From the standard terms and conditions/agreement between the parties, it is clear that the parties never clearly stated about the seat of arbitration but from Clause 10.6 of the agreement, the courts at Gautam Buddh Nagar, U.P., India, was agreed to have jurisdiction over all matters arising out of or relating to the allotment/provisional allotment. This clause proves that the parties had chosen the "seat" of arbitration as Gautam Buddh Nagar, U.P., India, and the "venue" of arbitration as New Delhi, India."

17. In similar situations, in **Meenakshi Nehra Bhat and others Vs. Wave Meghacity Centre Private Limited (Arbitration Petition No. 706 of 2020) decided on November 9, 2022 by the Delhi High Court,** where the agreement executed between the parties contained arbitration clause providing the venue of the arbitral proceedings to be New Delhi, but conferred exclusive jurisdiction to the Courts at Gautambudh Nagar, the Delhi High Court, while dismissing the petition due to lack of territorial jurisdiction, held that New Delhi is only a location for conducting the arbitral proceedings and the territorial jurisdiction vests in the Courts at Gautambudh Nagar and the Allahabad High Court, as may be applicable, depending on the proceedings in question.

18. In **Kush Raj Bhatia Vs. DLF Power and Services Ltd. (Arbitration Petition No. 869 of 2022) decided on December 6, 2022 by the Delhi High Court,** the arbitration agreement provided that the place of arbitration would be New Delhi but specified that the exclusive jurisdiction would be of Courts at Gurgaon/High Court at Chandigarh, the Delhi High Court observed that though the place of arbitration was to be New Delhi,

but there was a contra indica present in the agreement which provided exclusive jurisdiction to the Courts at Gurgaon/High Court at Chandigarh and as such the Delhi High Court has no territorial jurisdiction.

19. Applying the aforesaid law in facts of the present case, there appears a contra indication in the agreement to an extent that the "venue" of the arbitration is stipulated to be Lucknow, whereas the Courts at Agra and Allahabad are given exclusive jurisdiction in case of any dispute arising out of compliance/non compliance of the agreement. From the jurisdictional perspective, Lucknow is only a venue or location for conducting the Arbitral Proceedings. The exclusive jurisdiction clause contained in the agreement constitutes "significant contrary indica" as per Shashoua principle and only the Courts at Agra/Allahabad will have jurisdiction to decide the disputes between the parties arising out of agreement in question.

20. In view of the discussions made hereinabove, this Court is clearly of the view that the Court at Lucknow has no jurisdiction to entertain the present application and as per the exclusive jurisdiction clause contained in the agreement, the Courts at Allahabad will have jurisdiction to entertain it. The application is, accordingly, dismissed.

21. However, the applicant will be at liberty to move a fresh application seeking the relief as prayed in the present application before this Court at Allahabad, if the applicant is so advised.

(2022) 12 ILRA 12
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.12.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 240 of 1986

Ayodhya Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Kr. Shanti Prakash, Arun Sinha, Ashish Mishra, Kr. M. Rakesh, Raghvendra Pratap Singh, Riyaz Ahmad, Siddhartha Sinha, Surendra Pratap Singh, Vinay Kumar Singh

Counsel for the Respondent:
G.A., Janardan Singh, Suresh Kumar Upadhyay

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860-Section 147, 302, 325, 323, 307, 504, 506 -Challenge to-Conviction- As per FIR and the statement of witnesses that quarrel started over a small unripe mango fruit dropped from the mango tree between two children and this quarrel between the children ultimately resulted in death of a young boy- P.W.-1, P.W.-2 , P.W.-3,P.W-4 succeeded in proving the case beyond reasonable doubt that about 2 p.m. and the incident took place in the khaliyan-the accused committed assault on the deceased at the place denoted by letter "X' in the site plan-Prosecution also proved that the genesis of quarrel occurred in drop unripe mango between children-From the perusal of the post-mortem report and injury report time of occurrence is fixed between 1 to 2 p.m. -The ocular witnesses and the child witness deposed that the incident occurred at 2 p.m. The fact is also confirmed by the defence version as they stated to have sustained injuries by khodni inflicted by the deceased - the injuries were caused by some blunt object and were about 6 to 7 days old, the time opined by doctor also corroborate the time

of occurrence -P.W.-5 (Child) is examined by the prosecution who is the witness of that incident which lead to marpit-He deposed in court as child witness and stated that he entangled with another child on account of mango and thereafter father of another child armed with lathies attacked his father who succumbed to death on account of injury sustained by him-Learned trial court discussed all the material evidence on record, place of occurrence and with a very clear finding arrived at the conclusion of guilt of the accused/appellants.-The judgment passed by the learned trial Court is convincing.. The judgment passed by the trial court is liable to be upheld and is confirmed. (Para 28 to 42)

B. Evidence of child witness is not to be thrown away at its threshold. The only rider is that the child testimony weight that it must got corroborated from other evidences also. In the instant case Dabbu @ Brijesh is the only witness who was present at the spot and the dispute arose between Rudra Pratap and Dabbu about the unripe mango fruit. This fact is admitted by the defence also. Therefore, the evidence of Dabbu cannot be rejected at the very outset. (Para 33)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Suryanarayana Vs St. of Karn. (2001) 9 SCC 129

2. Panchhi Vs St. of U.P. (1998) 7 SCC 177

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

1. This criminal appeal has been filed by the appellants Ayodhya Singh, Lal Ji Singh, Man Bahadur Singh, Bharat Singh, Bhanu Pratap Singh against the judgment and order dated 04.04.1986 passed by the III-Additional Sessions Judge, Gonda in Sessions Trial No. 386 of 1985 State Vs. Ayodhya Singh and others Police Station Kotwali Dehat convicting the appellants and sentencing each of them six months rigorous imprisonment under Section 147 IPC, six months rigorous imprisonment under Section 323/ 149 IPC and to the imprisonment to life under Section 302/149 IPC.

2. During the pendency of appeal, appellant No. 1 Ayodhya Singh and Appellant No. 2 Lal Ji Singh, have died and the appeal stood abated with regard to the appellants No. 1 and 2.

3. Wrapping the facts in brief, on 19.4.1984 at about 2 p.m. Jagannath Singh, lodged a written report that his brother Vishwanath Singh was thrashing wheat in the field and his son Dabbu and one Rudra Prasap son of Ayodhya Singh were playing. Both the boys started quarreling. Rudra Pratap went to his house weeping. After some time Ayodhya Singh, Lalji Singh, Man Bahadur Singh, Bharat Singh and Bhanu Pratap Singh armed with lathies, arrived and started scolding Dabbu Singh. Vishwanath Singh also went there and asked as to what was the matter. The aforesaid accused thereupon started beating Vishwanath Singh with lathi. Vishwanath Singh also plied khodni in his self-defence. On the alarm raised by Vishwanath Singh informant Jagganath Singh and his brother Jagdish Singh, rushed to the spot and tried to save the deceased Vishwanath Singh. Jagdish Singh also sustained injuries. Witnesses Hanuman Singh, Ram Karan Singh alias Ghullur Singh, Jai Prakash Singh, Sipahi Singh and Ram Deo Singh intervened and the accused person then left the spot. Vishwanath Singh was being taken to the hospital by the informant and others, when he succumbed to death due to the injuries sustained by him.

4. A written report (Ex Ka-1) was lodged about the incident on 19.04.1984 at

about 4:30 p.m. in the police station which is at the distance of 11 km from the village Lorhiya Ghata. On the basis of written report chick report (Ex Ka-15) was prepared. A case was registered and endorsed in G.D. Investigation was entrusted to Sub-Inspector Satish Chandra Ojha who conducted and prepared the inquest report (Ex Ka-3). He also prepared photo lash and challan lash, sample seal, letter to C.M.O and send the body of the deceased for autopsy. Investigating officer recorded the statement of witnesses of inquest, Munizar Singh-Scribe of the report, Jagganath Singh and other witnesses Jagdish Singh, Hanuman Singh, Ram Karan Singh, Jai Prakash Singh, Siphai Singh, Ram Deo Singh and Dabbu Singh, inspected the spot and prepared site plan, recovered the blood stained and plain earth from the place of occurrence and prepared recovery memo thereof.

5. The case property was sent for chemical examination to forensic science laboratory, Agra through constable Shri Niwas Chaudhari. Thereafter investigation was taken over by Inspector Ram Kripal Tiwari who after satisfying from the investigation conducted by Satish Chand Ojha submitted charge-sheet against the appellants in court.

6. After compliance of Section 207 Cr.P.C, the case was committed to the Court of Sessions, charges were framed and read over to the appellants under Sections 147, 302/149, 323/149 IPC, the appellants abjured from the charges and claimed to be tried.

7. In order to prove the prosecution case the following witnesses were produced by the prosecution:-

(a) P.W.-1 Jaggan Nath Singh.
(b) P.W.-2 Jagdish Singh.
(c).P.W.-3 Hanuman Singh.
(d) P.W.-4 Dr. S.K. Gupta.
(e) P.W.-5 Dabbu @ Brijesh.
(f) P.W.-6 S.I. Satish Chandra Ojha.
(g) P.W.-7 Inspector Ram Kripal Tripathi.
(h) P.W.-8 H.C. C.P. 57 Sultan Ahmad.
(g) P.W.-9 C.P. 246 Lalit Kumar.
(h) P.W.-10 Dr. R.U.Pandey.

8. Beside the ocular evidence, prosecution adduced following documentary evidence:

(I) Written report (Ex Ka-1)
(II) Inquest Report (Ex Ka-3)
(III) Site Plan (Ex. Ka-9)
(IV) Recovery memo (Ex. Ka 11 to 13).
(v) First Information Report (Ex. Ka 15)
(VI) injury report (Ex Ka-2)
(VII) Post mortem report (Ex Ka-18)
(VIII) Forensic Science Laboratory Report (Ex Ka-19).

9. After the conclusion of the prosecution witnesses, statement of accused under Section 313 Cr.P.C were recorded. Accused denied all the allegations levelled against them and stated that Dabbu and Rudra Pratap were playing under the mango tree and both had a quarrel over a dropped mango from a tree. Dabbu complained the incident to his father and uncles who in-turn beat Rudra Pratap Singh with lathies. Hearing the cries of his son, he along with accused reached the place of occurrence then the deceased and his brother started beating them also then they plied lathies in their self-defence and the

person from both the sides got injuries. The accused shown their ignorance about the death of the deceased Vishwanath Singh. The accused Bhanu Pratap, Bharat Singh and Man Bahadur claimed him to be alive in the statements under Section 313 Cr.P.C. The appellants were given opportunity to adduce defence which they refused.

10. After perusal of the record, statement of the witnesses, documentary and ocular evidence, trial court convicted and sentenced the accused Ayodhya Singh, Lalji Singh, Man Bahadur Singh, Bharat Singh and Bhanu Pratap Singh for offences under Sections 147, 323/149 and 302/149 IPC. Aggrieved with the conviction and sentence the present appeal has been filed.

11. Heard Shri Vinay Kumar Singh, learned counsel for the appellants and Shri Prabhat Adhauliya, learned A.G.A for the State.

12. It is contended by learned counsel for the appellants that the appellants also sustained injuries in the incident which has not been explained by prosecution and the appellants are falsely roped in this case. The number of assailants have been deliberately increased, it is a clear case of self-defence because the prosecution should not be allowed to have the benefit of weakness and laches in the defence, injuries also indicate that there was no intent to kill. It is not known which was the fatal injury to deceased. The case is covered under Section 325 IPC or at the maximum by Section 304 part II IPC if the prosecution case is taken at its face value. The khodni which allegedly used in self-defence by the deceased Vishwanath Singh was not brought before the Court not even before the police.

13. Learned A.G.A on the other hand has argued that there was a dispute between the son of the deceased Vishwanath and son of accused-appellant No. 1 over having mango dropped from the tree both the children went to have dropped mango and when the son of deceased denied to hand over the mango to Rudra Pratap, he started weeping and complaint to his father and uncle and then the assailants armed with lathies arrived at the place of occurrence and started scolding the son of deceased Vishwanath and when the deceased Vishwanath enquired about the incident all the appellants started assaulting the deceased by lathis. The deceased used khodni in his self-defence but when he sustained injuries on his head he could not used khodni. Thereafter when the witnesses Jagdish and complainant himself tried to save Vishwanath Singh, the appellant assaulted and injured them also. He could not use khodni and his brother Jagdish sustain injuries while saving their brother Vishwanath Singh. It is also submitted by learned A.G.A that all the witness prove guilt of the appellants beyond reasonable doubt, their presence is admitted at the place of occurrence, therefore, the appeal filed by the appellants is liable to be dismissed.

14. Before analyzing the ocular evidence, it is appropriate to recapitulate the statement of witnesses in court.

15. P.W.-1 Jagannath deposed in Court that at about 2 p.m. on the date of incident, he along with his brother Jagdish and Vishwanath, were thrashing the wheat in their khaliyan. In south of the khaliyan there is a mango tree. Dubbu @ Brijesh and Rudra Pratap were playing under the mango tree. A mango dropped and was picked by Dabbu. Rudra Pratap shouted at

Dabbu and both of them started quarreling. Rudra Pratap went to the village and Dabbu returned to the khaliyan. After some time the appellants armed with lathies arrived in the khaliyan and started scolding Dabbu. Vishwanath enquired about the matter, the accused started beating Vishwanath Singh. Vishwanath Singh, tried to ply with Khodni and raised alarm. He and his brother reached at the place of occurrence and the accused assaulted them also. When the witnesses of the incident arrived all the accused went away towards the village. Injured Vishwanath was taken by him by tonga when he expired on the way.

16. P.W.-2 Jagdish the injured witness of the incident deposed that when he was present in his kaliyan along with his brother Jaggannath and Vishwanath and was thrashing wheat, son of Vishwanath entangled with Rudra Pratap on account of dropped mango from tree. After some time, the accused appellant armed with lathies arrived in khaliyan and started scolding Dabbu when Vishwanath enquired about the incident, all the appellant started beating him with lathies. He also sustained injuries inflicted by the appellants. Vishwanath died when he was being taken to the hospital

17. P.W.-3 Hanuman Singh who is stated to be eye-witness of the incident stated on oath that while he was thrashing wheat in his khaliyan, he saw that all the appellants were beating Vishwanath Singh with lathies. Vishwanath Singh plight with khodni in his self-defence twice or thrice but when he sustained injuries on his head he could not save himself and died when he was being taken to the hospital.

18. P.W.-4 Dr. S.K.Gupta who had medically examined the injured Jagdish Singh on 19.4.1984 and found following injuries:

1. Lacerated wound, 3 cms x.5cm x scalp deep on the left posterior side of head, 10 cms. Above left ear, fresh blood was present.

2. Traumatic swelling- 3 cms x 0.5 cms on the left forearm, 12 cms above left wrist joint.

3. Complaints of pain on the left him and right side back but no external mark of injury was seen.

19. P.W.-5 Dabbu @ Brijesh aged about 10 years is the star witness who stated on oath that he and Rudra Pratap were playing under the tree when small Tikora (mango) dropped he and Roopal (Rudra Pratap) rushed towards that mango. Dabbu got that mango. Roopal tried to snatch the mango but on being failed abused him and went to his house. He started playing again then all the accused armed with lathies arrived and started scolding and abusing him. His father came and enquired about the matter then all of them started beating his father. His father also tried to ply with khodni in his self-defence but he could not defend for long. Then his uncles Jagdish and Jaggannath tried to save his father but they also sustained injuries in the incident.

20. P.W.-6 Sub-Inspector Satish Chandra Ojha, appeared and deposed in Court that he started investigation of the case, prepared and proved the inquest report (Ex Ka-3), prepared photo lash and challan lash, specimen seal, letter to CMO and sent the relevant papered (Ex Ka 4 to Ka-8) and send the dead body for autopsy along with the copy of FIR and G.D recorded the statement of witnesses, scriber of FIR and statement of Jagannath Singh on

the same date. P.W.-6 recorded statement of Jagannath and Jagdish on 20.04.1984 investigated and prepared site plan with index (Ex Ka-9) prepared recovery memo of blood strain (Ex Ka-10) and plain earth (Ex-Ka-11). Investigating Officer sent the case property for chemical examination to Agra on 03.06.84 by Constable Shri Niwas Chaudhari. Recorded the statement of Rudra Pratap Singh.

21. P.W.-7 Inspector Ram Kripal Tripathi submitted charge sheet on the basis of the investigation conducted by P.W-6.

22. P.W-8 Head Constable C.P. 57 Sultan Ahmad proved chick report (Ex Ka-15) and G.D (Ex. Ka-16) and G.D No. 27 endorsed on 19.04.84 is proved as Ex. Ka-17.

23. P.W.-9 Lalit Kumar C.P. 246 deposed in court that he carried the dead body of deceased in sealed condition at 6:30 p.m. on 20.04.84 and handed it over to doctor. During this period the dead body remained in sealed condition.

24. P.W-10 Dr. R.U. Pandey conducted autopsy of deceased of deceased Vishwanath aged about 28 years and found the following antemortem injuries:

1. Lacerated wound-1.5 cm x 1cm x bone deep on right side top of head, 10 cms above right ear.

2. Lacerated wound- 3.5 cms.x 1 cm.x bone deep on left side head 7 cms above left ear.

3. Abrasion 2 cmsx .5 cm on the top of left shouldeer.

4. Abrasion 1.5 cms x .5 cm on the top medical aspect of left forearm, 13 cms below left elbow.

5. Abrasion 1 cm. X 1 cm on the front part of right leg 3 cms below right knee.

25. On internal examination, the doctor found hematoma in an area of 22 cms x 10 cms with 16 cms long line fracture of occipital bone under injuries nos. 1 and 2. The membranes were deeply congested and blood clottings were present. Brain was also congested. Abdomen was full of undigested rice food material. Small intestines contained pasty material and large intestines contained faecal matter. In the opinion of the doctor, death was caused due to come as a result of ante mortem head injuries nos 1 and 2.

26. D.W.-1 Dr. D.A. Khan stated on oath that he had examined and prepared the injury report of appellant **Lalji** and found following injuries:

1. Lacerated wound 3.5 cm x ½ cmx bone deep (infected) on the top of left side head, 12 cms above left ear.

2. Abrated contusion 6 cmsx 2 cms on the right side back, scapular region upper part.

3. Contusion 4 cmsx 1.5 cms on right side back, scapular region lower part.

4. Contused swelling on lower half of right calf muscle.

5. Abrasion 1 cm x 1 cm on front of right knee at lower and of patalla bone.

27. All the injuries were simple in nature and were caused by hard object and were about five days old. The following injuries were found on the person of **Ayodhya Singh:-**

1. Lacerated wound on right side head, 3 cms x .5 cmx muscle deep with

scabs formation, 6 cms above right eye brow.

2. Contused swelling 8 cms x 4cms on outer side left thigh, 8 cms above knee joint.

3. Contused swelling 10 cms x 8 cms on dorsum of right foot.

4. Diffused swelling 6 cmsx 4 cms on outer and backside of left forearm, 5 cms above wrist joint.

5. Diffused swelling 8 cms x 8 cms on back left side scapular region, middle part.

The injuries were caused by some blunt object and were about 6-7 days old. Their nature was simple.

28. It transpires from FIR and the statement of witnesses that quarrel started over a small unripe mango fruit dropped from the mango tree between two children Rudra Pratap and Dabbu @ Brijesh. This quarrel between the children ultimately resulted in death of a young boy aged about 28 years. The date of the incident and proximate time thereof is not in dispute as the accused have admitted that they sustained injuries by khodni inflicted by the deceased. Prosecution produced witnesses of fact as well as produced the injury report of the injured and post mortem report of the deceased respectively. From the perusal of the postmortem report and injury report time of occurrence is fixed between 1 to 2 p.m. on 19.04.1984. Dr. Satish Kumar Gupta who examined the injured Jagdish Singh, Dr. U.N. Pandey who conducted the post mortem had fixed the time of incident at about 2 p.m. on 19.04.84. The ocular witnesses Jaggannath, Jagdish, Hanuman Singh and the child witness Dabbu @ Brijesh deposed that the incident occurred at 2 p.m. on 19.04.1984. The fact is also confirmed by the defence version as they stated to have sustained injuries by khodni inflicted by the deceased and they are examined on 24.04.84 at 9:00a.m. by Dr. D.A. Khan in jail. Dr. Khan opined that all the injuries were caused by some blunt object and were about 6 to 7 days old. That also proved that the incident occurred on 19.04.1984. Therefore, the time opined by doctor also corroborate the time of occurrence and proximate thereof.

29. P.W.-5 Dabbu @Brijesh is examined by the prosecution who is the witness of that incident which lead to marpit. He deposed in court as child witness and stated that he entangled with Rudra Pratap on account of mango and thereafter father of Rudra Pratap armed with lathies attacked his father who succumbed to death on account of injury sustained by him.

30. Learned counsel for the appellant argued that the testimony of child should not be placed much reliance because a child may cramp up fact and may deposed on being tutored.

31. Supreme Court in the Case of **Suryanarayana Vs. State of Karnataka** reported at **(2001) 9 SCC 129:**

"..... The evidence of child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidene with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of child witness. .....corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence."

32. In the case of **Panchhi Vs.State of U.P.** reported at **(1998) 7 SCC 177**, Supreme Court has held thus:

"that the evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what other tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law."

33. Evidence of child witness is not to be thrown away at its threshold. The only rider is that the child testimony weight that it must got corroborated from other evidences also. In the instant case Dabbu @ Brijesh is the only witness who was present at the spot and the dispute arose between Rudra Pratap and Dabbu about the unripe mango fruit. This fact is admitted by the defence also. Therefore, the evidence of Dabbu cannot be rejected at the very outset.

34. P.W.-1 Jagganath Singh is an injured witness who also sustained injuries in this incident and whose presence is admitted by the appellants. He corroborated the prosecution case. Evidence of Dabbu is the genesis of marpit. Hanuman Singh and informant are eye-witness of the incident as well. It is also pertinent to mention here that as per the prosecution version deceased Vishwanat Singh plied with khodni caused injuries to Ayodhya Singh, Lal ji Singh. The injury report is proved in court but no FIR was lodged by the appellants. Learned counsel for the appellants argued that the injuries of the appellants are not explained. If we go through the FIR itself which was lodged by Jagganath Singh who also sustained injuries during this incident had deposed that the deceased also used khodni in self-defence thus, we are not in agreement with the contention of learned counsel for the appellants that the injuries of the appellants are not explained by the prosecution. No FIR was lodged by appellant however, they sent an application Ex. Kha-1 to the Superintendent of Police. That application is typed one and there over-writing on the date. Previously it was typed as "25' and later on retyped as "20' by over writing. It is stated in the application that "Lal Ji and Ayodhya Singh were injured and Ayodhya Singh went to lodge a report but he did not come back. The appellant remained under search and today he came to know that Ayodhya Singh surrendered and went to jail." The above mentioned accused surrendered in Court on 24.04.1984 as per records, therefore, it can be concluded that the applicant got the information of the surrender of Ayodhya Singh and Lalji Singh on 24.04.1984. Therefore, the date of application i.e. 20.04.1984 is certainly ruled out. Therefore, this application is moved after pre-planning, delebration, concoction in order to save the appellants.

35. Investigating Officer Satish Chandra Ojha stated in his statement that he enquired about the Ex Kha-1 also and found the defence version untrustworthy. Thus, conduct of the appellant shows that the defence version was not trustworthy and the application was moved only as a counter blast.

36. Learned counsel for the appellant also disputed the place of occurrence and argued that it was the complainant who arrived in their khaliyan and injured them in their khaliyan but the defence version with regard to the place of occurrence is not reliable as the Investigating Officer collected the blood strain and plain earth from the khaliyan from the place shown in the index by word "X'. The Investigating Officer stated that he did not found blood from any other place, however, he

inspected the spot and the mango tree as well. Therefore, the place of occurrence cannot be any other place than the place shown by letter "X' in the site plan.

37. In the post-mortem report two lacerated wound and 3 abrasions were found on the body of the deceased which goes to corroborate the prosecution version that the appellants assaulted Vishwanath Singh by lathis. On internal examination hematoma in an area of 22 cms x 10 cms with 16 cms long line fracture of occipital bone under injuries nos. 1 and 2 was found. Abrasion was congested and cause of death opined by the doctor was result of ante mortem head injury No. 1 and 2, therefore, the prosecution version is corroborated by injury report also.

38. It may be noted here that witness Jagannath Singh (P.W.-2) also sustained two injuries which is sufficient proof that witness was present at the place of occurrence and he saw the incident and the accused could not continue with the assault any further due to his intervention.

39. It is also admitted by the learned counsel for the appellant that there was no intention to kill anybody at most the accused can be convicted under Sections 323, 304 II IPC. This Court has also discussed that the trial court with precision had held that the appellant came to the place of occurrence armed with lathi and started scolding Dubbu @ Brijesh on account of his quarrel with Rudra Pratap over a mango. There was no need to arrive at the place of occurrence armed with lathis and unlawful assembly was formed by all the four appellants with common object and gave sufficient blows. The death of the deceased is the result of action of appellants. The appellants started plying lathies on deceased without even answering the query of deceased on the petty cause of quarrel and they voluntarily caused injuries to Vishwanath who died due to the injuries and Jagdish Singh and Jagganath Singh sustained injury while saving Vishwanath.

40. In view of the above discussions P.W.-1 Jagganath Singh, P.W.-2 Jagdish Singh, P.W.-3 Hanuman Singh and P.W-4 Dabbu @ Brijesh succeeded in proving the case beyond reasonable doubt that about 2 p.m. on 19.04.1984 the incident took place in the khaliyan of Ram Karan and the accused committed assault on the deceased Vishwanath Singh at the place denoted by letter "X' in the site plan leading to the death of Vishwanath Singh.

41. Prosecution also proved that the genesis of quarrel occurred in drop unripe mango between Dabbu and Rudra Pratap. Dabbu took that mango and Rudra Pratap complaint about the same to his parent who arrived at the place of occurrence armed with lathi and started scolding Dabbu. When the deceased Vishwanath Singh asked about the matter then they started assaulting Vishwanath Singh.

42. Learned trial court discussed all the material evidence on record, place of occurrence and with a very clear finding arrived at the conclusion of guilt of the accused/appellants. The judgment passed by the learned trial Court is convincing. We do not find any good ground to interfere with the findings of conviction recorded by the trial court. The judgment passed by the trial court is liable to be upheld and is confirmed and the appeal is accordingly **dismissed.**

43. The appellant No.3 Man Bahadur Singh, appellant No.4 Bharat Singh and

appellant No.5 Bhanu Pratap Singh are in jail since 16.10.2018 and shall serve out the sentence as awarded by the trial court and confirmed by this Court.

44. Office is directed to send a copy of this judgment along with lower court record to the trial court concerned for necessary information and follow up action.

(2022) 12 ILRA 21
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.12.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 445 of 2005

Yunus ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Amitabh Srivastava, Sanjay Kumar, Shivam Sharma

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 302 & 307 - Arms Act, 1878 - Section 25 - Challenge to-Conviction- the convict/appellant murdered the three persons i.e. husband, minor son and daughter of the informant (P.W.1) and also caused injuries to P.W.1- and P.W.2-The evidence of P.W.1- informant as well as injured eyewitness of the incident shows the true picture of the incident -the evidence of P.W.2- narrated the same prosecution case, who is also an injured eyewitness of the incident and the same found fully corroborated with the post-mortem report of the deceased as well as from the injury report of the two injured persons- a bloodstained *banka* was recovered along with bloodstained pant and shirt which the appellant was wearing from his house and as per report of the Forensic Science Laboratory, human blood was found on the *gandasa*, pant and shirt of the appellant, the assailants were no strangers to the inmates of the tragedy bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers-The prosecution has proved its case beyond reasonable doubt against the convict/appellant-it is well settled law that the evidence of relatives of the deceased cannot be thrown on that count alone but their evidence has to be examined by this Court minutely with caution to rule out any possibility of false implication of the accused.(Para 29 to 40)

B. As regards the contention that all the eye-witnesses are close relatives of the deceased, it is by now well settled that a related witness cannot be said to be an ''interested' witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between ''interested' and ''related' witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused. (Para 37)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Mano Dutt & anr. Vs St. of U.P. (2012) 4 SCC 79

2. Abdul Sayeed Vs St. of M.P. (2010) 10 SCC 259

3. St. of U.P. Vs Krishna Master (2010) 12 SCC

4. Nathuni Yadav Vs St. of Bih. (1998) 9 SCC 238

5. Raja Vs St. of T.N. (2008) SCC Online Mad 478

6. Sudhakar Vs St. (2018) 5 SCC 435.

7. Mohd. Rojali Vs St. of Assam (2019) 19 SCC 567

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

(The judgment is pronounced in terms of Chapter VII Sub-rule (2) of Rule (1) of the Allahabad High Court Rules, 1952 by Hon'ble Ramesh Sinha, J.)

(1) The convict/appellant, Yunus was tried by the Additional Sessions Judge, Fast Tract Court No.1, District Hardoi in Sessions Trial No.189 of 2002: *State vs. Yunus*, arising out of Case Crime No.338 of 2001 for the offence under Sections 307, 302 of Indian Penal Code, 1860 (in short "I.P.C.") and in Sessions Trial No.190 of 2002: *State vs. Yunus* arising out of Case Crime No.351 of 2001 for the offence under Section 3/25 Arms Act, which were registered at Police Station Shahbad, District Hardoi.

(2) Vide judgment and order dated 01.02.2005 passed in Sessions Trial Nos. 189 of 2002 & 190 of 2002, the Additional Sessions Judge, Fast Track Court No.1, Hardoi convicted the appellant under Sections 302, 307 I.P.C.. and Section 25 Arms Act and sentenced him to undergo:-

"(a) Under Section 302 I.P.C. to undergo life imprisonment and to pay a fine of Rs.10,000/-, in default of payment of fine, to undergo additional imprisonment for two years.

(b) Under Section 307 I.P.C. to undergo seven years imprisonment and to pay a fine of Rs.4,000/-, in default of payment of fine, to undergo additional imprisonment for one year.

(c) Under Section 25 Arms Act to undergo one year rigorous imprisonment and to pay a fine of Rs.2,000/-, in default of payment of fine, to undergo six months additional imprisonment."

All the aforesaid sentences were directed to be run concurrently.

(3) Feeling aggrieved by the aforesaid judgment and order dated 01.02.2005, convict/appellant has preferred the instant appeal before this Court.

(4) The facts relating to the case are as under:-

The informant, Smt. Gudiya *alias* Guddi (P.W.1) was sleeping along with her family members. Her son and husband were sleeping outside in the courtyard and the informant alongwith her daughter Km. Nagma were sleeping on one cot and another daughter Km. Gulshan was sleeping equally on the other cot. The bulb was burning in the house, therefore, there was light. The locks of the outer doors were closed from inside. Then on 30.10.2001 at around 4:30 a.m., suddenly voice of husband and sons's of the informant was heard, then her eyes opened. When she got up and came to the door of the room, she saw that her brother-in-law's son Yunus (convict/appellant) was assaulting her husband and son with *Gandasa* (a sharp edged weapon) and when the convict/accused saw the informant then he assaulted her with *Gandasa*. Then the informant fell there after being injured. Thereafter, she kept silent due to fear, then convict/appellant Yunus thinking her to be dead and also assaulted her daughter Gulshan and Nagama with *Gandasa* and

said that everyone is dead. Thinking everyone was dead, he started leaving with a burrow and climbed the ladder. Then the informant cried out in fear, then people from outside came. After that convict/appellant Yunus armed with country-made pistol has fired at roof and fled away by jumping from his house. Then she opened her door. The dead body of her husband, son and daughter are lying on the spot. It was further stated in the F.I.R. that the appellant Yusuf and his family members wanted to take all the property from the informant and her family members, due to which, they have done this incident. She has brought her injured daughter Nagma to police station and submitted a report for registering F.I.R. against the accused/appellant.

(5) The informant Smt. Gudiya *alias* Guddi (P.W.1) got the written report of the incident scribed by one Shambhu Nath Gupta, Moharir, who after scribing it read it over to her. She thereafter affixed her thumb impression on it. She then proceeded to the Police Station Shahabad and lodged it. The written report of the incident is proved as Ext. Ka-1.

(6) The evidence of **P.W.3- Jamuna Pandey** shows that on 30.10.2001, he was posted as Constable at Police Station Sahabad, District Hardoi and on the said date, at 6:15 a.m., informant- Smt. Guddi (P.W.1) came and filed a written report, on the basis of which, he prepared the chik F.I.R. (Ext. Ka-2). He further entered the same in G.D. Report No.7 (Ext. Ka-3).

(7) A perusal of the chik F.I.R. shows that distance between the place of incident and Police Station Sahabad was four *furlang*. It is significant to mention that a perusal of the chik F.I.R. also shows that on its basis, a Case Crime No. 338 of 2001, under Sections 302, 307 I.P.C. was registered against the appellant Yunus. After lodging the F.I.R., the informant Smt. Guddi and Km. Nagma, who sustained injuries, were sent to District Hospital Hardoi wherein between 8:30 to 8:50 a.m., the Doctor examined them.

(8) The investigation of the case was conducted by **Shri T.P. Singh (P.W.5)**. His evidence
runs as under:-

From 30.10.2001 to 27.12.2001, he was posted as Inspector In-charge/S.H.O. at Police Station Sahabad. The case was registered at police station on 30.10.2001 at 6:15 a.m. in his presence. The investigation of the case was taken by him on the date itself. He recorded the statement of informant Smt. Guddi (P.W.1) at police station and send her immediately to the District Hospital along with her minor daughter for medical examination. Thereafter he proceeded to the place of occurrence. On reaching the place of occurrence, recorded the statement of witness Fuddan (neighbour of informant) and directed S.I. Maharaj Singh to conduct the inquest proceedings and sent the three dead bodies for post-mortem examination. He, thereafter, inspected the place of occurrence and prepared the site plan (Ext. Ka-6). He collected the blood stained earth and plain earth from the place of occurrence in a two separate containers, kathari and pillow (Ext. Ka-7, 8 and 9). He further collected the 13 numbers of broken glass bangles (Ext. Ka-10) and also recovered one empty cartridge (Ext. Ka-11). The accused Yunus was arrested on 04.11.2001 then he stated in presence of witness that bloodstained *Gandasa*, with which, he committed murder and

bloodstained clothes, which he was wearing at the time of occurrence were hidden in his house. Then he proceeded to the house of accused Yunus along with witnesses Sonpal and Nausheshah. He recovered bloodstained *Gandasa*, pant and shirt from the house of the accused and the accused has confessed his crime there. Then S.I. Chandra Bhan Yadav has prepared the recovery memo of the said recovery as Ext. Ka-12. All the aforesaid recovered articles were sent to Forensic Science Laboratory, Lucknow for examination. He recorded the statement of witness Mangal Shah and after concluding the investigation, he submitted charge-sheet on 08.12.2001 which was proved as Ext. Ka-13.

P.W.5- T.P. Singh further deposed in his examination-in-chief that on 03.11.2001 at 8:30 p.m., he along with his companion have arrested the accused Km. Yunus from railway crossing at Bahad village Sikandarpur and during his physical search, a country-made pistol in running position was recovered from the right pocket of his pant whereas from the left pocket of his pant, two live cartridges of 12 bore were recovered and the accused was unable to show the licence for keeping the aforesaid weapon with him. The accused was acknowledged about registration of case under Section 302 I.P.C. against him and taken him into police custody. The accused has confessed his crime, therefore, he enquired him separately. He prepared the recovery memo of a country-made pistol and live cartridges which was proved as Ext. Ka-17. The case under Section 25 Arms Act was registered against the appellant. The statement of accused was recorded on 04.11.2001, in which, he has confessed his crime.

P.W.5- T.P. Singh, in his cross-examination deposed that prior to search of accused, they have searched each other and assured that no contraband item is found in the possession of Police Team. On search of accused, nothing incriminating was recovered except a country-made pistol and live cartridges at the pointing out of accused. The recovery memo was prepared in the light of jeep headlight and torch.

(9) The evidence of **P.W.7- Sri Krishan Yadav** shows that on 03.11.2001, he was posted as Constable at Police Station Shahabad. On the said date, he along with Inspector In-charge T.P. Singh (P.W.5), S.I. C.P. Yadav, S.I. Vrishkant Ray, S.I. Lamheraj Singh, Constable Sham Bahadur Yadav and jeep driver Amar Nath Tiwari had gone to Shahadara railway station in order to arrest the wanted accused. Then on the information given by the informer that accused Yunus has gone to Aujhi station. They arrested the accused Yunus near railway crossing on 03.11.2001 at 8:30 p.m. and during search of accused Yunus, they found one country-made pistol of 12 bore in his right pocket of pant and two live cartridges of 12 bore was also found in his left pocket of pant and recovery memo of the said articles was prepared in his presence. In the said recovery memo, he and his companion also put their signature. The recovered articles were present on the spot. The accused has confessed the commission of murder.

P.W.7- Sri Krishan Yadav, in his cross-examination deposed that they have arrested the accused Yunus from the spot. No search of anyone was made before and after the arrest of the accused. Nothing was recovered except a country-made pistol or live cartridges at the pointing out of the accused. He further deposed that records and the arrest was made on the spot and thereafter they came back to the police

station and submitted the recovered articles and custody of accused was made. The entry of the said recovered articles and arrest of accused in G.D. was made by S.I. C.K. Yadav.

(10) The evidence of **P.W.8- Sarvesh Kumar Sharma** shows that on 03.11.2001, he was posted as Constable Moharir at police station Shahbabd, District Hardoi. He deposed in his examination-in-chief that on the said date, he lodged the chik F.I.R. of the said case under Section 25 Arms Act on the basis of recovery memo which was proved as Ext. Ka-18. He had made the entry of the same in G.D. Report No.30.

In his cross-examination P.W.8- Sarvesh Kumar Sharma deposed that it is wrong to say that chik F.I.R. under Section 25 Arms Act was lodged anti-timed.

(11) The evidence of **P.W.9- S.I. Ram Awatar Singh** shows that on 03.11.2001, he was posted as S.I. at police station Shahabad, District Hardoi. P.W.9 deposed in his examination-in-chief that the investigation of Case Crime No.351 of 2001, under Section 25 Arms Act was handed over to him. During investigation, he has recorded the chik F.I.R., copy of report in G.D. and the statements of companion Inspector-in-charge S.I. T.P. Singh, S.I. Mehraj Singh, S.I. Krishna Kant, S.I. Chandra Bhan Yadav, Constable Sri Krishna Yadav (P.W.7) and Constable Ram Bahadur Yadav was recorded by him. The aforesaid procedure was done on 03.11.2001 and 04.11.2001. On 04.11.2001, on the direction of the S.I. Krishna Kant Roy, he inspected the place of occurrence and prepared the site plan (naksha nazri) under his signature which was proved as Ext. Ka-20. The Investigating Officer has framed the charges against the accused Yunus under Sections 302, 307 I.P.C. and took the custody of bloodstained *Gandasa* and bloodstained clothes of the accused Yunus and recovery memo of the said articles was prepared under his handwriting and signature in presence of witnesses Son Pal and Naushad Ali (P.W.10) which was proved as Ext. Ka-12. On 08.12.2001 the permission for initiating proceedings under Section 25 Arms Act was granted by the then District Magistrate Shri V.V. Singh which was proved by Ext. Ka-21. On the said date, on the basis of sufficient evidence, filed a chargesheet against the accused/appellant Yunus under Section 3/25 of Arms Act, which was signed by him and proved as Ext. Ka-22. He further deposed that he is well aware of the handwriting and signature of S.I. Mehraj Singh as he was posted at Police Station Sahabad along with him. In Case Crime No.338 of 2001 which was registered under Sections 302, 307 I.P.C., the panchayatnama and related police documents of deceased Nabiullah, Asif and Km. Gulshan was prepared by S.I. Mehraj Singh in his presence. The said document was presented before the witness in the Court. The panchayatnama of deceased Nabiullaha was proved as Ext. Ka 23, Chitthi Mazrobi as Ext.Ka 24, letter to C.M.O. (Ext. Ka 25), Challan lash (Ext. Ka-26), Photo lash (Ext. Ka-27), C.M.O. Report (Ext. Ka-28) and sample stamp (Ext. Ka 29). The panchayatnama of deceased Asif was proved as Ext. Ka 30, Chithi Mazroobi (Ext. Ka 31), letter to C.M.O. (Ext. Ka 32), Challan lash (Ext. Ka- 33), Photo lash (Ext. Ka 34), C.M.O. report on the cloth of deceased which was sent to police station (Ext. Ka- 35) and sample stamp (Ext. Ka 36). The panchayatnama of deceased Km. Gulshan was proved as Ext. Ka 37, Chithi Mazroobi (Ext. Ka 38), letter to C.M.O. (Ext. Ka 39),

Challan lash (Ext. Ka- 40), Photo lash (Ext. Ka 41), C.M.O. report on the cloth of deceased which was sent to police station (Ext. Ka- 42) and sample stamp (Ext. Ka 43).

P.W.9- S.I. Ram Awatar Singh, in his cross-examination, deposed that neither he was aware of the fact that for how long recovered articles were in the police station nor he knew when they were sent to Forensic Science Laboratory, Lucknow. Furthermore, he neither inquired anything from the accused before the recovery of the articles nor any statements were recorded. The statement of accused were written in the case diary by Investigating Officer. The place from where the accused was arrested shown to him by the S.I. but where the jeep was stalled was not shown to him. The witness was not aware as to how many persons lived in the house with the accused. When the witness along with the accused entered in the house, there was no man or woman in the house and also no one from nearby was willing to come when called upon by the witness. This fact was not mentioned in the recovery memo reason being there were two person from public with the accused already. He could not recollect when his statement was taken but he affirmed that the Investigating Officer has taken his statement. Although upon seeing the case diary, he deposed that statement of witness Son Pal and others along with his statements are not recorded in it.

(12) The evidence of **P.W.10- Naushad Ali *alias* Naushe shah**, who is the witness of recovery of alleged weapon of assault i.e. *Gandasa*, has deposed in his examination-in-chief that on 04.11.2001, the accused-appellant Yunus has not given any *Gandasa* or any other items to the police. He also did not go inside the house at the instance of the police. The said witness was declared hostile by the trial Court and was permitted for the cross-examination.

In cross-examination, P.W.10 deposed that the recovery memo (ext. Ka-12) was presented to the witness which upon seeing deposed that it was his signature which was made at the instance of the police officer on a blank paper in the police station. The Investigating Officer has not ever recorded any statement regarding to the present case. It is wrong to say that he has joined the hand with the accused, therefore, he has falsely deposed.

(13) The injuries of injured Smt. Guddi (P.W.1) and Km. Nagma (P.W.2) were examined on 30.10.2001 at 8:30 a.m. and 8:50 a.m. respectively, by **Dr. C.K. Gupta (P.W.4)**, who was posted as E.M.O. (Emergency Medical Officer) at District Hospital Hardoi. Dr. C.K. Gupta (P.W.4) found the following injuries on the persons of injured Smt. Guddi (P.W.1) and Km. Nagma (P.W.2):-

"Injury of informant Smt. Guddi (P.W.1), wife of Nabiullah

(1) I.W. on left eyebrow lateral half 2.5 cm x 0.5 cm x bone deep fresh bleeding.

(2) I.W. on left face cheek transfers 2.5 cm x 0.5 cm x subcut deep fresh blood.

(3) I.W. on Rt. forearm dorsal middle 5 cm x 2.5 cm x subcut deep fresh blood margin clear cut.

(4) I.W. on Rt. hand medial border middle 3 cm x 0.5 cm x bone deep fresh blood margin clear cut.

(5) I.W. on Lt. wrist dorsal extending onto hand 6 cm x 3 cm x bone deep fresh blood.

(6) I.W. on Lt. forearm dorsal medial border upper part 6cm x 3 cm x subcut deep fresh blood margin clear cut.

(7) I.W. on scalp frontal region middle transfers 4.5 cm x 0.5 cm scalp deep 7 cm above bridge of nose.

(8) I.W. on scalp front parietal junction 5 cm x 0.5 cm x scalp deep fresh blood."

As per the opinion of the Doctor condition of the patient was very poor; injuries were caused by sharp object; duration was about fresh; all the injuries were kept under observation; advise for x-ray of skull, Rt. forearm and Lt. forearm.

"Injury of Km. Nagma (P.W.2) D/o Mohd. Nabiullah aged about 4 years

(1) I.W. on Lt. forehead transfers extending from midleni to temporal region side 12 cm x 3 cm x cranial cavity deep underlying bone deep and fresh blood with parts of cerebral malte flowing out. Margins clear cut."

As per opinion of Doctor the injury caused by sharp object. Duration of injury is fresh; nature of injury kept under observation; advised for x-ray skull.

(14) The post-mortem on the dead body of the deceased Nabiullah, Asif and Km. Gulshan were conducted on 30.10.2001 at 4:00 pm., 4:30 pm. and 5:00 p.m. respectively by **Dr. J.L. Gautam (P.W.6)**, who was posted as E.M.O. (Emergency Medical Officer) at District Hospital, Hardoi.

"Ante-mortem injuries of deceased Nabiullah aged about 40 years

(1) Incised wound 12.0 cm x 3.0 cm x bone deep present left knee scalp 7.0 cm above from left ear. Cranial cavity exposed brain matter coming out of wound in obliquely placed.

(2) Incised wound 9.0 cm x 2.0 cm x cranial cavity deep present left side scalp 1.5 cm below injury no.1.

(3) Incised wound 10.0 c.m. x 1.0 cm muscle above deep present on left face upto left ear."

"Ante-mortem injuries of deceased Asif aged about 6 years

(1) Incised wound 14.0 cm x 2.0 cm. x cranial cavity deep presema tab of scalp obliquely situated underneath postrial part of both parietal and occipital bones found fractured. Brain matter in cavity."

"Ante-mortem injuries of deceased Km. Gulshan aged about 10 years

(1) Incised wound 10.0 cm x 2.0 cm x cranial cavity deep presema middle of scalp 6.0 cm. above root of nose. Underneath frontal bone found fractured.

(2) Incised wound 3.0 cm x 1.0 cm x bone deep presema left side scalp just above left ear with cut wound through and through of left ear pinna underneath left parietal bone found fractured.

(3) Incised wound 2.0 cm x 0.5 cm x bone deep present over chin."

The cause of death spelt out in post-mortem report is **due to coma as a result of ante-mortem injuries.**

P.W.6- Dr. J.L. Gautam has proved the post-mortem of all the three deceased as Ext.Ka-14, Ka-15 and Ka-16. He further opined that ante-mortem injuries of all the three deceased could be attributable by sharp edged weapon i.e. *Gandasa*. He further deposed that death of the deceased could be caused possibly on 30.10.2001 at 4:30 a.m.

In his cross-examination P.W.6- Dr. J.L. Gautam deposed that upon observing the injuries of the deceased, it

can be perceived that it could be sustained from one or two sharp-edged heavy weapon. The time of death of the deceased mentioned could be inclusive of 2-3 hours from both end.

(15) The case was committed to the Court of Chief Judicial Magistrate, Hardoi on 25.02.2002 and the Additional Sessions Judge, Court No.5, Hardoi framed charges against convict/appellant- Yunus, under Sections 302/307 I.P.C. on 06.10.2003 and Additional Sessions Judge, Fast Tract Court No.1, Hardoi framed charge against convict/appellant under Section 25 Arms Act on 20.11.2004. He pleaded not guilty to the charges and claimed to be tried. His defence was of denial.

(16) During trial, in all, the prosecution examined ten witnesses viz. P.W.1-Smt. Gudiya *alias* Guddi, who is the informant of the case, P.W.2- Km. Nagma, who is an eyewitness of the incident, P.W.3- Constable Jamuna Pandey, who lodged chik F.I.R. against the convict/appellant, P.W.4- Dr. C.K. Gupta, who examined the injury of injured i.e. Smt. Gudiya *alias* Guddi (P.W.1) and Km. Nagma (P.W.2), P.W.5- T.P. Singh, who is the Investigating Officer of the case, P.W.6- Dr. J.L. Gautam, who conducted post-mortem of the body of deceased, P.W.7- Constable Sri Krishan Yadav, P.W.8- Sarvesh Kumar Sharma, P.W.9- S.I. Ram Awatar, P.W.10- Naushad Ali *alias* Nausheshah, who is the witness of recovery of alleged weapon of assault i.e. *Gandasa*.

(17) After completion of prosecution, statement of convict/appellant- Yunus was recorded under Section 313 Cr.P.C., wherein he denied the prosecution evidence and stated that he has been falsely implicated in the present case due to enmity.

(18) Now, we would first like to deal with the evidence of informant, **P.W.1- Smt. Gudiya *alias* Guddi,** who is also an injured witness, deposed in her examination-in-chief that deceased Nabiullah was her husband, deceased Asif was her son and deceased Gulshan was her daughter. The incident was of around two and half years ago, the witness, her husband and their children were sleeping inside the house. Her house is in Shahbad where the facility of electricity is available. On the night of the incident, a bulb was illuminating because of which there was light over there. Her husband and her son was lying in the corridor while the witness and her daughters were lying in a room. At around 4-4:30 a.m., she heard the cries of her husband and son and she ran. When she reached at the doorstep of the room, she saw that accused Yunus armed with *Gandasa* was hitting her husband and son. Accused Yunus was accompanied by Asif Beg, Tanveer, Nasir, Waseem, Nanhey and Raviullah. The companions of the accused ran and grabbed her, meanwhile, the daughters Gulshan and Nagma also came out, all the companions of the accused caught hold of the witness and her daughter while accused Yusuf hit them with *Gandasa*. On hearing the hues and cries of them, the people of the locality gathered then accused and his companions run away from where they came i.e. the roof of the house. The accused was on the roof and he fired. Thereafter, other companion ran away. Then somehow the witness opened the front door and saw that her husband and son Asif and daughter were dead. She and her daughter Nagma had sustained injuries. All the accused had country-made pistol in their hand. The accused Rafiqullah is jeth (brother-in-law) of the witness and the accused Yunus is his son. The house of the witness had three shops which are in

possession of Asif, Nasir, Tanveer and Waseem and in her house, has been taken possession by her brother-in-law Rafiqullah. The witness is living in fear in Momeen District Hardoi and the accused are still searching for her with the intention to kill her. She went to Shahabad Police Station in order to lodge the report of the incident where she met one Munshi and she narrated whole incident to him and told him the names of the accused. The witness deposed that she is illiterate and also that report was not read over to her but she imprinted the thumb impression over the report. The witness is sustained a lot of injuries because of which, she could not understand that the names of the accused she was telling while deposing in the trial Court has not been mentioned in the said report. When the said report was read it over to her, she said that the names of accused is not completed and remaining thing is true which was proved as Ext. Ka-1. All the accused were identified in proper light by her.

P.W.1- Smt. Gudiya ***alias*** Guddi in her cross-examination deposed that her mother is alive. She has no real brother, cousin brothers. Names of cousin brothers are Firoz, Siddiq, Anis, Siraj etc. She did not know their father's name. He died. Her father's name is Babu. He also died. After the murder, she was living at Mominabad. She has danger to her life and also to the person on whose place she lives. In Mominabad, she lives at the place of one Sakraula. Sakraula is present in the Trial Court. She attends the Court along with Sakraula and cousins. Younger brother of the accused Yunus is Yusuf. The house of the witness and the house of the accused Yunus are separate. The witness and her husband along with their children used to live in a separate house. Accused Yunus, Yusuf (brother) and father used to live together in a separate house. There was not any difference in the age of the witness and her husband at the time of their marriage. It is wrong to say that the age of the husband was older than the witness. The Inspector has taken the statement of the witness. The witness denied that she has given the statement to the police that her husband was much older to her, if the Inspector has written such a statement then witness is not aware of reason thereof. After the incident, the witness didn't go to the police station. The police personnel had came to her house. She told the names of Naseer, Wasim, Yunus, who had killed her husband and children by a *Gandasa*. One boy Tanveer and Asif were involved in murder. Wasim, Naseer, Nanhe, Rafiullah were also involved in the murder. The witness had told the names of all the accused to the Police. The police has not lodged any report. The witness opened the lock when the police had arrived. She had told the names of the accused to the police and after telling the names she fainted. The witness deposed that she remained unconscious till reaching to Lucknow. The witness doesn't know to which place did the Police take her. During the scuffle, she had also sustained injuries. She was hit by the *Banka* six times. The witness had also the scar of the injuries on her head and hand. The witness is illiterate. At the time of the incident she was sleeping in the room along with her two daughters. The husband of the witness and her son Asif were sleeping outside the house. When Tanvir and Asif grabbed her husband then she screamed and made a lot of noise. While screaming she reached to rescue. Accused Yunus had cut the husband of the witness by *Gandasa*. When she reached near her husband to protect then Naseer and Wasim had grabbed her. Accused Yunus also hit her on

the said spot with the *Gandasa*. She instructed the children to run away. The daughter of the witness Gulshan ran away in the room and hid under the blanket and pleaded "dear brother don't kill me". Nanhe caught the daughter of the witness and Yunus hit her. The son of the witness hold her then the accused Yunus also hit her. The roof of the house of Yunus , Rafeeullah and the witness is conjoined and their stairs are always there. They came in and went back by climbing up to the roof of the house. The witness had deposed that names of all the accused in the court and had not told it before anyone. The witness deposed a total of seven persons came into her house.

(19) **P.W.2- Nagma**, who is daughter of the informant in her examination-in-chief deposed that name of her mother is Gudiya (P.W.1). In her house, father Nabiullah, brother Asif Beg, sister Gulshan and her mother Gudi were lived. The accused Yunus intruded in her house in the night which is present in the trial court. He had hit everyone present in the house. Her father, Asif and Gulshan died on the spot while the witness sustained injuries. There was light in the house as the bulb was illuminating.

(20) In her cross-examination P.W.2-Nagma deposed that she and her mother were lived with Babu at Mominabad, Hardoi. Accused Yunus had grabbed her in the house. Asif, Tanvir and Yunus had hit the witness. They also hit her mother and father. Naseer and Wasim had grabbed her mother and the witness remained standing there. There were seven people who intruded in the house and all seven of them were involved in the fight. They took away the box from her house. When the fight occurred, the mother of the witness (P.W.1) was present on the spot. The witness had eye-witness of the incident. It is wrong to say that the witness is deposing after being tutored.

(21) Heard Shri Sanjay Kumar, learned counsel for the appellant, Shri Arunendra, learned A.G.A. for the State-respondents and perused the material available on record.

(22) It has been argued by learned counsel for appellant that the appellant has been falsely implicated in the present case on account of the fact that he was having some previous animosity with the informant and her husband, as the appellant was the son of the elder brother of the husband of the deceased. He further argued that the incident has taken place in the night wherein the deceased and his minor son and daughter was done to death by some unknown miscreants with an intention to commit dacoity in his house entered and murdered three persons and the informant and her daughter received injuries at their hands. He further argued that from the F.I.R., it is apparent that the same was lodged against the appellant but during the trial the statement of the informant P.W.1- Smt. Gudiya *alias* Guddi was recorded by the trial court wherein, she has stated that there were six other accused persons i.e. Asif Beg, Tanveer, Naseer, Wasim, Nanhey, Rafiullah along with the appellant, who have entered her house and committed murder of her husband, two children and also inflicted injury on her as well as on her daughter. The falsity of the prosecution case is evident from the fact that the said accused persons were not put to trial by the prosecution and the appellant alone has been tried and convicted and sentenced by the trial court without there being any cogent evidence against him, hence, the impugned judgment and order

passed by the trial Court is liable to be set aside and the appellant be acquitted.

(23) It has further been argued by learned counsel for appellant that there was no proper source of light at the place of occurrence, in which the appellant could be identified and it has come in the evidence that the bulb was illuminiting at the house of the informant and deceased but the Investigating Officer has not shown the source of light in the site plan prepared of the place of occurrence, hence, the involvement of the appellant in the present crime is only on the basis of suspicion and inimical relationship with the informant's family. He next argued that the bloodstained Gandansa, which is a weapon of assault, stated to have been recovered at the pointing out of the appellant from his house along with the bloodstained pant and shirt of the appellant which he was wearing at the time of the occurrence, is in fact, a false recovery, as two witnesses of recovery of the said recovery which has been prepared as recovery memo Ext. Ka-12 dated 04.11.2001, namely, Son Pal and Naushad Ali (P.W. 10), out of which, Son Pal was not produced before the prosecution to prove the said recovery whereas Naushad Ali (P.W. 10) has not supported the said recovery.

(24) Learned counsel for appellant further argued that the evidence of P.W.1- Smt. Gudiya *alias* Guddi is not a reliable piece of evidence because informant is a highly interested and partitioned witness and moreover there appears to be major contradiction in her evidence which is contrary to the F.I.R. lodged by her of the incident. P.W.3- Kumari Nagma, who is a child witness, is also not a reliable one, as she happens to be a tutored witness, as she was in the company of some other, who has compelled her to depose against the appellant. He further argued that one Waseem had lodged the N.C.R. for the offence under Sections 498 I.P.C. on 30.01.2001 stating that his wife Smt. Guddi (P.W.1) has been enticed away by some persons and she was found at the house of the deceased Nabiullah, due to which, the appellant has been implicated in the present case and the origin of the prosecution case, has been deliberately concealed by the prosecution.

(25) Learned A.G.A., on the other hand, has vehementally rebutted the argument of learned counsel for appellant and has submitted that appellant was named in the F.I.R. and he has committed the murder of deceased (Nabiullah), who was his uncle and two cousins by *Gandasa* and also assaulted the informant P.W.1- Smt. Guddi, who is wife of the deceased Nabiullah and her minor daughter, namely, Km. Nagma, who have suffered incised wound on their person. He further submitted that one of the deceased (Km. Gulshan) was aged about 10 years whereas deceased Asif was aged about 6 years and it is a cold blooded murder and the P.W.1- Smt. Guddi along with P.W.2- Kumari Nagma, who are the injured witnesses of the occurrence have fully supported the prosecution case which is corroborated by the ocular testimony. He next submitted that the complicity of the appellant in the present case cannot be ruled out as when the appellant was arrested by the police on 03.11.2021 and he was taken out from the police lockup on 04.11.2021 and on his pointing out bloodstained *Gandasa*, weapon of assault and bloodstained pant and shirt were recovered from his house and it was kept in a jute beg. The said articles were sent to the Forensic Science Laboratory, Lucknow and as per report of

the Forensic Science Laboratory, human blood was found on the *Gandasa*, pant and shirt of the appellant.

(26) Learned A.G.A. further submitted that the appellant has also strong motive to commit the murder of the deceased, as it has come in the evidence of P.W.1- Smt. Guddi that the appellant wanted to grab the property of the deceased (Nabiullah) and the informant due to which her husband and two children were done to death and the recovery memo Ext. Ka-12, shows the recovery of bloodstained *Gandasa*, pant and shirt of the appellant has also been prepared and the same was also signed in the presence of all the witnesses, namely, Son Pal and one Naushad Ali *alias* Nausheshah (P.W.10). He further submitted that simply because Naushad Ali (P.W.10) has turned hostile, the recovery memo cannot be said to be doubted, as the appellant has also signed in the recovery memo.

(27) After considered the submissions advanced by learned counsel for parties, we have perused the impugned judgment along with lower court record and its exhibits and has further given a thoughtful consideration to the submissions advanced by learned counsel for the parties.

(28) It is evident from the prosecution case that the incident has taken place in the house of the informant in early hours of the morning on 10.02.2001 at 4:30 a.m. in which, the appellant, who entered the house of informant and the deceased, who were sleeping in their house with their children. The house of the appellant was adjacent to the house of the deceased. The convict/appellant entered and assaulted the deceased Nabiullah and his son, who were sleeping outside the room whereas the informant and his two minor daughters were sleeping inside the room on other cot and on hearing alarm raised by her husband Nabiullah while he was assaulted by the appellant with *Gandasa*, she woke up and saw that the appellant was assaulted her husband and minor son Asif with *Gandasa* and when she and her daughter tried to save them then the appellant assaulted the informant as well as his two daughters with *Gandasa* due to which her daughter Km. Gulshan has succumbed to her injuries whereas the informant and other daughter Km. Nagma (P.W.2) received injuries. The F.I.R. of the incident was lodged by the informant after getting the written report prepared by Munshi and she lodged the same at Police Station Shahabad, District Hardoi on 30.10.2001 at 6:15 pm. against the appellant which was at the distance of four *furlang*. The said F.I.R. was registered as Case Crime No. 168 of 2001 for the offences under Sections 302 and 307 I.P.C., P.S. Shahabad District Hardoi. She has proved the written report as Ext. Ka-1.

(29) The evidence of P.W.1- Smt. Gudiya *alias* Guddi, who is an informant as well as injured eyewitness of the incident goes to show that she has narrated the prosecution case in toto against the appellant, who has killed her husband and minor son and daughter with *gandasa* (weapon of assault). The contention of learned counsel for appellant that her evidence is not a reliable one is concerned, as she has disclosed the participation of five other accused persons along with the appellant. P.W.1 has categorically stated that she has disclosed the names of all the accused persons, who were involved in present case to the police but the police had not registered the F.I.R. against the said accused persons. It is well settled that because of the mischievous act and conduct

of the police, the prosecution case against the appellant cannot be thrown out on this count, as she is an injured witness and her presence at the place of occurrence cannot be doubted. Similarly, the evidence of P.W.2- Nagma is concerned, she too has narrated the prosecution case, who is also an injured eyewitness of the incident and the daughter of the appellant and one of the deceased, namely, Nabiullah. She too has reiterated the prosecution case as has been stated by her mother P.W. 1- Smt. Guddi and the same found fully corroborated with the post-mortem report of the deceased as well as from the injury report of the two injured persons.

(30) In ***Mano Dutt and another v. State of Uttar Pradesh - (2012) 4 SCC 79,*** Hon'ble Apex court held:

"We may merely refer to Abdul Sayeed v. State of M.P. - (2010) 10 SCC 259 where this Court held as under:

"The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness.' [Vide Ramlagan Singh v. State of Bihar -(1973) 3 SCC 881, Malkhan Singh v. State of U.P. - (1975) 3 SCC 311, Machhi Singh v. State of Punjab - (1983) 3 SCC 470, Appabhai v. State of Gujarat - 1988 Supp SCC 241, Bonkya v. State of Maharashtra -(1995) 6 SCC 447, Bhag Singh v. State of Punjab - (1997) 7 SCC 712, Mohar v. State of U.P.- (2002) 7 SCC 606, Dinesh Kumar v. State of Rajasthan-(2008) 8 SCC 270, Vishnu v. State of Rajasthan -(2009) 10 SCC 477, Annareddy Sambasiva Reddy v. State of A.P.-(2009) 12 SCC 546 and Balraje v. State of Maharashtra- (2010) 6 SCC 673.]

(31) The next argument of learned counsel for appellant that there was no proper source of light at the place of occurrence, in which the witnesses could have identified the appellant, hence, the prosecution case is not a reliable one. It is noteworthy to mention here that P.W.1- Smt. Gudiya @ Guddi has categorically stated that there was a light of bulb at the place of occurrence which was burning in her house. The witnesses were cross-examined at great length by the learned counsel for the defense, nothing significant could be brought on record from which one can, with certainty deduced that there was no light of electricity bulb at the place of incident. Further in ***Re: State of U.P. vs. Krishna Master: (2010) 12 SCC*** it was held that *"the High Court was not justified in holding that there was no electric power in the whole village and there was complete darkness on account of amavasya of rainy season due to which it was impossible for the eyewitnesses to witness the incident. Further the visibility capacity of urban people is not the standard to be applied to the villagers"*. Moreover, in the case of ***Nathuni Yadav vs. State of Bihar: (1998) 9 SCC 238,*** the Court observed that: *"the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those, who were sleeping on the terrace. If the light then available, though meager, was enough for assailants, why should we think that the same light was not enough for the injured, who would certainly have*

pointedly focused their eyes on the faces of the intruders standing in front of them."

We must bear in the mind that the fact that the assailants were no strangers to the inmates of the tragedy bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers. We are therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was a possibility for making a wrong identification of them, hence, it was easily possible for P.W.1- Smt. Gudiya *alias* Guddi and P.W.2- Nagma to identified the appellant, who committed the murder of the deceased which was witnessed by both of them.

(32) The contention of learned counsel for appellant that three deceased were done to death by some unknown miscreants as a dacoity took place in their house but the said contention has no legs to stand, as it is not borne out from the record that any articles from the house of the informant and the deceased were looted or taken away by the miscreants for which any information was given to the police which goes to show that no such dacoity taken place and the true picture was given by the P.W.1-Smt. Gudiya about the incident to the police in the F.I.R. lodged by her.

(33) The complicity of the appellant is further evident from the fact that at this pointing out a bloodstained *banka* was recovered along with bloodstained pant and shirt which the appellant was wearing from his house and the same was sent to the Forensic Science Laboratory and as per report of the Forensic Science Laboratory, human blood was found on the *gandasa*, pant and shirt of the appellant, therefore, the contention of learned counsel for appellant that one of the witness of recovery P.W.10- Naushad Ali has not supported the recovery, is also of no consequences.

(34) In case of ***Raja vs. State of Tamil Nadu: 2008 SCC Online Mad 478*** held that *"..... of course, the recovery cannot by itself be regarded as conclusive piece of evidence for incriminating accused, but it is certainly a piece of evidence which goes to support the other evidence about the guilt of accused, vide Namdeo Daulata Dhayagude vs. State of Maharashra, (1976) (4) SCC 441, and further the recovery of the blood-stained material object on the disclosure statement of the appellant provides enough corroboration to the prosecution evidence against the appellant, vide Puran Singh vs. State of Punjab, 1995 Supp (3) SCC 665.* In the said case, the fact relating to the recovery of bloodstained weapon was similar to the instant case, wherein, the Apex Court observed that *according to the report of serologist, the bloodstained on the kirpan were of human origin. The recovery of bloodstained Kirpan on the disclosure statement of the appellant provides enough corroboration to the prosecution evidence against the appellant.*

(35) Further it has been argued by learned counsel for the appellant that the evidence of P.W.1- Smt. Gudiya @ Guddi and P.W.2- Nagma be not relied upon by this Court, as they are highly interested and partisaned witnesses, as they are relative of the deceased but the said argument of learned counsel for appellant also has no substance, as it is well settled law that the evidence of relatives of the deceased cannot be thrown on that count alone but their evidence has to be examined by this Court minutely with caution to rule out any

possibility of false implication of the accused.

(36) The criminal law jurisprudence makes a clear distinction between a related and interested witness. A witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished as held by the Hon'ble Apex Court in ***Sudhakar Vs. State : (2018) 5 SCC 435.*** Thus, from the facts and circumstances of the case, it cannot be said that the testimonies of P.W.1- Smt. Gudiya and P.W.2- Nagma, are not trustworthy and are not reliable.

(37) It is well-settled in law that mere fact that relatives of the deceased are the only witnesses is not sufficient to discredit their cogent testimonies. The Apex Court in ***Mohd. Rojali v. State of Assam : (2019) 19 SCC 567*** reiterated the distinction between "interested" and "related" witnesses and has held that the mere fact that the witnesses are related to the deceased does not impugn the credibility of their evidence if it is otherwise credible and cogent. The relevant extract of the report is reproduced as under :-

"13. As regards the contention that all the eye-witnesses are close relatives of the deceased, it is by now well settled that a related witness cannot be said to be an "interested' witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested' and "related' witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki, (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 SCC 107; and Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC298). Recently, this difference was reiterated in Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549, in the following terms, by referring to the three-Judge bench decision in State of Rajasthan v. Kalki (supra):

"14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be "interested"..."

14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab, 1954 SCR 145, wherein this Court observed:

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199:

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

(38) Thus, from the evidences led by the prosecution, it is well established that it was the convict/appellant Yunus, who was involved in the present case and has murdered the three persons i.e. husband, minor son and daughter of the informant Smt. Gudiya @ Guddi (P.W.1) and also caused injuries to P.W.1- Smt. Gudiya @ Guddi and P.W.2- Km. Nagma. The prosecution has proved its case beyond reasonable doubt against the convict/appellant and the trial Court after examining the entire prosecution evidence has rightly convicted and sentenced the convict/appellant for the offence in question.

(39) In view of the above and for the reasons stated hereinabove, no interference of this Court is called for in the instant appeal as the learned trial Court has rightly convicted the appellant by the impugned judgment and order dated 01.02.2005.

(40) The instant appeal fails and deserves to be dismissed and is accordingly **dismissed.** The appellant- Yunus, who is in jail, shall serve the sentence as awarded by the trial Court.

(41) Let a certified copy of this order as well as lower Court record be transmitted to the trial Court concerned for necessary information and compliance forthwith.

(2022) 12 ILRA 36
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.12.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 549 of 2016
connected with other cases

Devendra Pandey & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Arun Sinha, Alok Shukla, Anil Kumar, Arti Ganguly, Aseem Goswami, Atul Verma, Edward Sam Julius Paul, Gaurav Shukla, Hari Krishna Verma, Hemant Kumar Mishra, Janardan Singh, Nagendra Mohan, Rajendra Prasad Mishra, Ram Mohan Mishra, Salil Mohan, Sanjay Kumar Srivastava, Saroj Kumar Shukla, Sheikh Wali-Uz Zaman, Umesh Chandra Yadav

Counsel for the Respondent:
Rishad Murtaza, Anurag Kumar Singh, B. Nath, Ishan Baghel, S.B. Pandey, Vivek Kumar Rai

A. Criminal Law -Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code,1860-Sections 302/120-B, 364/120-B, 365/120-B, 218/120-B & 117/120-B-Challenge to –Conviction-appellants killed ten terrorists persons as they eliminated them in self defence-the claim of the appellants that they killed ten terrorists persons in self-defence does not corroborate with the medical evidence as from perusal of the ante-mortem injuries of four deceased persons out of ten deceased persons killed in the forest area-it transpires that apart from injuries of fire arm, lacerated and abrasion wounds as well as amputation were found on the body of the four deceased persons-the appellants failed to explain/prove the lacerated wounds, abrasions and amputation caused on the body of the deceased-Thus, the case of the appellants would be covered by Exception 3 to Section 300 of the I.P.C., which provides that culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, thinks to be lawful and necessary for the due discharge of his duty as a public servant without ill-will towards the person whose death he has caused but the appellants cannot be justified to kill innocent persons along with some terrorist taking them to be also terrorists.(Para 144 to 150)

The appeals are partly allowed. (E-6)

List of Cases cited:

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

2. E.G. Barsay Vs St. of Bom. (1961) AIR SC 1762

3. Yash Pal Mittal Vs St. of Punj. (1977) 4 SCC 540

4. K. R. Purushothaman Vs St. of Ker. (2005) 12 SCC 631

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

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A. INTRODUCTION

(1) Forty-seven accused persons, namely, **Gyan Giri, Subhash Chandra, Lakhan Singh, Nazim Khan, Harpal Singh, Rajendra Singh, Narayan Das, Krishnveer, Karan Singh, Rakesh Singh, Nem Chandra, Shamsher Ahmed, Satyendra Singh, Badan Singh, Devendra Pandey, Mohd. Anis, Ramesh Chandra Bharti, Veer Pal Singh, Nathu Singh, Dhani Ram, Sugam Chandra, Collector Singh, Kunwar Pal Singh, Shyam Babu, Banwari Lal, Dinesh Singh, Sunil Kumar Dixit, Arvind Singh, Ram Nagina, Vijay Kumar Singh,**

Vijendra Singh, M.P. Mittal, M.C. Durgapal, R.K. Raghav, Surjeet Singh, Udai Pal Singh, Munna Khan, Durvijay Singh son of Tadinal, Mahaveer Singh, Gaya Ram, Register Singh, Rashid Hussain, Durvijay Singh s/o Dilaram, Syed Aale Raza Rizvi, Satya Pal Singh, Harpal Singh and Ram Chandra Singh, were tried by the Special Judge, C.B.I., Court No.1/Additional District Judge, Lucknow in Criminal Case No.1800439 of 2001: *State of U.P. Through C.B.I. Vs. Gyan Giri & others,* arising out of (i) R.C.1(S)/1993; (ii) R.C.2(S)/1993; and (iii) R.C.3(S)/1993, under Sections 120-B, 302, 364, 365, 218, 117 I.P.C., Police Station C.B.I./S.I.C., New Delhi.

(2) Vide judgment and order dated 04.04.2016, the Special Judge, C.B.I., Court No.1/Additional District Judge, Lucknow convicted and sentenced the accused persons in the manner stated hereinbelow :-

Accused Gyan Giri, Subhash Chandra, Lakhan Singh, Nazim Khan, Register Singh, Shyam Babu, Syed Aale Raza Rizvi, Gaya Ram, Narayan Das, Rashid Hussain, Mahavir Singh, Dhani Ram, Sunil Kumar Dixit, Kunwar Pal Singh, Sugam Chandra, Shamsher Ahmad, Krishna Veer, Karan Singh, Dinesh Singh, Nem Chandra, Ram Nagina, Arvind Singh, Badan Singh, Ram Chandra Singh, Harpal Singh son of Munshi Singh, Durvijay Singh son of Tadinal, Banwari Lal, Nathu Singh, Durvijay Singh son of Dilaram, Satyendra Singh, Rakesh Singh, Collector Singh, Vijay Kumar Singh and Munna Khan :-

	Conviction	Sentence	Fine
01.	Under Section 302 read with 120-B I.P.C.;	Life imprisonment	Rs.2,00,000/- (Rupees Two Lac) In default of payment of fine to undergo 1½ years additional simple impriso- nment.
02.	Under Section 364 read with 120-B I.P.C.	10 years R.I.	Rs.50,000/-. In default of payment of fine to undergo one year additional simple impriso- nment.
03.	Under Section 365 read with 120-B I.P.C.	5 years R.I.	Rs.25,000/-. In default of payment of fine to undergo six months additional simple impriso-nment.
04.	Under Section 218 read with 120-B I.P.C.	5 years R.I.	----
05.	Under Section 117 read with 120-B I.P.C.	1 year R.I.	----

Accused Harpal Singh son of Shri Bhim Sen, M.P. Vimal, R.K. Raghav, Veerpal Singh son of Mohindra Singh, Satyapal Singh, Surjeet Singh, Ramesh Chandra Bharti, M.C. Durgapal and Udai Pal Singh

	Conviction	Sentence	Fine
01.	Under Section 302 read with 120-B I.P.C.;	Life imprisonment	Rs.5 Lac. In default of payment of fine to undergo 2 years' additional simple impriso-nment.
02.	Under Section 364 read with 120-B I.P.C.	10 years R.I.	Rs.5 Lac. In default of payment of fine to undergo 2 years' additional simple

			impriso-nment.
03.	Under Section 365 read with 120-B I.P.C.	5 years R.I.	Rs.1 Lac. In default of payment of fine to undergo six months additional simple impriso-nment.
04.	Under Section 218 read with 120-B I.P.C.	2 years R.I.	----
05.	Under Section 117 read with 120-B I.P.C.	1 year's R.I.	----

Accused Vijendra Singh, Mohd. Anis, Rajendra Singh and Devendra Pandey,

	Conviction	Sentence	Fine
01.	Under Section 302 read with 120-B I.P.C.;	Life imprisonment	Rs.7 Lac. In default of payment of fine to undergo 03 years additional simple impriso-nment.
02.	Under Section 364 read with 120-B I.P.C.	10 years R.I.	Rs.3 Lac. In default of payment of fine to undergo 03 years additional simple impriso-nment.
03.	Under Section 365 read with 120-B I.P.C.	5 years R.I.	Rs.1 Lac. In default of payment of fine to undergo six months additional simple impriso-nment.
04.	Under Section 218 read with 120-B I.P.C.	2 years' R.I.	----
05	Under Section 117 read with 120-B I.P.C.	1 year R.I.	----

All the sentences were directed to run concurrently and the period of incarceration was directed to be set off against the sentence of imprisonment. It was also directed to pay Rs.14,00,000/- each to the family members of the deceased out of the fine imposed as compensation.

(3) Feeling aggrieved by their aforesaid conviction and sentence, convicts/appellants, Devendra Pandey, Mohd. Anish, Ramesh Chandra Bharti, Veer Pal Singh, Nathu Singh, Dhani Ram, Sugam Chand, Collector Singh, Kunwar Pal Singh, Shyam Babu, Banwari Lal, Dinesh Singh, Sunil Kumar Dixit, Arvind Singh, Ram Nagina and Vijay Kumar Singh, have preferred Criminal Appeal No.549 of 2016, whereas convicts/appellants Vijendra Singh, M.P. Vimal (M.P. Mittal), M.C. Durgapal, R.K. Raghav, Surjeet Singh, Udai Pal Singh, Munna Khan, Durvijay Singh son of Todilal (Tadinal), Mahavir Singh, Gaya Ram, Register Singh, Rashid Hussain, Durvijay Singh son of Dila Ram, Syed Aale Raza Rizvi, Satya Pal Singh, Harpal Singh and Ram Chandra Singh have preferred Criminal Appeal No.513 of 2016 and convicts/appellants Rajendra Singh, Harpal Singh s/o Shri Bheem Sen, Gyan Giri, Subhash Chander, Lakhan Singh, Nazim Khan, Narayan Das, Krishna Veer, Karan Singh, Rakesh Singh, Nem Chandra, Shamsher Ahmad, Satinder Singh and Badan Singh have preferred Criminal Appeal No.551 of 2016.

(4) During pendency of the above-captioned appeals, appellant no.3-M.C. Durgapal and appellant no.9-Mahavir Singh of Criminal Appeal No. 513 of 2016; appellant no.14-Badan Singh of Criminal Appeal No. 551 of 2016; and appellant no.6-Dhani Ram in Criminal

Appeal No. 549 of 2016, died and as such, the above-captioned appeals filed on their behalf stood abated. Now, the above-captioned appeals are surviving only against **forty-three** convicts/appellants i.e. Devendra Pandey, Mohd. Anis, Ramesh Chandra Bharti, Veer Pal Singh, Nathu Singh, Sugam Chand, Collector Singh, Kunwar Pal Singh, Shyam Babu, Banwari Lal, Dinesh Singh, Sunil Kumar Dixit, Arvind Singh, Ram Nagina, Vijay Kumar Singh, Vijendra Singh, M.P. Vimal (M.P. Mittal), R.K. Raghav, Surjeet Singh, Udai Pal Singh, Munna Khan, Durvijay Singh son of Todilal (Tadinal), Gaya Ram, Register Singh, Rashid Hussain, Durvijay Singh son of Dila Ram, Syed Aale Raza Rizvi, Satya Pal Singh, Harpal Singh, Ram Chandra Singh, Rajendra Singh, Harpal Singh s/o Shri Bhim Sen, Gyan Giri, Subhash Chandra, Lakhan Singh, Nazim Khan, Narayan Das, Krishna Veer, Karan Singh, Rakesh Singh, Nem Chandra, Shamsher Ahmad and Satyendra Singh.

(5) Since the above-captioned criminal appeals arise out of a common factual matrix and impugned judgment dated 04.04.2016, this Court proceeds to decide the same by a common judgment.

B. FACTUAL MATRIX

(6) In the intervening night of 12/13.07.1991, three incidents at three different places i.e. (1) Neoria, (2) Bilsanda, and (3) Puranpur, in District Pilibhit took place between the alleged Sikh terrorists and the police of District Pilibhit, in which ten alleged militants were killed. In this regard, cumulatively thirteen F.I.Rs. were lodged in police station Neoria, Bilsanda and Puranpur of district Pilibhit.

(i) F.I.R. RELATING TO THE INCIDENT THAT TOOK PLACE WITHIN THE JURISDICTION OF POLICE STATION NEORIA

(7) In respect of the incident that took place at Neoria, district Pilibhit, wherein four alleged terrorists, namely, *Baljeet Singh alias Pappu, Jaswant Singh alias Jassa, Harminder Singh alias Minta and Surjan Singh alias Bittoo*, were killed in an encounter, Case Crime Nos. 144 to 148 of 1991, under Sections 147, 148, 149, 307 I.P.C. and Section 25 of the Arms Act were registered at Police Station Neoria, District Pilibhit on the oral complaint of Chander Pal Singh, Station Officer, Police Station Neoria, alleging therein that in the intervening night of 12/13.07.1991, he along with Constable Sukhpal Singh of Police Station Neoria, S.I. Brahm Pal Singh of Police Station Sungadi, Constable No. 331 Gyan Giri, Constable No. 76 Subhash Chander, Constable No. 410 Lakhan Singh of Police Station Sungadi, Constable No. 394 Mahender Singh of Police Station Puranpur, Constable No. 481 Nazim Khan of Police Station Barkhera, Constable/Driver Shiv Ram Singh of Police Lines in one party and in another party, S.O. Harpal Singh of Police Station Gajraula, S.O. Rajinder Singh of Police Station Amaria, Constable No. 85 Ram Swaroop, Constable No. 428 Narain Lal, Constable No. 27 Krishanaveer, Constable No. 30 Karan Singh of Police Station Gajraula, Constable No. 125 Rakesh, Constable No. 465 Nem Chand, Constable 375 Shamsher of Police Station Amaria in Government Jeep along with Driver Veer Singh of Police Station Amaria, HC 51 Satyender Singh of Police Station Neoria, Constable No. 247 Badan Singh of Police Station Neoria, had laid an ambush near Dhamela Kuan in the Mahof forest. At

about 04:00 p.m., 5-6 Sikhs were seen coming towards them. On suspicion, they challenged them. On being challenged, they (5-6 Sikhs) opened fire on the police parties with the intention to kill them, upon which the police parties had also opened fire in self-defence. The firing between the Sikh militants and the police parties continued for about half an hour. In the meanwhile, two militants were seen to be running away toward the forest, upon which one party headed by S.O. Amaria chased them but they ran away in the forest. After the firing stopped from the side of the militants, the police party went there and found the dead-bodies of four unknown Sikh militants, who died as a result of gun shot injuries. From the possession of one militant, one S.B.B.L. country-made gun 12 bore and four cartridges laid near to him were recovered; from the possession of second militant, one S.B.B.L. countrymade gun 12 bore and five cartridges laid near to him were recovered; from the possession of third militant, one 315 bore countrymade rifle and four live catridges laid in his half-open fists of right hand, were recovered; and from the possession of fourth militant, one 315 bore countrymade rifle and five live catridges laid in his left side, were recovered. Thereafter, the recovery memos of the aforesaid arms and ammunition were prepared separately and brought to the police station.

(7.1) The investigation of the aforesaid incident took place at Neoria, district Pilibhit was conducted by S.I. Naresh Chand, who, after conducting inquest of the dead-bodies of the four unidentified militants, sent it for post-mortem.

(7.2) The post-mortem of the deadbodies of four unidentified alleged militants (later on identified as *Harmendra Singh alias Minta, Baljeet Singh alias Pappu, Surjan Singh and Jaswant Singh alias Lassa)* were conducted between 06:00 p.m.-07:00 p.m. on 13.07.1991 at District Hospital, Pilibhit by Dr. P.N. Saxena, who found the following ante-mortem injuries on their persons:-

"Ante-mortem injuries of first unidentified deadbody, aged about 22 years (Ext. Ka. 23/1)

(1) A Gun Shot wound of entry on the Rt. upper arm 8 cm below the shoulder medially 0.5 x 0.5 cm ċ wound of exit on the lateral side. 2 cm lateral to the injury No. (1) measuring 0.8 cm x .6 cm. No blackening tattooing.

(2) A.G.W. of entry 4 cm x 2 cm at front of chest 1 cm above the Rt. nipple ċ wound of exit on Lt. side of chest measuring 5 cm x 6 cm. No blackening tattooing at ant. axillary fold.

(3) A.G.W. of entry on the Rt. side chest .5 cm x .5 cm x cavity deep. 8 cm lateral to Rt. nipple at 9 O'clock. No blackening tattooing present.

(4) A.G.W. of entry .5 cm x .5 cm on Lt. (sic) ċ wound of exit point to the w. of entry measuring 1.5 cm x 1.5 cm. No blackening tattooing present.

Ante-mortem injuries of second unidentified deadbody aged about 28 years (Ext. Ka.23/2)

(1) G.W. of entry 8 cm x 4 cm x muscle deep directing upward out the Rt. side chest. 6 cm below the Rt. nipple at 6 O'clock position. One pellet recovered.

(2) G.W. of entry 2 cm x 1 cm at the epassguinea x cavity deep ċ wound of exit in the hypogastrium measuring 6 cm x 4 cm loops of bowels coming out.

(3) A.G.W. of entry at Rt. side of abdomen 2 cm x 2 cm cavity deep. Communicating ċ wound of exist at Rt. iliac fossa 4 cm x 3 cm.

(4) Two wounds of entry measuring each .5 cm x .5 cm at Rt. upper

arm just below the shoulder joint ċ wound of exit in the Rt. axilla 4 cm x 4 cm ċ fracturing underlying bones.

(5) A.L.W. 4 cm x 3 cm x muscle deep at Lt. side chest. 4 cm below the Axilla.

Ante-mortem injuries of third unidentified dead-body aged about 28 years (Ext. Ka. 23/3)

(1) A.G.W. of entry 2 cm x 2 cm x cavity deep. Rt. side chest. 8 cm below the axilla at ant. axially fold. Rt. side chest communicating ċ wound of exit 4 cm x 4 cm at Rt. inguinal region.

(2) A.G.W. of entry at Lt. side neck 2 cm above in Lt. clavicle middle part 0.5 cm x 0.5 cm x cavity deep ċ wound of exit 10 cm x 4 cm just below the Lt. nipple underlying bones fractured.

(3) G.W. of entry just below the Lt. scapula 0.5 cm x 0.5 cm communicating ċ wound of exit. 4 cm x 4 cm just above the Rt. illiac crest.

(4) L.W. 10 cm x 4 cm x muscle deep at lateral on side of Rt. thigh in the middle.

(5) A.L.W. 12 cm x 6 cm at anterior-lateral side of lower 1/3rd of Rt. leg underlying bones fractured.

(6) An abraded contusion 10 cm x 10 cm at his mid of sacrum.

Ante-mortem injuries of fourth unidentified deadbody aged about 24 years (Ext. Ka. 23/4)

(1) A.G.W. of entry 0.5 cm x 0.5 cm on the top of Rt. shoulder x cavity deep. Communicating with wound of exit at Lt. side abdomen 6 cm above the A.S.I.S. measuring 3 cm x 3 cm.

(2) A.G.W. of entry .5 cm x .5 cm at Lt. side neck (sic) part, 7 cm below the angle of mandible ċ wound of exit 6 cm x 4 cm at left tempo parietal region brain matters coming out of the wound. # of underlying bones.

(3) A.G.W. of entry .5 cm x .5 cm Lt. side of epigastrium x cavity deep with wound of exist 5 cm x 3 cm at level of 2nd (sic) spine Rt. side back.

(4) L.W. 2 cm x 1/2 cm x muscle at wrist joint gone left side medially.

(5) L.W. 5 cm x 2 cm x muscle deep in the middle of Lt. leg laterally."

The cause of death spelt out in the post-mortem reports of all the dead-bodies of unidentified alleged terrorists was due to shock and haemorrhage as a result of aforesaid ante-mortem injuries.

(ii) F.I.R. RELATING TO THE INCIDENT THAT TOOK PLACE WITHIN THE JURISDICTION OF POLICE STATION BILSANDA

(8) In respect of the incident which took place at Bilsanda, district Pilibhit, wherein alleged four militants, namely, Lakhvinder Singh *alias* Lakkha, Jaswant Singh *alias* Fauji, Kartar Singh son of Ajaib Singh and Randhir Singh *alias* Dheera, were said to be killed in alleged encounter by the police, Case Crime Nos. 136 to 140 of 1991, under Sections 147, 148, 149, 307 I.P.C., Section 25 of the Arms Act and Section 3/4 of TADA Act, were registered at Police Station Bilsanda, District Pilibhit on the oral complaint of S.O. Devendra Pandey of police station Bilsanda, district Pilibhit, alleging therein that in the intervening night of 12/13.07.1991, he alongwith SHO Mohd. Anis of Police Station Bisalpur, S.I. Ramesh Bharti of Police Lines, Pilibhit, Constable Ashok Kumar of Police Station Bisalpur, S.I. Veerpal Singh, H.C. No. 9 Nathu Singh, Constable 567 Dhani Ram, Constable 164 Ugar Pal, Constable 540 Sugam Chandra, Constable 551 Collector Singh, Constable 19 Kunwar Pal Singh, Constable 392 Shyam Babu, all of Police Station Bilsanda, H.C. Banwari Lal of

PAC, Constable 42114 Dinesh Singh, Constable 42855 Sunil Kumar Dixit, Constable 42943 Arvind Kumar, Constable 42231 Ram Nageena and Constable 42237 Vijay Kumar Singh, all of 32nd Battalion PAC B Coy and Shyam Nath Shukla Platoon Commander 32nd Battalion B Coy of Provincial Armed Constabulary (PAC) with half section, left Police Station Bilsanda at 23:15 hours vide G.D. Entry No. 48 in connection with the investigation and in search of militants of Case Crime No. 13 of 1991 registered on 12.07.1991 at Police Station Bilsanda relating to looting of one .315 bore rifle of Shri Prahlad Singh son of Beche Singh, resident of Pipergehna and one .12 bore gun of Shri Jagdish son of Sardar, resident of Bhikampur. In connection thereof, the aforesaid police party reached Phagunai Ghat at 03:30 a.m. in the intervening night of 12/13.07.1991, wherein they found movement of some persons near the river bed. After that, the Station Officer lit his torch and in the torch light, the Station Officer found that those persons appeared to be Sikh militants. Immediately thereafter, he challenged them on which the militants opened fire on the police party with the intention to kill them and raised slogans *"Khalistan Jindabad'*, upon which the police party had also opened fire in self-defence. During the firing, 4-5 militants crossed the river and ran away. At about 04:30 a.m., when the firing from the militants stopped, the police party moved ahead and recovered the unidentified deadbodies of three militants from the river bank and that of one militant from inside the river. From the possession of the aforesaid four militants, arms and ammunitions were seized under the recovery memos.

(8.1) The investigation of the aforesaid incident was entrusted to S.I. Netrapal Singh, who, after conducting the inquest of the deadbodies of four alleged unidentified terrorists from S.D.M. Bisalpur, sent their deadbodies for post-mortem.

(8.2) The post-mortem of three unidentified deadbodies (later on identified as Jaswant Singh *alias* Fauji, Kartar Singh and Randeer Singh *alias* Dheer) was conducted on 13.07.1991 at 10:00 p.m. in District Hospital, Pilibhit by Dr. P.N. Saxena, who, found the following ante-mortem injuries on their persons :-

Ante-mortem injuries of first unidentified deadbody of alleged terrorist aged about 30 years (Ext. Ka. 24/1)

1. G.W. shot lacerated wound Rt. side skull 10 cm x 6 cm x cavity deep bones fractured in pieces. Brain matter coming out.

2. G.W. of entry at medial side of thigh (Left) at perineum 5 cm x 5 cm ċ communicating wound of exit 5 cm x 3 cm at the upper part of thigh front aspect 2 cm below in A.S.I.S.

3. L.W. 2 cm x 1.5 cm at the base of Lt. great toe.

Ante-mortem injuries of second unidentified deadbody of alleged terrorist aged about 20 years (Ext. Ka. 24/2)

1. Firearm wound entry 2 cm x 2 cm on the front of chest on the central part of sternum bone, cavity deep.

2. Firearm wound of exit 5 cm x 5 cm on the left side back 10 cm below lower angle of scapula.

3. Fire wound of entry 2 cm x 2 cm on the top of Rt. shoulder of mole (sic).

4. Fire wound of exit 18 cm x 5 cm on the front aspect of Rt. forearm elbow & forearm.

5. Lacerated wound 3 cm x 3 cm on the left thumb in distal half of left hand with amplitude of distal half of (sic).

Ante-mortem injuries of third unidentified deadbody of alleged terrorist aged about 45 years (Ext. Ka. 24/3)

1. G.W. of entry .5 cm x .5 cm x cavity deep at Rt. side para sternum region ċ wound of exit at milieu scapula region measuring 6 cm x 5 cm.

2. G.W. entry .5 cm x .5 cm x cavity deep at parasternal region 3 cm below & Rt. to the injury no.(1) ċ xiphisternum wound of exit Rt. side lower part of back just above the sacral region.

1. L.W. 10 cm x 5 cm x muscle deep just above & front of Rt. knee.

2. Lacerated wound (sic) muscle deep at back (sic).

(8.3) The post-mortem of fourth unidentified dead-body of alleged terrorist (later on identified as Lakhvinder Singh *alias* Lakkha) was conducted on 13.07.1991 at 10:30 p.m. in District Hospital, Pilibhit by Dr. Vimal Kumar, who found the following ante- mortem injuries on his person :-

Ante-mortem injury of fourth unidentified deadbody of alleged terrorist aged about 38 years (Ext. Ka. 24/4)

1. Lacerated wound of gun shot present on the medial side of left upper top of head 12 cm x 6 cm x cranial cavity deep from where brain matter are coming out under bone of scalp fractured.

2. Abrasion 2 cm x 2 cm on the front of Rt. knee.

3. Abrasion 2 cm x 2 cm on the middle of left forearm on the back aspect.

4. Lacerated wound 4 cm x 2 cm x muscle deep on the Rt. palm.

5. Abrasion 3 cm x 2 cm on the back of Rt. elbow."

The cause of death spelt out in the aforesaid post-mortem reports of four unidentified deadbodies was due to shock and haemorrhage as a result of ante-mortem injuries.

(iii) F.I.R. RELATING TO THE INCIDENT THAT TOOK PLACE WITHIN THE JURISDICTION OF POLICE STATION PURANPUR

(9) In respect of the incident which took place at Puranpur, wherein two alleged terrorists, namely, Narendra Singh *alias* Ninder and Mukhvinder Singh *alias* Mukha, were said to be killed in an encounter, Case Crime Nos. 363 to 365 of 1991, under Sections 147, 148, 149, 307 I.P.C. and under Section 25 of the Arms Act were registered against the two unknown deceased militants at Police Station Puranpur, District Pilibhit on 13.07.1991 at 06:15 a.m., on the oral complaint of Vijendra Singh, Station House Officer, Puranpur, alleging therein that on 12.07.1991, at about 09:05 p.m., he received an information that a gang of 6-7 militants armed with AK47, .315 bore rifles, 12 bore gun and revolver were likely to come from *Tarai* side around midnight, upon which he requisitioned police force from police station Madho Tanda and a section of PAC, 1½ Section of Special Protection Force (SPF). After requisition, the force had arrived at Police Station Puranpur. Thereafter, he alongwith S.I. M.P. Vimal, S.I. M.C. Durga Pal, S.I. R.K. Raghav, S.I. Surjit Singh, S.I. U.P. Singh, S.I. S.S. Virk, Constable 473 Munna Khan, Constable 584 Durvijay Singh, Constable 23 Munis Khan, Constable 409 Vijay Bahadur, Constable 210 Veer Singh, Constable 128 Mahavir Singh, Constable 30 Gaya Ram, Constable 371 Register Singh, Constable 80 Rashid Hussain, Constable 470 Durvijay Singh, Constable/Driver Syed Aale Raza Rizvi, all of Police Station Puranpur, S.O. Rajesh Chander Sharma of Police Station Madho Tanda, S.I. M.P. Singh, S.I. S.P. Singh, Constable 37 Harpal Singh, Constable 429 Ram Chander, Constable 165

Kishan Bahadur, all of Police Station Madho Tanda along with one section of Central Reserve Police Force (CRPF), one section of PAC 15th Battalion and one and a half section of SPF and Constable No. 257 Suraj Pal of Police Station Kotwali, Pilibhit, left the police station at 22:30 hours and reached Barhamdev Barrier at about 22:50 hours in police vehicles. The police vehicles were left at the barrier. S.I. S.S. Virk, Constable 210 Veer Singh, Constable 409 Vijay Bahadur along with one Section of PAC of 15th Battalion were instructed to lay a picket in front of village Pattabhoji and the rest of the force went inside the Pattabhoji forest to lay an ambush. Around 12 midnight, 6-7 persons came from the North side. On being challenged, they opened fire on the police party with intention to kill. The fire was returned by police personnel. The intermittent exchange of fire between the militants and the police party continued until a little before dawn. When there was no firing from the militants' side for about half an hour, the police party came out from the ambush and noticed two militants lying dead on the *kacha* road. The arms and ammunitions recovered from the possession of the aforesaid two militants were seized under the recovery memo.

(9.1) The investigation of the aforesaid case was conducted by SI S.S. Vrik, who after conducting the inquest of the two unidentified dead-bodies of the alleged terrorists, sent it for post-mortem.

(9.2) The post-mortem of two unidentified dead-bodies of the alleged terrorists (later on identified as Mukhvinder Singh *alias* Mukkha and Narendra Singh *alias* Ninder) was conducted on 13.07.1991, at 05:30 p.m., in District Hospital Pilibhit by Dr. D.B. Kaushik, who found the following ante-mortem injuries on their persons :-

"Ante-mortem injuries of first unidentified dead body of the alleged terrorist aged about 28 years (Ext. Ka. 25/1)

1. A Gun shot wound of entry of size .5 cm x .5 cm frontier arm of (Lt.) shoulder ċ wound of exit 3 cm x 2 cm (sic) post aspect (Lt.) shoulder.

2. A Gun shot wound of entry of size .5 x .5 cm present on back of (Lt. side) Abdomen 3 cm (sic.) with exit wound of size 3 cm x 3 cm cavity deep (sic.) linear part of Rt. side of chest 8 cm below the (Rt.) nipple, 9th & 10th ribs #.

3. A Gun shot wound of entry of size .5 cm x .5 cm from below of upper part of abdomen 6 cm below the middle line 10 cm above the iliac spine, with wound of exit 5 cm x 4 cm cavity deep (sic) epigastrium (Lt.) side.

4. Multiple Gun shot wounds of entry of size 2 cm x 2 cm in the area of 6 cm x 6 cm (sic.) Rt. side muscle deep & cavity deep. Bullets recovered (7)mm/in No. from the wounds.

1. a L.W. of size 6 cm x 4 cm x muscle deep (sic.) of (Rt.) forearm 9 cm above the left joint. In all the injuries, no blackening and tattooing.

"Ante-mortem injuries of second unidentified dead body of the alleged terrorist aged about 28 years (Ext. Ka. 25/2)

1. G.S. wound of entry .5 cm x .5 cm frontier (R) side of chest cavity deep just above the nipple communicating with the wound of exit of size 6 cm x 4 cm at the xiphisternum (Lt.) side.

2. G.S. wound of entry of size .5 cm x .5 cm frontier (Rt.) nipple cavity deep. Communicating ċ the exit wound of size 6 cm x 4 cm at the xiphisternum (Lt.) side.

3. G.S. wound of entry present at the base of Rt. side (sic) 2 cm above the

clavicle .5 cm x .5 cm cavity deep. Communicating ċ the wound of exit 3 cm x 3 cm at the Rt. mid scapular line (inter scapular region).

4. G.S. wound of entry of size .5 cm x .5 cm frontier (Lt.) scapula medial (sic.) communicating with the wound of exit 8 cm x 4 cm (sic) present (Lt.) side front of chest just above the nipple.

5. G.S. wound of entry of size .5 cm x .5 cm cavity deep 8 cm below the injury No. (4) communicating with the wound of exit of injury No.4.

6. L.W. of size 12 cm x 6 cm from medial side of (Lt.) forearm middle muscle deep.

7. G.S. wound of entry .5 cm x .5 cm from the base of (Lt.) thumb (sic) communicating ċ the wound of exit 6 cm x 6 cm at the medial side of (Lt.) (sic.).

In all the above injuries, no bleeding and tattooing present.

The cause of death spelt out in the aforesaid post-mortem reports of the unidentified deceased was due to shock and haemorrhage as a result of ante-mortem injuries.

(10) It is pertinent to mention that after post-mortem, all ten unidentified dead-bodies were cremated by the police at the cremation ground located by the side of police lines, Pilibhit during the night of 13.07.1991.

(iv) BACKGROUNDS OF ENTRUSTMENT OF INVESTIGATION TO THE CENTRAL BUREAU OF INVESTIGATION AND FILING OF CHARGE-SHEET AGAINST THE ACCUSED PERSONS

(11) A news item was published in *"The Times of India'* edition dated 18.07.1991 i.e. after five days of the aforesaid incidents. On the basis of the aforesaid news item, R.S. Sodhi, Advocate, had filed Writ Petition (Criminal) No. 1118 of 1991 : *R.S. Sodhi, Advocate Vs. State of U.P. and others*, before the Apex Court on 18.07.1991 itself, wherein the Apex Court directed the Additional Chief Judicial Magistrate, Pilibhit to conduct an inquiry and submit his report. In pursuance thereof, the Additional Chief Judicial Magistrate, Pilibhit, conducted an inquiry into the matter and submitted a report before the Apex Court, pointing out therein that the identity of the persons killed in the encounters was not correctly stated. In the meanwhile, the State Government also appointed one member Commission headed by a sitting Judge of the Allahabad High Court to inquire into the matter.

(12) During pendency of the aforesaid writ petition, the Investigating Officer had submitted final report in the aforesaid three F.I.Rs. on the pretext that ten Sikhs, which were killed at Neuria, Bilsanda and Puranpur, were terrorists.

(13) Thereafter, on 15.05.1992, the Apex Court had considered all the aforesaid facts and circumstances of the aforesaid incidents and after considering it, the Apex Court, vide order dated 15.05.1992, entrusted the investigation of the aforesaid incidents which took place at Neuria, Bilsanda and Puranpur in district Pilibhit, to the Central Bureau of Investigation.

(14) After entrustment of the investigation by the aforesaid order dated 15.05.1992, the Central Bureau of Investigation had registered three separate corresponding cases under Sections 120-B, 302/34, 364, 365, 218, 117 I.P.C., at Police

Station C.B.I./S.I.C., District Lucknow on 01.01.1993 at 04:00 p.m. viz. Crime No. RC 1 (S) of 1993 (Ext. Ka.39) in respect of Case Crime Nos.144 to 148 of 1991 registered at Police Station Neoria in connection with the incident which took place in the Dhamela Kuan forest within the area of Police Station Neoria; Crime No. RC 2 (S) of 1993 (Ext. Ka.40) in respect of the Case Crime No. 136 to 140 of 1991 registered at Police Station Bilsanda in connection with the incident which took place in Wahad Gram, Sheetlapur Fanaighat within the area of Police Station Bilsanda; and Crime No. RC 3 (S) of 1993 (Ext. Ka. 41) in respect of Case Crime Nos. 363 to 365 of 1991 registered at Police Station Puranpur in connection with the incident which took place in Pattabhoji forest within the area Puranpur, district Pilibhit.

(15) The investigation of Crime No. RC 1 (S) of 1993 was conducted by the Inspector J.C. Prabhakar, C.B.I. (P.W.29); the investigation of Crime No. RC 2 (S) of 1993 was conducted by the Inspector Shri Hoshiyar Singh and after that it appears that investigation was entrusted to Shri R.S. Prasad, D.S.P. and thereafter to Randhir Singh Punia (P.W.63), D.S.P., C.B.I.; the investigation of Crime No. RC 3 (S) of 1993 was conducted by Shri Harbhajan Ram, D.S.P., C.B.I. P.W.64-Diwan Singh Dagar had conducted the investigation of the aforesaid three cases as an Assistant Investigating Officer.

(16) Thereafter, further investigation of the aforesaid three cases was entrusted/transferred to Shri R.S. Dhankar, D.S.P., C.B.I., who, after due investigation, prepared the common charge-sheet against 57 accused persons for the offences punishable under Sections 120B read with Sections 302, 364, 365, 218 I.P.C. and submitted it before the Court concerned on 09.06.1995.

(17) At this juncture, it would be apt to mention that during the course of trial, Shri R.S. Dhankar died, therefore, he was not examined by the trial Court.

(18) After investigation, the case set up by the CBI is that on 20.06.1991, a passenger bus, bearing No. UP-26/0245, of Shri Amit Kumar (P.W.5), was chartered by Talwinder Singh (missing after the incident) for Rs.30,000/- for a pilgrimage trip to Patna Saheb and Hazoor Saheb from 29.06.1991 to 12.07.1991. In this regard, an advance payment of Rs.500/- was made vide receipt No. 720 on 20.06.1991 itself and Talwinder Singh gave a list of passengers in duplicate to the owner of the aforesaid bus Shri Amit Kumar (P.W.5).

On 28.06.1991, Shri Amit Kumar applied for issuance of a temporary permit for the aforesaid bus in respect of a pilgrimage trip to R.T.O., Bareilly by enclosing the list of passengers in duplicate and obtained temporary permit no. 872 for the period 30.06.1991 to 13.07.1991 on the date itself i.e. on 28.06.1991.

On 29.06.1991, Talwinder Singh contacted the owner of the aforesaid bus Shri Amit Kumar, upon which Shri Amit Kumar gave temporary bus permit along with the list of passengers to his driver Mushraff Hussain and directed him to ply the bus as chartered. Around 09:00-10:00 a.m., Driver Mushraff Hussain, helper Pradeep Kumar *alias* Rashid along with Talwinder Singh left Pilibhit for Sitarganj, Nanak Matha and Amaria for collecting the passengers.

After collecting 24 passengers from the aforesaid places, the bus returned

to Pilibhit in the late afternoon of 29.06.1991 itself. Thereafter, at Pilibhit, Talwinder Singh made the balance payment of Rs.29,500/- to Shri Amit Kumar and thereafter the bus left for onward journey. Having left Pilibhit, the aforesaid 24 passengers/pilgrimages along with Talwinder went to Banaras, Patna Sahib, Hazur Sahib and Nanded etc.

On 11.07.1991, after paying darshan at Nanded, the pilgrimages/passengers party left Nanded and reached Gwalior. On 12.07.1991, after paying obeisance at Gwalior Gurdwara, the party left Gwalior and reached Kachla Ghat, Police Station Kotwali Soron, District Etah at about 10:00-11:00 am, wherein armed police personnel of district Pilibhit intercepted the aforesaid bus. After that ten Sikh pilgrimages (deceased) as well as Talwinder Singh (missing) were deboarded from the bus and boarded in sky blue colour mini-bus belonging to the police. Thereafter, 8-10 armed police personnel boarded in the passengers' bus and kept roaming it here and there for whole day. Thereafter, in late night of 12.07.1991, passenger's bus was brought to a Gurdwara in Pilibhit and its occupants were let off. In the meanwhile, ten Sikh persons, who were deboarded from the aforesaid pilgrimage bus, were divided into three parts and in the intervening night of 12/13.7.1991, the police of district Pilibhit killed them at three different places i.e. Neuria, Bilsanda and Puranpur showing them as Sikh terrorists in a fake encounter.

(19) The case was committed by the Special Judicial Magistrate (C.B.I.), Lucknow vide order dated 03.02.2001 to the Court of Sessions, wherein 55 accused persons out of 57 charge-sheeted accused persons (two accused died) were charged for the offence punishable under Section 120B read with Sections 302, 364, 365, 117, 218 I.P.C. and Section 302/34 I.P.C on 20.01.2003. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(20) It is relevant to mention here that out of 57 accused persons, ten accused persons, namely, Munish Khan, Rajesh Chandra Sharma, Madan Pal Singh, Kishan Bahadur, Surajpal, Ashok Kumar, Ramswaroop, Sukhpal Singh, Chandrapal Singh and Brahmpal Singh, died, hence their trial stood abated. After the death of ten accused persons, trial of 47 accused persons/ convicts/appellants, as stated hereinabove, were commenced by the trial Court.

(v) PROSECUTION WITNESSES

(21) During trial, the prosecution, in order to prove its case, had produced 67 witnesses, out of which P.W.1-Brajesh Singh, P.W.2-Ranveer Singh, P.W.3-Santosh Singh, P.W.4-Ajeet Singh, P.W.5-Amit Kumar, P.W.6-Ram Singh, P.W.7-Jasbeer Singh, P.W.11-Swarn Kaur, P.W.13-Balwinderjeet Kaur, P.W.17, Kamaljit Singh, P.W.18-Gurmej Singh, P.W.19-Bhagwat, P.W.21-Brijesh Kumar, P.W.24-Avtar Singh, P.W.30-Ranjit Kaur, P.W.34-Milkha Singh, P.W.35-Shyam Lal, P.W.36-Darshan Singh, P.W.38-Mahendra Singh, P.W.39-Rajjab, P.W.40-Major Singh, P.W.41-Subhash Singh and P.W.52-Balakram, were examined as witnesses of facts, whereas P.W.1-Brajesh Singh, P.W.2-Ranveer Singh, P.W.9-Ram Kumar, P.W.10-Manohar, P.W.12-Ram Kumar, P.W.14-Ishwar Chand, P.W.15-Mewa Lal, P.W.16-Om Prakash Yadav, P.W.22-Ravindra Singh Yadav, P.W.23-Dr. G.G. Gopaldas, P.W.26-Rampal Sharma, P.W.27-Anek Pal, P.W.28-Ram Swaroop, P.W.32-Siyaram, P.W.33-

Amal Sarkar, P.W.37-Surendra Kumar, P.W.39--Rajjab, P.W.44-D.P. Awasthi, P.W.48-Narayan Singh, P.W.50-Trilok Singh, P.W.51-Mahendra Singh Chandel, P.W.54-Constable Kunwar Singh, P.W.57-Dayan Singh Lakshpal, P.W.58-Harkesh Singh, P.W.61-Naresh Pal Singh, P.W.62-Gopal Singh, were examined as witnesses of manipulation of records; P.W.8-Avijit Dey, P.W.23-Dr. G.G. Gopal, P.W.25-Sudesh Lal Makkhi, P.W.31-Dr. Vipul Kumar, P.W.49-Dr. P.K. Singh, P.K.60-Dr. G.D. Gupta, P.W.65-Dr. S.K. Chaddha, P.W.66-Dr. S.C. Mittal and P.W.67-Dr. Satyapal Khanna were examined as expert witnesses; P.W.29-G.C. Prabhakar, P.W.63-Randhir Singh Punia, P.W.64-Devan Singh Dagar, were examined as witnesses of investigation; and P.W.19-Gurucharan Singh, P.W.42-Dhruv Kumar Singh, P.W.45-Diwan Singh Rawal, P.W.43-Jitendra Sonkar, P.W.46-Pratap Singh, P.W.47-Anil Kumar, P.W.53-Sohan Lal, P.W.55-Netrapal Singh, P.W.56-Naresh Chandra and P.W.59-Hind Prabhat Singh, were examined as miscellaneous witnesses.

(22) P.W.1-Brajesh Singh, who was posted as A.R.T.O. in district Bareilly between September, 1988- July, 1992, had deposed while seeing Paper No. D-3 (i) that Amit Kumar (P.W.5), son of Jagdish Prasad, resident of Pilibhit, moved an application for temporary permit (Ext. 1) w.e.f. 30.06.1991 to 13.07.1991 for plying his vehicle no. UP26/0245 empty from Bareilly to Sitarganj and thereafter from Sitarganj to Patna Saheb and Huzur Sahab along with the list of passengers (Ext. 2). On the basis of the aforesaid application, temporary permit No. 872 was granted to him on 28.06.1991. After some days from the date of issuance of the aforesaid permit, the then Superintendent of Police (Rural) Dayanidhi Mishra came to his office and enquired about the aforesaid permit and the bus. At that moment, ARTO and office peon Rajan were also sitting there. After that Dayanidhi Mishra requested to give photocopy of the aforesaid permit, upon which he and ARTO (Administration) Pandey asked the concerned Clerk to supply the photocopy of the aforesaid permit to the Superintendent of Police Dayanidhi Mishra. At that time, D.P. Yadav was posted as R.T.O.

On the next day, concerned Clerk Ranbir wrote an application to R.T.O. informing him that in place of original list of passengers, photocopy of the same was annexed with the application. After that the R.T.O. asked him (P.W.1) to give his report. In pursuance thereof, he (P.W.1) submitted his report, stating therein that on the request of the Superintendent of Police (Rural), Bareilly, photocopy of the carbon copy of the list of passengers was made by office peon Rajan on the direction of him (P.W.1) and Pandey, however, on the next date, he came to know that the original carbon copy did not reach to the office and as such, he immediately contacted the Superintendent of Police (Rural), who informed him that he had only photocopy of the carbon copy of the list and not original carbon copy.

P.W.1 had deposed that original carbon copy of the list of passengers was tagged with the file when Dayanidhi Mishra was shown the file. He further deposed that the purpose of the passenger list is that when enforcement officer checks the vehicle, then, it could ascertain whether genuine passenger is travelling or not. He also deposed that Police Officer could also check the vehicle.

In cross-examination, P.W.1 had stated that he had not handled paper no. D-3 (I) nor he had issued any direction on it.

He had no knowledge about the writing or cutting of numbers in the corner of the document nor he had any knowledge as to who had cut after writing in between point no. 6 to 8. He had no role officially in issuance of the aforesaid permit but he could also issue permit officially. He further deposed that permit section was the official custodian of the application.

P.W.1 had also deposed that he had not issued direction to Rajan to get the photocopy of the document but it was issued by ARTO (Administration). When the Superintendent of Police (Rural) came, he was sitting there. This fact was stated to C.B.I. during investigation. He also deposed that while giving official record to Superintendent of Police (Rural), no application was taken from him. When photocopy was handed over to Superintendent of Police, he was not present and therefore, he could not say whether receipt was taken from him while supplying the photocopy of the document or not.

P.W.1 had further deposed that passenger list was not easily legible, however, it could be read. He denied the suggestion that passenger list in the shape of carbon copy was not annexed with the application and photocopy of the passenger list was only annexed, which has been presently tagged.

(23) P.W.2-Ranvir Singh, who was posted as Senior Clerk in RTO, Bareilly in 1984, deposed that he was assigned the work to issue temporary permit of buses. On 28.06.1991, the bus owner Amit Kumar (P.W.5) had applied for temporary permit of bus No. UP26/0245. He proved the temporary permit issued by him w.e.f. 30.06.1991 to 13.07.1991 of the aforesaid bus handed over to the owner of the bus. At that time, Brajesh Singh was posted as A.R.T.O. Enforcement, Bareilly, who sought information regarding the permit of the aforesaid bus and also directed him to bring the file. In pursuance thereof, he brought the file. At that time, A.R.T.O. (Administration) Pandey and R.T.O. D.P. Yadav were present there. He handed over the file to R.T.O. D.P. Yadav and went from there. He deposed that after two hours, when the file was returned to him, then, he noticed that in place of original carbon copy of passenger's list, photocopy of the same was tagged in the file. In this regard, a note (Ext. Ka. 5) was forwarded to A.R.T.O. Brajesh Singh.

P.W.2 had also stated that the permit was sought from Bareilly to Sitarganj (empty) and Sitarganj to Patna Sahib-Huzur Sahib and back and it was issued. The permit was prepared in one copy and entry of the same was made in the register and handed over to the owner the vehicle.

On 04.06.2003, the cross-examination of P.W.2 was deferred on account of the fact that the Hon'ble High Court in Criminal Misc. Case No. 614 of 2003 directed not to compel the accused to cross-examine the witness. After that another opportunity was granted to the accused to cross-examine P.W.2 on 14.07.2003 but the learned Counsel for the accused refuted to cross-examine P.W.2 on account of non-supply of documents and petition before the Hon'ble High Court.

However, on 28.01.2009, the cross-examination of P.W.2 was made, wherein he had stated that in the passenger list, name of passengers, their age and number of passengers were mentioned. The name of Sardar Amarpal Singh aged about 60 years was mentioned in the first number of the list of passengers and in column of his name, four passengers were endorsed.

The second name of Dyan Singh aged about 65 years was mentioned and the third name of Amrik Singh aged about 62 years was mentioned in the list of passengers. The name of all the passengers mentioned in the list of passengers was not readable. The lowest age of passenger was written as 31 years in the list of passengers and no passenger younger that 31 years was on that list. According to the list, total number of passengers traveling in the bus was mentioned as 45. The permit Ext. K.6 was valid w.e.f. 30.06.1991 to 13.07.1991. The carbon copy of the list was taken away by Superintendent of Police (Rural), Bareilly and photocopy of the original carbon copy of the list was with him. This list was handed over in R.T.O. Office on 28.06.1991.

(24) P.W.3-Santosh Singh, who is the father of deceased Mukhvinder Singh *alias* Mukkha (encountered in Pattabojhi forest falling in the jurisdiction of police station Puranpur), had deposed in his examination-in-chief that he is an agriculturist. He had two sons, namely, Mukhvinder Singh *alias* Mukkha (deceased) and Harjinder Singh. In 1991, Mukhvinder (deceased) was aged about 23 years and he went from the house for Huzur Sahib. At that time, Mukhvinder (deceased) was doing the work of Carpenter and he told that he would return on 16-17 July, 1991. Mukhvinder (deceased) had also informed him that he would also visit Nanakmatta.

P.W.3-Santosh Singh had deposed that when his son Mukhvinder (deceased) did not return on 17.07.1991, then, he made efforts to search him and he also went to the police station, wherein the police had informed that photo was published in the newspaper and his son might have been killed. Thereafter, he came to know from the newspaper that his son Mukhvinder, who was shown as Vichitra Singh as well as Kartar Singh and Jaswant Singh of his village who also went to Huzur Sahib along with his son from bus, were shown dead. He further deposed that all three were not terrorists. He identified two photos (paper/photo no. D-174/1 and D-174/2) of his son Mukhvinder Singh (deceased) as well as paper/photo No. D-175/1 of Randhir Singh (deceased), Jaswant Singh

P.W.3-Santosh Singh had further deposed that one Inspector of Pilibhit came to his village and showed him Photo D-174/2, upon which he identified his son (deceased Mukhvinder). He also identified the photo No. 4 of Jaswant Singh (Ext.3). He further deposed that earlier his son Mukhvinder (deceased) was doing the work of Carpenter in Jammu, however, later on he was doing it in the village. He also deposed that A.C.J.M. Pilibhit summoned him in the Court, wherein his statement was recorded and he also identified the photo of all four persons. He further deposed that no case has been registered against his son in the police station. He proved the signature of Kartar Singh (deceased) on the register (paper No. D-6) of Gurudwara Langar Sahib, Nanded. He deposed that his son and his other three friends were killed in a fake encounter.

P.W.3-Santosh Singh, in his cross-examination, had deposed that his statement was recorded by the C.B.I. Officer but he did not state anything about his son Harjinder to C.B.I. His son Mukhvinder (deceased) was unmarried and was doing the work of carpenter. He further deposed that he is a heart patient; he is illiterate and he could only write his name in *"gurumukhi"*; he has cataracts; he could not read *"gurumukhi"*; and he could also not read *"gurumukhi"* prior to it. He further deposed that he could not identify any

photo because at that moment, he saw one of three. First of all, the Inspector of Pilibhit had shown photo and at that moment, he identified the photo and after that he identified the photo in Court. He denied the suggestion that as there was cross in the register and some of the photos were not identifiable, therefore, he is not telling the right reason by making a false excuse of cataract.

(25) P.W.4-Ajit Singh, who is the father of deceased Harmendra Singh *alias* Minta (killed in encounter in Dhamalkuan forest falling in the jurisdiction of police station Neuria) and father-in-law of Swarnkaur (P.W.11), had deposed in his examination-in-chief that he had two sons, namely, Harmendra *alias* Minta (deceased) and Sukhvinder. His elder son Harmendra *alias* Minta along with his wife Swarnkaur (P.W.11) with whom he married just six months' back, went as pilgrim to Nanakmatta (U.P.) in the month of *baisakh* from Delhi. From Nanakmatta, his elder son wrote a letter to him that he is going to Huzur Sahib from Nanakmatta and he would return on 15-16. After that he came to know that the pilgrims who had gone to Huzur Sahib were killed, then, he along with his son went to the house of Yashpal Singh, wherein newspaper was shown to him, in which the photo of the persons killed in encounter was there and he identified the photo of his son. He identified the photo (Paper No. 175/2) (Ext. Ka. 8 & 9) of his son Harmendra Singh (deceased) and his wife Swarnkaur (P.W.11). He further deposed that against him or his son, not a single F.I.R. was lodged in the police station and the police had shown fake encounter.

P.W.4-Ajit Singh had further deposed that when he came to know about the incident, he met with S.S.P., Gurdaspur and C.O. Gurdaspur and also enquired from them regarding pendency of any case against him or his son. After that he went to Pilibhit, wherein he met with Advocate Bhagwant Singh. Thereafter, he went to the Court of ACJM, wherein his statement was recorded and he identified the photo of his son. After that, the marriage of his daughter-in-law Swarnkaur was solemnized with his younger son Sukhvinder because she had a small daughter. He also deposed that he came to know about the killing of other persons including his son for the first time from newspaper and after that he came to know about the whole incident when he reached Pilibhit.

In cross-examination, P.W.4-Ajit Singh had deposed before the trial Court that he denied the suggestion that F.I.R. No. 70 of 1990, under Sections 452, 147, 148, 149, 302 I.P.C., Sections 25/54/59 of the Arms Act and Section 3/4 of the TADA Act; F.I.R. No. 115 of 1990, under Sections 395, 396, 397, 148, 149 I.P.C., Sections 25/24/29 of the Arms Act and Section 3/4 of the TADA Act; and F.I.R. No. 152 of 1990, under Sections 147, 148, 149, 302 I.P.C., Sections 25/54/59 of the Arms Act and Section 3/4 of the TADA Act, were lodged against his son Harmendra *alias* Minta at Police Station Dhariwal on 08.05.1990, 21.08.1990 and 26.11.1990, respectively. He further deposed that except his son, he did not know about other killed terrorists nor he could make effort to know about them. He also denied the suggestion that his son Harmendra Singh *alias* Minta was actively participating in terrorist activities in the year 1990 within the jurisdiction of police station Dhariwal, District Gurdaspur. He also denied the suggestion that his son came to Pilibhit from Punjab on account of avoiding his arrest by the police and involvement in

terrorist activities. He also denied the suggestion that Swarnkaur (P.W.11) was also involved along with his son Harmendra Singh (deceased) in terrorist activities.

P.W.4-Ajit Singh had further deposed that his son Harmendra Singh *alias* Minta left home on 15th -16th of the month of *"Jyesth'* for pilgrimage and this was also stated by him to the Investigating Officer but the same has not been written by the Investigating Officer in his statement under Section 161 Cr.P.C. He also stated that his son went to Delhi for enquiry about going to abroad as well as pilgrimage. He further deposed that he gave Rs.10,000/- to his son after selling the land, however, he did not know how much amount out of Rs.10,000/- he took out.

P.W.4 had further deposed that Huzur Sahib is nearer from Punjab but as Harmendra (deceased) had some work in Delhi, therefore, he went to Huzur Sahib via Delhi. His son went to see Nanakmatta, which was the part of his visit. He further deposed that news was published that while returning from Huzur Sahib, some people including Harmendra were killed. After 2-3 days of reading this news, he went along with his daughter-in-law to Pilibhit. After that he went to leave his daughter-in-law to home. He had shown the photo (Ext. 8 (D-145/2) to Shri Sodhi Advocate, who had filed his case before the Apex Court, however, he did not tell the Investigating Officer of the same because it was not asked from him by the Investigating Officer.

(26) P.W.5-Amit Kumar, who is the bus owner of the bus no. UP26/0245, had deposed before the trial Court in his examination-in-chief that his travel agency New Hindustan Travels Company, is situated in Chatri chauraha, district Pilibhit, which was looked after by him, his father Jagdish Prasad and his brother Anil Kumar. He could not ply the bus No. UP26/0245 on any route but it was kept only for booking of reserve party and marriage party. On 20.06.1991, Talwinder Singh came to the office of his Company and asked him of a bus for going to Huzur Sahib, Patna Sahib and Nanded. He was also told by Talwinder Singh that bus would go on 29.06.1991 and would return on 12.07.1991. In this regard, he informed Talwinder Singh about fare of Rs.30,000/- of the bus. After that, Talwinder Singh gave him Rs.500/- in advance along with the list of passengers in two sets. After that he went to R.T.O., Bareilly and applied for temporary permit of bus no. 26/0245 from 30.06.1991 to 13.07.1991 (Ext. Ka. 6) by enclosing two sets of the list of

P.W.5 had further deposed that on 29.06.1991, Talwinder Singh came and he gave temporary permit to him and a copy of temporary permit was also given to the driver of the bus Mushraff. Thereafter, the bus driver went to pick up the passengers and Talwinder Singh, after returning, gave Rs.29,500/-, of which he gave receipt thereof. He deposed that the receipt was prepared in three sets. The original receipt was handed over to Talwinder Singh; the carbon copy of the receipt was handed over to his driver; and third copy of the receipt was enclosed in his office record, which was given to the C.B.I. He proves the receipt (Ext.Ka.7), wherein signature of him and Talwinder Singh were there.

PW.5 had further deposed that the bus had left in the evening of 29.06.1991 and it was plied from Company office. The list of passengers was necessary to be attested from any M.L.A., M.P. or Block Pramukh and record regarding the bus was in the old R.T.O. Office. He deposited

Rs.320/- for temporary permit. The driver of the bus was Mushrraf, who was resident of Moradabad. He also knew the two sadu of Mushrraf, who were also driver. When the driver came by picking up the passengers from Sitarganj, then, 25-26 passengers were in the bus. He gave documents and Rs.20,000/- to the driver of the bus. After that the bus left with passengers and Talwinder Singh. This bus was to return either on 12.07.1991 or 13.07.1991.

P.W.5 had further deposed that in the morning about 8:00 or 08:30 a.m. of 13.07.1991, driver Mushrraf came and told him that the bus was standing near the office. The C.B.I. had enquired from him. Now, the driver Mushrraf does not work in his company.

The accused was provided opportunity to cross-examine P.W.5 but the accused did not cross-examine P.W.5.

(27) P.W.6-Shri Ram Singh, who is the Salesman of Bharat Service Centre situated in Assam Road, Pilibhit, had deposed that on 29.06.1991, between 05:00-05:30 p.m., the bus of Hindustan Travels came and after taking diesel left from his Service Centre. Some passengers were in the bus.

(28) P.W.7-Jasbir Singh, who is the elder brother of Kuldeep Singh used to serve in Huzur Sahib Gurudwara, Nanded, had deposed in his examination-in-chief that he has three brothers, out of which, he is eldest. His younger ones are Kuldeep Singh and Mahendra Singh. He and his brother Kuldeep Singh have studied till 10th class and they knew Punjabi and Hindi language and also could write, read and speak Punjabi and Hindi language.

P.W.7 had further deposed that around 1990-91, his brother Kuldeep Singh used to participate in service of Huzur Sahib Gurudwara, Nanded. He knew the handwriting of his brother Kuldeep very well. After seeing page no.133 and document no. 6 of the register of Gurudwara Langar Sahib, Nanded, which related to the arrival and departure of pilgrims, booking rooms etc., he deposed that it was his brother's handwriting, which was marked in red circle (Ext. Ka.10) and the same was booked in the name of Kartar Singh.

In cross-examination, P.W.7 had deposed that he has lived in Delhi since the beginning and has studied in Delhi Government Municipal Corporation School, Delhi. His brother Kuldeep Singh is still alive. At the moment, his brother Kuldeep Singh is living with him. He deposed that it is true to say that there is some overwriting on Ext. Ka. 10 and some cutting and also there is over writing on Ext. Ka. 10 where vehicle number is written. However, he could not say if earlier it had other number and after that it has been changed to another. This handwriting did not occur in front of him nor any entry of the register was made in front of him neither could he even tell when and where the register has been written.

(29) The evidence of P.W.8-Abhijeet shows that he was posted as Senior Science Officer Grade-II in the year 1993 and 1994 in Central Forensic Science Laboratory, C.B.I., Lucknow. During this period, case property of the instant case including weapons and cartridges was sent to him in ten parts for examination and he had examined the same on 22.09.1993, 04.03.1994, 22.04.1994, 18.05.1994, 07.04.1994, 13.05.1994, 04.03.1994, 05.10.1993, 11.05.1994, 08.04.1994, 13.10.1993 and 29.03.1994. All the reports

were typed on his direction and after making corrections, he made signature thereon.

P.W.8 had further deposed that he, after legal examination (Scientific Examination) of the photographs relating to holes of the vehicle in question marked as B-13, B-14, B-6, gave report that all these holes have come due to the bullet. He also deposed that he did not examine the case to the effect that as to which of the weapons sent for the test, holes in the bus in question would have come from as the photographs of three holes nature were taken from other angles.

(30) The evidence of P.W.9-Ram Kumar shows that around 15-16 years ago, he was coming after planting paddy from the field of Bangali (Haran) and in the cross-road of Richaula Kothi, police called him and boarded him in blue maruti car. On enquiry, he was told by the police that a thief has to be caught. After that he was taken away to police station Neuria, wherein he was told by the police that the police has caught the thief and subsequently, the police got the signature of him on a plain paper. At that moment, a boy, namely, Manohar Lal was also sitting in police station and the police had also affixed his thumb and got signature of him on it. However, he did not know as to whether police brought anyone to police station or not because the matter is quite old. After that on the same date, the policemen after bringing him in the blue car, dropped him on *Kacha*hari crossroad.

(31) P.W.10-Manohar has stated that after planting paddy in the field and taking food, when he was sitting in his field, then, the police came and brought him to police station Neuria from a vehicle, where the police got his thumb impression on a plain paper.

In cross-examination, P.W.10 had stated that for the first time, he deposed the fact that the police forcefully took his signature on 2-3 papers, in the Court and before that he had not told this fact to anyone. He denied the suggestion that he deposed falsely on account of pressure of C.B.I.

(32) P.W.11-Swarnjeet Kaur, who is the wife of Harmindra Singh Minta (deceased), had deposed before the trial Court in her examination-in-chief that she went to pilgrimage at Nanakmatta, Patna Sahib (Bihar) and Huzur Sahib Maharasthra. She and her husband Harmindra Singh *alias* Minta (deceased) sat in the bus from Nanakmatta. She deposed that about 25-26 persons were also in the bus. After 12-13 days of the visit, the bus came back.

P.W.11 had deposed that when the bus was returning on 12.07.1991, then, the policemen stopped her near the barrier of a very big river bridge, wherein many policemen climbed into her bus and deboarded 10-11 young Sikhs from the bus and 2-3 old people, children and women were allowed to sit in the bus. Thereafter, some policemen sat in her bus and some policemen boarded the young Sikhs in their bus. After that, the policemen were roaming her bus here and there and did not even allow stopping to use bathroom. Then, in the evening, her bus was left to Pilibhit Gurudwara and she did not know where their fellow Sikhs have been taken away by the policemen. In the night, she stayed in Gurudwara and in the morning, she asked a *Sewadar* to telegram her father-in-law in Punjab. After receipt of telegram, her

father-in-law came from Punjab and took her to her house, where her father-in-law told her that her husband was killed.

When a photograph was shown to P.W.11, then, objection was made by the learned Counsel for the defense/convicts/ appellants to the effect that it is a secondary evidence and is not admissible in Court nor it was given to accused under Section 207 Cr.P.C. On this objection, trial Court observed that this objection has to be decided during the course of analysis of evidence. Thereafter, P.W.11 was shown the photographs of D175/1, D175/2, D175/5, D175/6, D175/7 and D176/3, then, P.W.11 had identified the photo of her husband Harmender Singh Minta in D175/1; her photo and her husband's photo in D175/2; her photo in D175/5; her photo and her husband's photo in D175/6; her photo in D175/7; and her husband's photo in D176/3. She further deposed that these photos were taken during the course of pilgrimage.

In cross-examination, P.W.11 had stated that as on date, she was not a widow as now her husband is Sukhvinder Singh who is the younger brother of her deceased husband. After one year of her husband Harmindra Singh's killing, her second marriage was solemnized. The name of her father and her father-in-law are Ajit Singh (P.W.4). The distance between her father's house and the village of her father-in-law Satkoha is 15-20 Kms. Her marriage was solemnized with Harmendra Singh (deceased) in the month of February, 1991. She further deposed that her husband Harmendra was studying in 11th Class and was doing the work of agriculture. After marriage, her husband wanted to go abroad after getting a passport. The passport of her husband was made and she showed her husband's passport to the C.B.I.

P.W.11 had further deposed that firstly she went to Amritsar and after that she went from Amritsar to Delhi, however, she did not know when she went from Amritsar to Delhi as it was a matter of 14-15 years ago. She further deposed that she went to Delhi from Amritsar in the month of June. She also deposed that she left from Amritsar to Delhi via train without any reservation in the evening and she reached Delhi in the morning, wherein she stayed 2-3 days and visited Seeshganj, Rakabganj and Bangla Sahib and in all three days, she stayed in Sheeshganj Gurdwara. She further deposed that C.B.I. had recorded her statement. She had stated to C.B.I. that she came from Amritsar to Delhi for darshan of Gurudawaras but she did not know whether she told the C.B.I. that she saw Gurudwaras, or not. She further deposed that she did not know whether Rakabganj Gurudwara is in New Delhi or old Delhi because big incident happened against her. She further deposed that she did not know to whom Harmendra Singh Minta went to meet in Delhi because she stayed in Gurdawara. She also stated that she went from Delhi to Nanakmatta through rail without any reservation.

P.W.11 had further deposed that the bus was big and in the bus, there was 25-26 passengers but she did not remember whether the bus was full or not. She also did not remember as to whether she stated to C.B.I. that 25-26 passengers were in the bus. She also did not remember that out of 25-26 passengers, how many men; how many women; and how many children were travelling in the bus. She had also stated that after coming from Huzur Sahib, she did not go to Nanakmatta but she went to Pilibhit Gurudwara, wherein the policemen had left her by bus. On the next morning, she sent a telegram to her father-in-law through *sewadar*. In the telegram, she had written that her husband was caught by the police and she was in the Gurudwara. She

did not give any money to *Sewadar* for telegram nor *Sewadar* had asked for it. She was crying at that time. The *Sewadar* did not give her the receipt of the telegram nor she demanded it from him.

P.W.11 had also stated that in these 2-3 days, thousands of persons visited the Pilibhit Gurudwara but she did not hear from them in these 2-3 days that 10-11 Sikhs were encountered by the police, may be, because she was almost crying and was already upset. She did not tell in these 2-3 days to any granthi or any Sardar that her husband was caught by the police nor she made request to any one to get her to higher police officers because in the meantime, other women kept on supporting and telling her that the policemen first catch and thereafter leave the person.

P.W.11 had further deposed that she came to know about the killing of Harmindra Singh by the police when she reached her home in Punjab with her father-in-law. She stated that when her father-in-law started crying after getting off the ricksaw, then, she came to know her husband had died. She further deposed that she does not remember that whether she gave statement to C.B.I. that the day when the police had dropped her in Pilibhit Gurudwara in the night, she thought that the police would leave her husband too but only a day after, it came to be known from the newspaper that her husband and other police personnel arrested many Sikhs and encountered them. She also deposed that the name of her husband Harmendra *alias* Minta was neither entered in any police station nor he had any criminal history nor his name was in the list of declared terrorist nor she was the member of any group of terrorist.

(33) The evidence of P.W.12-Ramkumar shows that in the year 1993, he and his father were doing the work of planting rice in the farm of Balkar Singh. During lunch hour when he was having lunch, the police vehicle came and brought him and his father to Neuria police station, wherein the police took his signature.

In cross-examination, P.W.12-Ram Kumar had deposed that he is an illiterate person, therefore, he could not tell which year is going on. He further stated that he told the C.B.I. that he was not literate, however, he only put signature.

(34) P.W.13-Balwinderjeet Kaur *alias* Lado, who is the wife of deceased Baljeet Singh *alias* Pappu, had deposed before the trial Court that she along with her husband Baljeet Singh *alias* Pappu, brother-in-law Jaswantar Singh and mother-in-law Surjeet Kaur went to pay darshan of Nanakmatta (Nainital) on 29.06.1991 by bus. She further deposed that in the bus, 25-26 passengers were traveling, out of which there were 10-11 young Sikhs, 2-3 old persons, 2-3 children and rest women. They were travelling for about 12-13 days and in these days, they visited Nanakmatta, Patna Sahib, Huzur Sahib, Nanakjeera and other Gurudwaras. When they were returning from pilgrimage on 12.07.1991, then, around 9-10 a.m., some policemen stopped the bus on a bank of a river, wherein a big bridge was lying. After that 8-10 policemen got into her bus through both the doors of the bus and took off 10-11 young Sikhs including Baljeet Singh Pappu and her brother-in-law Jawant Singh and boarded them in the blue colour police bus. After that the police sat on her bus and were roaming the bus whole day here and there and in the evening they were dropped in Pilibhit Gurudwara. The policemen told them that they were deboarding the Sikhs terrorists from the bus, therefore, do not tell anyone about it.

P.W.13-Smt. Balwinderjeet Kaur *alias* Lado had further deposed that when the policemen deboarded the Sikhs, then, 2-3 Sikhs ran after escaping from the police, however, villagers caught them and handed them over to the police. The policemen abused and threatened her a lot and on being asked, the policemen told her that after investigation, they would leave her husband. At that time, they had cameras but the policemen snatched them. She identified the photographs of his brother-in-law Jaswant Singh Jassa (D-176/1) and Bajeet Singh Pappu (D-176/2).

In cross-examination, P.W.13-Smt. Balwinderjeet Kaur *alias* Lado had deposed that her marriage was solemnized with Baljeet Singh (deceased) out of her sweet-will on 12.12.1990. She admitted the facts that in the month of September, 1990, while sitting in her courtyard, she was weaving chadar and all of her family members had gone outside the house for work and she was alone. On finding her alone in the house, some unknown persons came with Maruti Van and brought her to unknown farm house, wherein Baljeet Singh *alias* Pappu was present and Baljeet Singh *alias* Pappu older than her told her that he want to marry her. At that time, she was not screaming while sitting in Maruti Van. She deposed that her family members did not want to marry her with Baljeet Singh *alias* Pappu, therefore, she solemnized marriage with Baljeet Singh *alias* Pappu out of her sweet-will. She stated that she did not solemnized the marriage with Baljeet Singh *alias* Pappu because she was forcibly taken by the men of Baljeet Singh *alias* Pappu or because of the pressure of Baljeet Singh *alias* Pappu but she got marriage with Baljeet Singh *alias* Pappu as her family members did not want her to marry with Baljeet Singh *alias* Pappu.

P.W.13 had further stated that she was brought by the men of Baljeet Singh *alias* Pappu before fifteen days of her marriage. After bringing her, she was taken away at Tataiya Khurd, Nawabaganj, district Bareilly, where the sister of Baljeet was living and they lived for some time there, however, she could not tell how many days she lived there. She further stated that from the house of the sister of Baljeet, she and Baljeet left for Nanakmatta Gurudwara, Nainital, where they stayed for some time with fake names Simarjeet and Sukhdev. She further stated that their marriage was solemnized in Nanakmatta Gurudwara and the family members of Baljeet were ready for their marriage they and sister of Baljeet who lived in Tatatiya Khurd, Bareilly were not coming at the time of marriage. She stated that when she and Baljeet reached the house of the sister of Baljeet at Tatatiya Khurd, the sister of Baljeet was not present as she went to Punjab in relation to the marriage of her son. She stated that because she and Baljeet did love marriage, hence they wrote down their fake name in Nanakmatta in order to conceal their identity. She did not know how many criminal cases were registered before the marriage and after marriage against Baljeet. She also did not know whether case of murder, snatching, TADA and dacoity was lodged before the marriage upon Baljeet or not. She stated that at the time when she was brought from her house, terrorism has spread a lot in Punjab,Pilibhit, Nanital, Udham Singh Nagar and *tarai* of Bareilly. She denied the suggestion that Baljeet Singh was a named terrorist in police station Dhariwal, district Gurudaspur because of which he was not living with his father at village Arjunpur and was involved in terrorist activities in *tarai* area of Bareilly. She also denied the suggestion that she was the active member

of the terrorist gang of Baljeet Singh and was living with the active members of Baljit Singh's gang in *tarai* area. She also denied the suggestion that the Government of Punjab gave a job because she was the member of a group of terrorists and her husband was a named terrorist and after the murder of her husband, job was given to her under the settlement scheme. She further stated that the name of her brother-in-law was Jaswant Singh *alias* Jassa *alias* Bijli.

P.W.13 had further deposed that they did not stay in Nanakmatta Gurudwara but they came there only for darshan. They came to know at Nanakmatta Gurudwara that one bus for pilgrimage was to go on 29.06.1991. She further stated that on 29.06.1991, they came at Nanakmatta Gurudwara and on that day, they went for pilgrimage tour. She further stated that they came from Punjab through rail without reservation. After Nanakmatta Gurudwara, they reached Pilibhit and on the date itself, they went from Pilibhit to Banaras, where they stayed for about one day but she could be tell the timing of reaching Banaras.

P.W.13 had denied the suggestion that her husband, brother-in-law and other Sikhs were killed in police encounter on account of their involvement of terrorist activities.

(35) P.W.14-Shri Ishwarchand Sharma, who conducted the *''panchayatnama'* of four unidentified dead-bodies of Phagunaighat forest area, police station Bilsanda, had deposed that in the year 1991, he was posted as Sub-Divisional Magistrate, Bhisalpur, district Pilibhit. On 13.07.1991, he received a message in the wireless set installed in his jeep that encounter of terrorists took place in the area of Bilsanda, therefore, S.D.M. be sent for *''panchayatnama'*. On receipt of the aforesaid message, he reached at the place of the incident, wherein Anis Ahmad (convict/appellant), Inspector of Kotwali Bhisalpur, met and told him that he sent the wireless message to him for *''panchayatnama'* but he stated to him that no wireless message was received by him till time, however, he came on listening the message on the wireless set installed in his jeep, therefore, if it is necessary, then, panchayatnama would be conducted by him. After that, Inspector told him that it is necessary to conduct *''panchayatnama'* by him. Therefore, he saw the dead-bodies lying on the spot and after seeing the dead-bodies, he prepared the *''panchayatnama'* of it with the help the police and put signature thereon. He stated that deceased were four in number and all the four were Sikhs. The photograph of the dead-bodies were not snapped in his presence. He sent the letter for post-mortem in district headquarter because the post-mortem would be conducted in Pilibhit. No permission was obtained from him regarding the cremation of the dead-bodies of the deceased. He proved the document nos. D-60/3, D-60/4, D-60/6, D-60/11 and D-61/3, D61/5, D61/10, D61/11 and D-62/3, D62/4, D62/5, D62/10 and D63/3, D63/4, D63/5 and D63/10.

In cross-examination, P.W.14 had deposed that S.D.M. or Magistrate had only concern to fill panchayatnama and had no concern with the post-mortem or cremation of the dead-bodies, hence no permission was required to be taken in this regard. He further stated that he took five panchas from the gathering whose name were reduced in the panachayatnama and their statements were recorded. Out of five panchas, the name of one "panch' was Sardar Jaswinder Singh and another one was Sabran Singh.

(36) P.W.15-HCP Mewalal Yadav had deposed before the trial Court in his cross-examination that in July, 1991, camp of his Company (15th Battalion PAC, Agra) was on tehsil in front of police station Puranpur. In the intervening night of 12/13.07.1991, a Constable from the police station Puranpur came to his camp and told to his Major that encounter is going on, hence he would have to go on duty. After that Major woke him up and on the direction of C.C. Shri Badri Prasad Verma, he went to police station Puranpur, wherein he told the Munshi to endorse his "entry', upon which the Munshi told him that Inspector went towards Bhagwantpur forest area, hence he should go there. After that he asked him (Munshi) to provide a guide but the same was not provided to him and he was asked to go there as Inspector would meet him there. Thereafter, he along with 1½ Section of the armed police of the Company went towards Bhagwantpur forest but after some distance from the police station, the big bus of PAC bogged down on the bridge, hence whole section of the Company proceeded to go by foot from there. However, they reached there in the morning at about 5-5:30 a.m.

P.W.15, in cross-examination, had deposed that entry and exit have been recorded in the G.D. of the Company. He stated that the days in which the incident has taken place, terrorism was in full swing in district Pilibhit and policemen wearing police uniform were not moving alone. He heard that terrorist looted a Bank before the incident.

(37) P.W.16-Om Prakash Yadav, in his examination-in-chief, had deposed before the trial Court that on 16.04.1974, he was appointed on the post of "Sipahi' in Central Reserve Police Force. In July, 1991, his Company 25th Vahini was posted in district Pilibhit. The platoon was posted in police station Madhotanda, wherein he was also posted. At that time, he was Lans Nayak and his Commander was H.C. Chajjuram. On 13.07.1991, at 02:00 a.m. in the morning, Constable Chajjuram told that they have to go on special operation, therefore, they should prepare for duty. After that he along with Constable Chajjuram, Lans Nayak Amal Kumar, Constable Ashok Kumar, Constable Subodh Nath, Constable Jasbir Rathi and also S.I. M.P. Singh of police station Puranpur went towards Puranpur. When they reached at police station Puranpur, S.I. M.P. Singh left the jeep outside the police station Puranpur and went inside the police station Puranpur. After some time, SI M.P. Singh and Inspector Vijendra Singh came from police station Puranpur and went towards Pattabhojhi forest from the same Jeep. Before one kilometre from the forest, Jeep was stopped and all of them were going by foot towards forest. After that SI M. P. Singh had deployed him in left portion of the forest before 30-40 yards before the start of forest area and directed that if any terrorist or suspicious men are seen coming from the forest area, then any how they should not be allowed to go outside and if necessary, fire may also be opened. S.I. M.P. Singh had also told him that around 400-500 yards ahead, Uttar Pradesh Police, S.T.F., P.A.C. had laid ambush. At that time, it was around 03:15 a.m. Thereafter, S.I. M.P. Singh and Vijendra Singh went towards the forest on foot. After 15-20 minutes of their departure, sound of fire was suddenly coming and it seemed as if many weapons were being fired. After that, few fires lasted till 05:30 p.m. After the fire stopped, S.I. M.P. Singh came to their Section and ordered the Section Commander Chajjuram to search the left side of the forest. After ordering this much,

S.I. M.P. Singh went back to the forest. While searching, they reached near the raw path of the forest, then, he saw from a distance of 30-40 yards that two Sikh men were lying dead. The distance between the two would be 60-70 yards. At that time, S.I. M. P. Singh ordered to close the section and wait for them outside the forest. Some policemen were also standing on rough road. After that they came outside of the forest and waited for the police. Thereafter, at 10:00 a.m., a Protection Jeep and an Ambassador Car were seen going towards the forest. The Ambassador Car had a red beacon and it was learnt that the Superintendent of Police, Pilibhit had come. After one hour, the vehicle came outside the forest. Thereafter, he also came through Jeep along with S.I. M.P. Singh to police station Puranpur. After that S.I. M.P. Singh brought them to their camp Madho Tanda at 13 hours.

(38) P.W.17-Kamaljeet Singh had deposed that on 12.07.1991, 05:00 p.m., when he was returning after taking fertilizer from M/s Lalit Hari Sugar Factory, Gajraula through tractor-trolley, Railway Crossing situated in Mala Railway Station was closed, therefore, he stopped his tractor trolley and saw police vehicles there. He stated that two Jeepsi, which was opened from three sides, were standing forefront, in which armed police personnel were sitting and behind it, TATA-407 was standing, in which some Sikh persons and police personnel were sitting and behind it, vehicle of PAC was standing, wherein also his tractor trolley was standing. After 10 minutes, railway crossing was opened and first of all, police vehicles crossed the railway crossing and after that he crossed the railway crossing. On the next day, he read in the newspaper that some terrorists were killed by the police in encounter.

(39) P.W.18-Gurmez Singh had deposed on 17.10.2007 before the trial Court that he was posted at Mala Range in Forest Department between 1985-86 to 1997. On 12.07.1991, he was posted at Richaula Gate in Forest Barrier. His duty was between 04:00 p.m. to 12:00 p.m. Around 05:00 p.m.-05:30 p.m., he saw 3-4 police vehicles coming, which were going from railway crossing towards Madhotanda via Richaula, out of which in one vehicle, some policemen and some Sikhs were there. Their face was covered and their hair was open. They were Sardar and they had beard. The policemen were armed with firearm. One vehicle was in blue colour.

(40) P.W.19-Gurucharan Singh had deposed before the trial Court on 07.11.2007 that he under the partnership of his elder brother Kuldeep Singh was running a Firm, namely, Punjab Gun House situated in Station Road, Pilibhit, for selling gun, cartridges etc. to the license holder. On seeing the document No. D-1-6/1, which is a cash memo No. 2005 dated 19.05.1978, he stated that 12 Bore of S.B.B.L. Gun No. 57729 was sold out to Sukhdev Singh through cash memo no. 2005 dated 19.05.1978.

In cross-examination, P.W.19 had stated that he did not take photocopy of license from Sukhdev Singh because at that time, photocopy did not happen. He had not kept copy of the license in his record. He sold out new gun, which was purchased by him from Punjab Gun House, Bareilly and the record of the same was available in his home but as the same was not asked to be brought, hence he has not to bring it. The license on which he sold the gun was of all India, therefore, he sold the gun. The license number was 128/SAD/78, which was valid upon 31.12.1978, however, he

had no knowledge when the license was issued but it was issued from D.M., Tripura (West). The address which was mentioned in the license was 207, M.T.N. Regiment C/O 99 A.P.O., P.S. Raidhara Village Sultan Pahal Amritsar. He had not verified the license before selling the gun. He did not send any information of sale of the gun to the D.M. Tripura (west) and D.M. Amritsar on this license but he only sent information regarding sale of this gun to S.P., Pilibhit and except him, no one was informed by him about sell of it. He proved Ka-22/3, which was the Sales Certificate for selling cartridges to Sukhdev Singh.

(41) P.W.20-Bhagwat had deposed before the trial Court on 11.01.2008 that he was posted in Mala Railway Gate, district Pilibhit from 1987 to around 1994. On the direction of Station Master, he closed the railway gate on arrival of rail and opened the gate on departure of rail. He proved the facts that on 12.07.1991, for the first time, he closed the railway gate around 04:40 p.m. and opened it around 04:55 p.m. and after that he closed the railway gate at 05:40 p.m. and opened it at 06:00 p.m.

In cross-examination, P.W.20 had deposed that he can neither speak English nor write English. He never gave any statement in Eenglish to anyone in his life. The police had

(42) P.W.21-Brajesh Kumar had deposed before the trial Court on 01.08.2009 that in the year 1991-92, he was posted as Head Wireless Operator in district Pilibhit. At that time, Shri Joshi and S.O. Shri B.D. Sanola were posted along with him. His duty was only to the effect that received wireless message was required to be sent to the concerned officers or persons. On seeing the document No. D-88/2, he stated that this radiogram was the photocopy of the essentiality certified in which there was his signature and a copy of this wireless was sent through S.P., Pilibhit on 08:36 hour. This wireless was transmitted by him to Zone Control, district Bareilly and district Nainital at 09:40 a.m. and 10:30 a.m., respectively. This wireless was also transmitted to district Kheri by P.D. Joshi. The radiogram was sent on priority basis.

In cross-examination, P.W.21 had deposed that he was posted in Pilibhit in the year 1994. The whole record with respect of receiving and passing wireless message of a day between 12 O'clock to 12 O'clock were sent to R.S.O. Office and after six months, all the records were weeded out in the R.S.O. Office. He did not bring the photocopy of the receiving or passing of the wireless message. He further stated that when any question was put to him in English, he could not answer the same in hindi without understanding the whole thing. He further stated that he never gave any statement to C.B.I. in English. The C.B.I. interrogated him in Hindi, however, he did not know that C.B.I. had recorded his statement in Hindi or English as his statement was not shown to him. His statement recorded in English under Section 161 Cr.P.C. was read out to him, then, he stated that he did not give his statement in English. He also stated that in those days, terrorism of Sikh was prevalent in district Pilibhit.

(43) P.W.22-Ravindra Singh Yadav had deposed before the trial Court on 23.09.2009 that in the year 1984-2000, he was posted as Block Pramukh in Faridpur, district Bareilly. The related matter was of district Pilibhit and he had no concern with district Pilibhit. Paper No. D-3(II) was

shown to him and asked from him whether his signature was in Q-1 and Q-2, then, he stated that this photocopy was neither in his handwriting nor his signature nor the seal on it was of him. After that paper no. D-109/1 to D109/3 was shown, then, he admitted that it was in his handwriting and signature. He also stated that he very well knew Jagdish Prasad of Pilibhit, who is doing the work of transport and his bus is also running. Shri Jagdish Prasad had never come to him at Pilibhit for attestation.

In cross-examination, P.W.22 had stated that he never gave his statement to any officer of C.B.I. or Investigating Officer in English. He did not know whether C.B.I. recorded his statement in English or in Hindi.

(44) P.W.23-Dr. G.G. Gopal had deposed before the trial Court on 25.09.2012 that in the year 1989-1994, he was posted as EMO in District Hospital, Pilibhit. In the night of 12.07.1991, he was on Emergency duty and along with him, Pharmacist Shri L.K. Jaiswal was also posted. On seeing the Emergency Admission Register, O.P.D. Register, Medicine issue Register and Bed Head Ticket of 12.07.1991, he stated that on 12.07.1991, at 11:15 p.m., Shri C.P. Singh, the then Station Officer, district Neuria, came to Pilibhit Hospital and complained about abdomen pain, entry of which was made in page no. 57 of the O.P.D. register, which is D-81 (Ext. Ka. 75). On seeing serial no. 6 of page no. 129 (D-79) dated 12.07.1991, he stated that the name of Shri G.P. Singh, S.O., Neuria, Pilibhit and his details were endorsed and it was written in the handwriting of Pharmacist Shri N.K. Jaiswal and there was his small signature. On seeing paper no. D-80, he stated that the complete details of patient were endorsed, which was in the handwriting of Shri N.K. Jaiswal. On seeing the medicine issue register, he stated that the bottle of Injection Diazepam and Dextrose were given from hospital. The name of Shri C.P. Singh and medicine were endorsed on D-82.

In cross-examination, P.W.23 had deposed that as soon as patient arrives, his entry would be made in O.P.D. register. In the end of 10.07.1991 and above 11.07.1991, three lines were left, in which number of patients of the previous date have been mentioned. He had not prepared O.P.D. register but it was written by concerned Pharmacist. The entry of the name of Shri C.P. Singh in O.P.D. register was at last number 10 and after that no line was left. Serial No. 11 was started from date 13.07.1991, wherein after cutting the time, 11:20 was written but there was no signature of him on it. Above 14.07.1991, five lines were left, in which some calculations were written. He further stated that during treatment, he could not ascertain the reason for abdomen pain to C.P. Singh. He also stated that in the bed head ticket and O.P.D. register, the mark of identification of Shri C.P. Singh was not written nor his thumb impression or his signature was on it. He stated that there was no provision to write the mark of identification of the patient in bed head ticket and O.P.D. register nor signature on it. The number of 1548 mentioned in Bed Head Ticket was related to admission. He further stated that as per admission register, C.P. Singh was admitted last among the admitted patients. He further stated that discharge of patient was not written in admission register, however, he put the date of discharge on the bed head ticket but he left to endorse the time on it. The medicine mentioned in the bed head ticket was in his

handwriting and the details of patient was written by Pharmacist. He also stated that in the medicine issue register, the name of Shri C.P. Singh was written at serial no.1.

(45) P.W.24-Avtar Singh had deposed before the trial Court on 01.04.2013 that he was doing the work of farming and studied upto High School. On seeing Pilgrimage Register B-6 of Gurudwara Langer Sahib, Nanded, he identified the signature of Kartar Singh on page no. 72. In the army, the name of Kartar Singh was Avtar Singh son of Ajaib Singh. Kartar was his cousin. He saw Kartar Singh while he was writing. He identified the signature of Kartar Singh, which was marked as A1 to A8 on D198/1, D198/2, D198/3 to D198/4, D199/1 and D199/2, respectively.

In cross-examination, P.W.24 had deposed that the name of the father of Kartar Singh was Ajaib Singh. Kartar Singh had served in the army and his name in army was Avtar Singh, who used to serve in army in his original name and the pension was disbursed to him in the name of Avatar Singh. He could not tell when Avtar retired from service. As in the Ration Card, Voter List, his name was Kartar Singh, hence he made the Passport in the name of Kartar Singh. He further deposed that in the year 1981, Kartar was not in service and Kartar died at the age of 50 years. In 1962, after the war with China, Kartar was recruited and was retired before completion of 35 years. Kartar was recruited at the age of 18-19 years.

P.W.24 had further stated that he could slightly speak English. C.B.I. asked question on *''Gurumukhi'*, then, he answered in Gurumukhi. After that he put his signature on his statement in *''Gurumukhi'*. He did not give statement in English and if his statement was recorded in English, then, he could not tell the reason thereof. He denied the suggestion that Kartar Singh and Avtar Singh were two different person. He also denied the suggestion that Kartar Singh mentioned in D-6 was the resident of Pilibhit (U.P.). He stated that Kartar Singh was not a driver. Ext. Ka. 8 is the form of Fauji Kartar Singh, in which his job was mentioned as Driver. He further stated that he could not tell as to why Kartar Singh wrote his job as Driver. He also denied the suggestion that the aforesaid form was of another Kartar Singh.

(46) P.W.25-Sudesh Lal Makhi had deposed before the trial Court that he was the expert of examining the disputed documents. In this case, on 30.08.1994, some document was sent by Shri S.K. Bhatnagar, S.P., C.B.I., STC-II, New Delhi to the Director, C.F.S.L., which was scientifically examined by him. On examining the document marked as "Q3', he stated that some original writing in Q3 document (Ext. Ka.6) was obliterated. He proved the Ext. Ka.30.

(47) P.W.26-Constable Rampal Sharma deposed before the trial Court on 17.12.2013 that on 11.07.1991, he was posted as Constable in G.D. Office, Police Line, Pilibhit. At that time, Head Constable was Umesh Chandra Shukla and three Constables were also posted there. On seeing D-18, he stated that this one is of G.D. of police line. Report No. 11 i.e. departure of force was written by him, which was shown to be departed to unknown place. Two parties left, out of which in one party, Additional S.P. Shri Badri Prasad Singh and in another party Shri Brijendra Sharma, Additional S.P.. On seeing Report No. 54 (D-20 (ii), he stated that endorsement on it was made by him,

wherein Shri Additional S.P. Badri Prasad Singh along with PAC armed personnel were shown to have returned. Vide Report No. 55 dated 12.07.1991 at 23:30 hour, on the direction of S.S.P., PAC Force was departed to police station Neuria and this entry was made by him. On seeing GD dated 12.07.1991 of Police Line Pilibhit and Report No. 56, he stated that he made entry of the same in the GD, wherein it was shown that Constable Driver Hoop Singh along with Additional S.P. returned from operation, out of which, Incharge Inspector Anis Ahmad was dropped in police station Bisalpur and S.I.. Veerpal Singh was dropped in police station Bisanda.

(48) P.W.27-S.I. Anek Pal Singh had deposed before the trial Court that in the year 1991, he was posted as Head Moharrir in police station Puranpur. He proved the report no.20 dated 11.07.1991 (Ext. Ka.33) written by him.

(49) P.W.28-Constable 91 Civil Police Ramswaroop had stated that he was posted as Constable Clerk in police station Bilsanda from 1988 to 1991. He was doing the office work. He proved the report no. 27 (Ext. Ka. 38) written in his handwriting.

In cross-examination, P.W.28 had stated before the trial Court that he could not write English nor speak or read English. He did not give statement to the Investigating Officer in English but he gave statement in Hindi. If the Investigating Officer wrote his statement in English, then, he could not say the reason for it.

(50) P.W.29-J.C. Prabhakar had stated before the trial Court that the investigation of Case Crime No. RC-1/S/93-SIU-5 was entrusted to him on 01.01.1993 by the then S.P. C.B.I./SIC-II/SIU-5 New Delhi. In the first F.I.R. (D-185) of the aforesaid case, there was signature of S.I. Sharad Kumar, which he identified. He also identified the signature of S.I. Sharad Kumar on Crime Case No. RC-II (S)/93-SIU-5 (D-186) and RC3 (S)/93-SIU-V (D-187). He prepared the site plan in Crime Case No. RC-1(S)/93-SIU-V/SIC-II CBI on the spot. During investigation, he recorded the statement of various witnesses and also collected the concerned documents as well as articles/materials. He proved the production memo D-151, D-155, D-156, D-157, D-158, D-81-82-83, D-160, D-161. On seeing D-94/1 and 94/2 (Inspection Memo), he stated that he inspected the Tempo Traveller (Mini Bus), bearing No. UP-26/0634 in the presence of witnesses, Shri S.K. Bhatnagar, S.P. SIC-II, R.S. Dhankar Dy. S.P. (died), Shri D.S. Dagar, Inspector SIC.

P.W.29 had further deposed that between 1984 to 1995, he was posted as Inspector and Dy. S.P. in C.B.I. Branch S.I.C.-II, New Delhi and during that period, he worked with Shri R.S. Dhankar, Dy S.P., C.B.I. S.I.C.-II, Delhi and he recognized the handwriting and signature of Shri R.S. Dhankar. However, Shri R.S.Dhankar died in the year 2014. He further stated that after completion of investigation in RC1/S/93-SIU-V/SIC, New Delhi, RC-2/S/93-SIU-V/SIC-II New Delhi, RC-3/S/93-SIU-V/SIC-II New Delhi, one charge-sheet was filed by Shri R.S. Dhankar, the then D.S.P./C.B.I./SIC-II and reasons for filing only one charge-sheet was described in the charge-sheet. He identified the signature of R.S. Dhankar on the charge-sheet. The aforesaid charge-sheet was forwarded by Shri Kanwar Balwant Singh, S.P. SIC-II. He also identified the signature of Shri Kanwar Balwant Singh on the charge-sheet.

In cross-examination, P.W.29 had deposed before the trial Court that in page

no.1 of Ext. Ka. 39, the name of Shri Chandra Pal Singh, S.O. P.S. Neuria district Pilibhit was mentioned as complainant. In Ext. Ka. 39, Sections 149, 148, 149, 307 IPC and 25 of the Arms Act was also written and in the place of accused, six unknown Sikh terrorists was written. In similar terms, description was made in both R.Cs, in which some of the offence was of some different Act and the complainant was also different and this description was of police memos. On the basis of these police memos, C.B.I. had prepared the F.I.R. of R.C. He stated that he knew that R.S.Sodhi had filed a petition before Hon'ble Supreme Court but he could not know the averments made thereon by him. F.I.R. was not prepared on the basis of the petition.

P.W.29 had stated that he had not investigated RC 2(S)93/SIU-V. In all three F.I.Rs., the name of public witnesses was not written. The timing of starting entry and ending in the Case Diary was not mentioned by him. He, first of all, recorded the statement of Dr. P.N. Saxena on 18.05.1993, who conducted the post-mortem. In the permit (Ext. Ka.6), it was written as Bareilly to Sitarganj empty and Sitarganj to Patna Sahib, Huzur Sahib. This permit was valid from 30.06.1991 to 13.07.1991. He took the statement of A.R.T.O., Bareilly through Shri Bijesh. He further stated that Shri Brijesh, the then A.R.T.O. told him that D-3 annexed with Ext. Ka.6 was not the carbon copy of the list of passengers, which was given to the Additional S.P. Dayanidhi Mishra but in its place, photocopy of the different list of passenger was given to him. This was written in the statement of Brijesh Kumar, A.R.T.O. On seeing the statement of Brijesh Kumar, A.R.T.O., P.W.29 had stated that in the statement of Brijesh Kumar, it was not written anywhere that after making forged photocopy of the carbon copy of the passenger list, the same was given to Shri Dayanidhi Mishra.

P.W.29 had stated that even after knowing the fact during the investigation that Dayanidhi Mishra had brought carbon copy of the list of passengers from the office of A.R.T.O., he had not recorded the statement of Dayanidhi Mishra. He stated that the police took the original copy of the list of passengers from owner of the bus and this was written in the statement of owner of the bus. In the list D-3 (2), which was exhibited in the Court, the name of the terrorists who were eliminated in encounter were not mentioned but the list was changed. The list which was proved was forged and copy of same was also given to the accused. On seeing D-3 (II), which was the list of the passengers, P.W.29 had stated that he could not tell whether name of prosecution witnesses Smt. Swarnjeet Kaur and Smt. Balwinderjeet Kaur *alias* Lado were in the list of passengers or not because the list of passengers was misprint and could not be read. However, he had tried to get the original list of passengers, which the police got earlier. He had not recorded the statement of Santosh and Ajeet Singh. He had recorded the statement of Smt. Balwinderjeet Kaur *alias* Lado. He knew about witness Smt. Balwinderjeet Kaur *alias* Lado from reliable sources. He took the statement of Balwinderjeet Kaur *alias* Lado while going to Punjab. He further stated that in the whole statement of Balwinderjeet Kaur *alias* Lado recorded under Section 161 Cr.P.C., the name of the accused, who was challaned, were mentioned because the police personnel had deboarded her husband and other persons but the names of the police personnel were not known. He further stated that during the entire investigation of RC 1(S), identification of the accused from the prosecution witnesses was not made.

He had not recorded the statement of P.W.15-Shri Mewa Lal, H.C.P. as his statement was recorded by D.S. Dagar. He also did not record the statement of P.W.16-Shri Om Prakash Yadav, who was the Constable of C.R.P.F. He recorded the statement of P.W.17-Kamaljeet Singh, who did not tell about the number of TATA 407 but he told him about TATA 407. P.W.29 had further stated that he could not make sure from the police line and S.P. Pilibhit that how many TATA 407 vehicles were with the police and what were the numbers, however, other Investigating Officer may have found out.

P.W.29 had further deposed that he recorded the statement of P.W.18-Gurmej Singh after getting information about him from reliable sources. He could not tell at this moment whether P.W.17-Shri Kamaljeet Singh and P.W.18-Gurmej Singh were the Sikhs or not.

P.W.29 denied the suggestion that he made the Sikhs witnesses during investigation with a dishonest intention. He also denied the suggestion that he has not taken any paper from the shop of Shri Gurcharan Singh, Punjab Gun House and false testimony has been deposed before the Court.

P.W.29 had further stated that the whole document of the investigation of the F.I.R., which he was conducting, was handed over to Shri R.S. Dinkar, Dy. S.P., who, thereafter, filed charge-sheet. In all three cases, Shri R.S. Dinkar was the supervisor.

P.W.29 had further stated that P.W.19-Gurcharan Singh sold his gun to Sukhdev Singh but he could not remember whether he recorded the statement of Gurcharan Singh or not. He also did not record the statement of D.M., Pilibhit in connection with the sale of the said gun.

P.W.29 had further stated that during investigation, he recorded the statement of Constable Kulvinder Singh of Police Station Dhariwal, District Gurdaspur, who informed him about the criminal history of the Sikhs who were eliminated in encounter, namely, Balwinder Singh son of Ajit Singh, Baljeet Singh son of Basant Singh, Jaswant Singh son of Basant Singh and Surjan Singh son of Karnel Singh. He further stated that during investigation, Head Constable Kulwinder Singh told him that F.I.R. No. 75 of 1986, under Sections 302, 307/34 I.P.C. and Section 25/54/59 of the Arms Act was lodged at police station Dhariwal on 22.04.1986 against Baljeet Singh *alias* Pappu and three other accused and in addition, on 12.05.1986, F.I.R. No. 85 of 1986, under Sections 302/34 I.P.C. and Sections 25/27/54/59 of the Arms Act was registered against Baljeet Singh *alias* Pappu in police station Dhariwal; on 04.09.1986, FIR No. 141 of 1986, under Sections 302/34 I.P.C. and Section 25/54/59 of the Arms Act was registered against Baljeet Singh and three others; on 08.05.1990, F.I.R. No. 70 of 1990 under Sections 302, 452, 148, 149 I.P.C. and Sections 25/27/54/59 of the Arms Act was registered at Police Station Dhariwal against Baljeet Singh *alias* Pappu, Harmendra Singh *alias* Minta and six others; on 21.08.1990, F.I.R. No. 115 of 1990, under Sections 395, 396, 397, 148, 149 I.P.C. and Section 25/54/59 of the Arms Act was registered against Baljeet Singh *alias* Pappu, Jaswant Singh *alias* Bijli, Harmendra Singh *alias* Minta and sixteen others; on 10.10.1990, F.I.R. No. 130 of 1990, under Sections 307, 148, 149, 427 I.P.C. and Section 4/5 of the Explosive Act and Section 3/4 of the TADA Act was registered against Baljeet Singh *alias* Pappu, Jaswant Singh and three others; on 01.11.1990, F.I.R. No. 135 of 1990, under

Sections 302, 148, 149 was lodged against Baljeet Singh *alias* Pappu and six others; on 12.11.1990, F.I.R. No. 147 of 1990, under Sections 302, 452, 148, 149 IPC, 25/54/59 of the Arms Act and 3/4 of the TADA Act was lodged against Baljeet Singh *alias* Pappu, Jaswant Singh *alias* Bijli, Surjan Singh *alias* Bittu and four others; on 21.11.1990, F.I.R. No. 149 of 1990, under Sections 302, 364, 307 I.P.C. and Section 25/54/59 of the Arms Act and Section 3/4 of the TADA Act was registered against Baljeet Singh *alias* Pappu, Harmendra Singh *alias* Minta, Surjan Singh *alias* Bittu and three others; on 26.11.1990, FIR No. 152 of 1990, under Sections 302, 148, 149 IPC and Sections 25/54/59 of the Arms Act and Section ¾ of the TADA Act was registered against Baljeet Singh *alias* Pappu, Harmendra Singh *alias* Minta, Surjan Singh *alias* Bittu and three others; on 11.12.1990, FIR No. 155 of 1990, under Sections 302/34 I.P.C. and 25/54/59 of the Arms Act and Section ¾ of the TADA ACt against Baljeet Singh *alias* Jaswant Singh *alias* Jassa and two others was registered at police station Dhariwal.

P.W.29 had further stated that he sought a report from police station Gurdaspur about four deceased persons Harmendra Singh son of Ajeet Singh, Baljeet Singh son of Basant Singh, Jaswant Singh son of Basant Singh and Surjan Singh son of Karnail Singh, upon which Kulwinder Singh told him that the name of Baljeet Singh *alias* Pappu was mentioned in serial no.5 of the hardcore extremists; the name of Jaswant Singh *alias* Bijli was mentioned in serial no.1; the name of Baljeet Singh was also in the list of history-sheet. In addition to this, four cases were registered against them.

(51) P.W.30-Ranjeet Kaur had stated before the trial Court that her husband Kartar Singh was in the army and also got pension later on. Her husband Kartar Singh was also called Avtar Singh. She had four children; one boy and three daughters. She knew that her husband Kartar Singh and her brother-in-law Jaswant Singh were killed by the police in Pilibhit on 13.07.1991. The officer of C.B.I. came to her residence and she handed over some document of Kartar Singh in which there was signature of Kartar Singh, to the C.B.I. She identified the photograph of her husband Kartar singh.

In cross-examination, P.W.30 deposed that the name of her husband was Kartar Singh, who was in Army. She was paid the pension of Rs.8000/-. She did not know whether F.I.R. No. 367 of 1990, under Sections 307/302 I.P.C. and ¾ of the Dowry Prohibition Act was lodged at Police Station Kotwali, District Pilibhit against her husband. However, the Government had lodged false F.I.R. No. 67 of 1984, under Sections 148, 307/147 I.P.C. against her husband. She got information about the murder of her husband on 14.07.1991 and this was told by her to the Inspector of C.B.I.

(52) P.W.31-Dr. Bipul Kumar had deposed before the trial Court that he was posted as E.N.T. Surgeon in District Hospital, Pilibhit between 1990 to June, 2000. He stated that on 13.07.1991, he conducted the post-mortem of two dead-bodies at 10:00 p.m., which were brought by Constable C.P. No. 551 Collector Singh and CP540 Sugandh Chandra along with requisite documents. After conducting the post-mortem of two dead-bodies, he prepared the post-mortem report (Ext. Ka. 24/2). He further stated that in respect of injury no.1, he could not tell about the direction of the deceased and fire arm,

however, injury no.1 could be attributable in front and injuries no. 3 and 4 could be attributable upon upper direction. The deceased died due to shock and haemorrhage as a result of ante-mortem injuries.

(53) P.W.32-Constable No. 271 Shri Siyaram had deposed before the trial Court that on 13.07.1991, he was posted as Constable in Police Station Gajraula, District Pilibhit. He proved the GD entry dated 13.07.1991 of police station Gajraula, district Pilibhit made in his handwriting. He stated that according to entry no.5 at 00:20 O'clock made in G.D. dated 13.07.1991, Consable Narayan Das with Rifle No. 9664, Constable Krishnaveer Singh with Rifle No. 2745, Constable Ram Swaroop with Rifle No. 8350, Constable Gyan Giri with Rifle No. 9427 went along with fifty cartridges each for duty on the direction of officers. As per G.D. entry No.7, at 04:20 a.m., information was received from the police station Neuria that in Muhuk forest near Dhamalkuan, encounter was going on, therefore, force be immediately sent. On this information, S.I. Shri Rajesh Bharti, Constable Yashvir Singh along with M.L.R. and 36 catridge magzine, Constable Pomendra Kumar with rifle and 50 cartridges, Constable Rajendra Singh and Constable Mahipal Singh were sent.

(54) P.W.33-Amar Sarkar had stated before the trial Court that in the year 1991, his father was admitted in Government Hospital, Pilibhit. In the night, he was stayed in the hospital, however, in the morning when he was returning from the hospital through bicycle and reached Rasaula, then, police came and forcefully took away him to police station Neuria, wherein at about 04:00 p.m., the police got his signature on some papers, wherein something was written and some papers were blank. After that the police dropped him to Pilibhit, whereupon he went to his father and narrated whole story to his father, upon which his father became unconscious. He further stated that when the police took his signature on papers, then at that moment, no dead body was lying there, however, the police took signature from some labourers working behind the field of police station. He did not listen the sound of any fire. He further stated that on account of fear from police, he wrote his name as Amal Sarkar instead of Amar Sarkar.

(55) P.W.34 had deposed before the trial Court that 23-24 years ago, at about 3-4 P.M., when he was returning from his field to the Farm House, then, he saw that two police vehicles were standing before half kilometers of his house, in which 15-16 police personnel armed with weapons and two Sikhs in each vehicle whose hair were open, were sitting. When he looked the police vehicles carefully, then, the police used abusive languages against him and then, he came to his house. Later on, he saw that two vehicles of the police along with Sikhs went towards Mala Railway Crossing. After two days, Shyam Lal of his village met him and told him that the police brought his tractor-trolley for bringing four dead-bodies from the forest.

In cross-examination, P.W.34 had deposed before the trial Court that he is uneducated. He did not give any statement to C.B.I. In Pilibhit, fifteen thousands farms of Sikhs were situated. In the course of commission of offence in district, the people of all communities including Sikhs who committed offence were caught by the police.

(56) P.W.35-Shyam Lal had stated before the trial Court that 23 years ago, the police came in the morning at about 07:00

a.m. and told that his tractor was required, upon which he brought his tractor-trolley to police station Gajraula, district Pilibhit, where S.I. Shri Bharti told him that they had to go in the forest. After that three Chaukidar, 2-3 Constables and Inspector Bharti sat on his tractor and reached Dhamalkuan, wherein he saw four dead-bodies were lying. At that moment, there was large number of police personnel. The S.H.O. of police station Neuria, Pilibhit and S.H.O. Haripal Singh of police station Gajraula, Pilibhit were also present there. After sealing all four dead-bodies, the police kept it on tractor-trolley and he brought these dead-bodies to Postmortem House, Police Line. At that time, police and Chokidar were also along with the dead-bodies. After conducting the post-mortem, he brought ten dead-bodies to cremation ground along with Chowkidar and police officials, where all ten dead-bodies were cremated by the police. He reached the police line at about 12:00 O'clock in the night and he stayed there in the night and on the next day, in the morning, he came to his house.

(57) P.W.36-Darshan Singh was declared hostile.

(58) P.W.37-Surendra Kumar had deposed before the trial Court that from 1991 to 1992, he was posted as Constable at police station Amariya, district Pilibhit. He proved the G.D. entry dated 12.07.1991 made by him.

(59) P.W.38-Mahendra Singh had deposed before the trial Court that on 13.07.1991, he was in his house situated in village Richaula, Police Station Gajraula, Disrict Pilibhit and at about 02:00 p.m., two Constables came to his house for drinking water, upon which he provided them lemon water. In the meanwhile, S.O. Harpal Singh of police station Gajraula with 6-7 police personnel came to his house along with blue colour Tata mini bus of police station Gajraula and told that he was tired because he was busy in encounter whole night and he killed four persons. Meanwhile, a Constable, who came along with S.O. Harpal Singh, informed S.O. Harpal Singh that he got information from wireless that police of police station Bichinda encountered Gurnam Singh Fauji and Jaswant Singh Fauji who was the Lt. General of the terrorist group, upon which S.O. Harpal Singh instructed that this was not to be leaked as all were kept confidential. He further stated that S.O. Harpal Singh also told him that they killed Baljeet Singh *alias* Pappu and his companions.

In cross-examination, P.W.38 had deposed that he knew S.O. Harpal Singh when he was posted at police station Gajraula. He is a Sikh by birth. The persons who were killed were also Sikh and not the terrorists but they were pilgrimage. He denied the suggestion that terrorism of Sikh was spread for making seven districts of *tarai* as Khalistan between 1989 to 1992.

(60) P.W.39-Rajab had stated before the trial Court that he was doing the work of labour in Neuria area of district Pilibhit. When he was planting paddy in the field, the police personnel took him to the Inspector by saying that Inspector had called him. He went with him to police station, Neuria, where the Inspector took some signatures and also put thumb print on the papers, out of which, some of them were plain and some were written. He was uneducated, therefore, he did not know what was written in it. He did not go to Dhamelakuan even on the day the Inspector

got his signature and thumb impression. No tuss or box were made in front of him, he did not see the cartridge weapon there and nothing was shown to him by the police. He had also not seen any corpse etc. wrapped in cloth. He further stated that nothing was sealed in front of him; no panchayatnama was filed in front of him nor did he knew of any encounter. While seeing D-53/3, he stated that in D-53/3 (Ext.Ka.126), his name has been written as Rajab with thumb impression on it. He also proved his thumb impression on D-54/4 (Ext. Ka.127); D-55/3 (Ext. Ka. 128); and D-56/3 (Ext. Ka. 129).

In cross-examination, P.W.39 had stated that the police took him at about 03:00 O'clock. He denied the suggestion that he is not Rajab and by becoming a liar, he had come to give statement in Court.

(61) P.W.40-Major Singh had stated before the trial Court that on 12.07.1991, around 04:00-04:30 p.m., he was coming to his house by tractor and behind his tractor, a wooden *Suhaga* was tied. At that time, one police vehicle belonging to police station Gajraula, which was driven by Harpal Singh's driver and Station Officer of Police Station Gajraula Harpal Singh was sitting nearby him, was coming from behind his tractor. He stated that wooden *suhaga* laid behind his tractor was moving, on account of which it collided with the police Jeep, upon which Inspector Harpal Singh hit upon his shoulder and also abused him. He further stated that behind the police Jeep, the Gipsy of Superintendent of Police was also coming, in which three Sikhs whose heads were cleaned; hands were tied behind; and their heads were in lowered position, were also sitting on floor of it. Apart from these police vehicles, there was also a mini police bus, in which police personnel armed with firearms were also sitting. He further stated that on 13.07.1991, from the newspaper, he knew that Sikhs, who were killed in fake encounter, were not the terrorists but they were pilgrims.

In cross-examination, P.W.40 had stated before the trial Court that he did not know who was the S.O. in the year 1991. He never heard about the terrorists in Pilibhit. He read newspapers and in the newspaper, he never saw that Station Officer and Inspector were killed. He did not remember the facts that from 1989 to 1992, there was extreme terrorism in Pilibhit and no policeman travelled in train and bus by wearing the uniform. He also did not know the name of Gipsy of the Superintendent of Police. He also did not know the name of Superintendent of Police of Pilibhit. He could not tell how many police stations were there in Pilibhit in the year 1991. He further stated that he did not known when SI Harpal Singh was posted as Station Officer of Police Station Gajraula but at the time of the incident, he was posted in police station Gajraula. He did not go to police station Gajraula in the year 1991. He gave statement to C.B.I. before his statement in the Court, wherein he had stated to C.B.I. about the bus and truck but he did not state to C.B.I. about mini bus. He did not know that on 22.03.1992, Inspector of Puranpur was killed by the terrorists or not.

(62) P.W.41-Subhash Singh had stated before the trial Court that he was working in daily newspaper from 1990 to 1991. On 10.07.1991, he came to know from reliable sources that a bus from Pilibhit had gone for pilgrimage in which terrorists were also travelling; the said bus was to go for visit of Nanded Sahib and Patna Sahib and

would return on 12.07.1991; Men and Women were travelling in the bus as pilgrims; and Baljeet Singh *alias* Pappu along with youth were also travelling. On the basis of the aforesaid information, he published a satirical article in daily newspaper on 11.07.1991 under the heading *''sau sau chuhe khakar billi.....'*. He proved the D-203, which was the newspaper, in which the aforesaid article was published by him.

In cross-examination, P.W.41 had denied to give status of reliable sources. He denied the suggestion that there was no press report nor there was any article and he falsely deposed before the Court in the pressure of C.B.I.

(63) P.W.42-Dhruv Kumar Singh had stated before the trial Court that in the year 1988, he was posted as a Sub-Inspector in the D-II Section of the Intelligence Head Quarter. On seeing the letters D-1 and D-2 dated 06.06.1991, he stated that both these letters were signed by Shri Ramesh Chandra, the then Deputy Inspector General of Police, Special Cell., Uttar Pradesh, Lucknow. He further stated that as he was working with Shri Ramesh Chandra, therefore, he was acquainted with his handwriting and signature. He further stated that D-2 section was established in connection with Sikh terrorists and Kashmiri terrorists; the letter D-1 (Ext. Ka. 130) was related to the information of terrorist Jaswant Singh Fauji and his 6-7 accomplices being active in Pilibhit area; D-2 (Ext. Ka.131) letter was in relation to the activity in Nainital and Pilibhit area and recovery of money along with 6-7 companions of Baljit Singh Pappu *alias* Chanchal Singh. He further stated that both the aforesaid letters (D-1 and D-2) were sent to the concerned offices including Superintendent of Police, Pilibhit and Senior Superintendent of Police, Nainital. The letter D-2 was based on the report of S.I.B.

In cross-examination, P.W.42 had stated before the trial Court that in the D-1 letter, the facts were mentioned on the basis of information that terrorist Jaswant Singh Fauji along with his other associate terrorists would blast police vehicles by laying a mini tunnel. It was also mentioned in this letter (D-1) that Balvinder Singh *alias* Binda terrorist has set a target to sent his own party leaders to Punjab after recovering one crore rupees from the area, out of which he had stated to have collected sixty lakh rupees. He further stated that the second letter D-2 was also related to the activities of terrorists, in which Baljit Singh *alias* Pappu *alias* Chanchal Singh, resident of Arjun Pura Police Station Dhariwal District Gurdaspur, was active in Nainital, Pilibhit etc. since the last four years.

(64) P.W.43-Jitendra Sonkar had stated before the trial Court that he was posted as Additional Superintendent of Police in district Pilibhit from March, 1993 to August, 1993. During this period, on 11.06.1993, he gave Production Memo No. 139 of 1994 to Dy. Superintendent of Police Shri R.S. Prasad under his signature and he proved the same. On seeing seizure memo D-168 (Ext. Ka. 64), he stated that on 04.08.1993, he gave the case diary (serial no. 1 to 11, in total serial no. 1 to 146) of police encounter and final report in connection with Case Crime No. 136 of 1991 to 140 of 1991 of police station Bilsanda as well as special report file of Case Crime No. 136 of 1991 to 140 of 1991 of police station Bilsanda to Shri R.S. Dhankar, Dy. Superintendent of Police, C.B.I.

(65) P.W.44-D.P. Awasthi had deposed before the trial Court that on 28.05.1994, he was posted as Pharmacist in District Hospital, Pilibhit. On seeing production memo D-158 (Ext. Ka. 47), he stated before the trial Court that OPD register, Duty Register of Doctor, Emergency Ward Daily Medicine, Issue Register mentioned in the production memo were given by him to the Investigating Officer of C.B.I. After that on seeing D-81, D-82 and D-83, he stated that OPD register, Emergency Ward Daily Issue Medicine Register and Duty Register was given by him to the Investigating Officer of C.B.I.

(66) P.W.45-Diwan Singh Rawal had deposed before the trial Court that in the year 1992, he was posted as Station Officer in police station Bilsanda. The investigation of Case Crime Nos. 136 of 1991 to 140 of 1991 was entrusted to him. Thereafter, he recorded the statements of witnesses; took the photo of the persons killed in the encounter; and went to Punjab, where he got them identified after showing the photo. In this regard, he recorded the statements of Village Sarpanch and the family members of the deceased and also took written report from them. The criminal history of the persons killed in encounter from the respective police stations who were punished by the Court were also compiled by him and included in the case diary. After completing the investigation and on the basis of the available evidence, he prepared the final report and forwarded the same on 30.03.1992.

In cross-examination, P.W.45 had stated before the trial Court that the terrorists, who were killed in encounter, were identified when he went to Punjab during investigation. He further stated that he investigated the Case Crime No. 136 of 1991 to 140 of 1991 in relation to the killing of four terrorists. During investigation, he knew the name of the terrorists, their father's name, village and district which they belonged. Out of four terrorists, the name of one terrorist was Lakhwinder Singh *alias* Lakha, however, he did not remember the name of rest of the terrorists. The cases of terrorism were registered against them in Punjab. He was shown the photo of all four terrorists by the Investigating Officer of C.B.I. and he identified them.

(67) P.W.46-Pratap Singh Pangti had deposed before the trial Court that on 22.04.1994, he was posted in R.S.I. Police Line, Pilibhit. On seeing D-160 (Ext. Ka.48), he stated that he gave weapons etc. mentioned in the production memo to the Dy. S.P. of C.B.I. under his signature, out of which 303 bore of rifle no.1 mark-3 with magzine was given to him. On seeing production memo D-172 (Ext. Ka. 133), he stated that he gave weapons etc. by means of this production memo to the Inspector of C.B.I. under his signature. He proved the paper no. D-156 and D-144, which were given to the C.B.I. under his signature.

In cross-examination, P.W.46 had stated before the trial Court that from 1991 to 1994, Sikh terrorism was at peak and most of the police personnel used to go outside the police station in plain uniform. The terrorism lasted from 1989 to 1994.

(68) P.W.47-Anil Kumar Kamal had stated before the trial Court that in the year 1994, he was posted as Munsarim/Reader in the Court of 1st A.C.J.M., Pilibhit. On seeing D-90 (Ext. Ka.134), he stated that the documents mentioned therein had been handed over to him in the office of Justice K.P. Singh, who was conducting the

judicial enquiry in the present case, which was handed over by him to S.P. of C.B.I. on 13.05.1994 under his signature.

In cross-examination, P.W.47 had stated that he had no knowledge about the outcome of the judicial inquiry.

(69) P.W.48-Narayan Singh had stated before the trial Court that in the year 1991, he was posted in H Company of P.A.C., 31 Battalion, Rudrapur. Before 12.07.1991, his company's tent was installed in the premises of Tehsil Puranpur. It was informed by the police station Puranpur, Pilibhit at around 02:30 O'clock to get ready as they had to go for duty. After that around one platoon, along with Subedar/Platoon Commander Shri Dayan Singh left for Puranpur police station in PAC Truck and reached at police station Puranpur at about 03:00 a.m. Thereafter, a constable of Police Station Puranpur sat on his vehicle and they went as per his instructions.

On seeing G.D No. 60 dated 12.07.1991 relating to Puranpur, he stated that arrival time shown in G.D. was 21:55 hours. He thereafter stated that the arrival time shown in G.D. was wrong as the arrival was of 13.07.1991 at 02:45. After that on seeing G.D. No. 64 dated 12.07.1991 of police station Puranpur, which was in relation to departure of police to the place of encounter, he stated that in this G.D., departure was shown as 22:30 hours. He thereafter stated that the date of department and time in the aforesaid G.D. has wrongly been shown as actually the departure took place on 13.07.1991 at 03:00 a.m.

P.W.48 had further stated before the trial Court that on 13.07.1991, they went along with a Constable of Police Line and after running about one hour, his vehicle got stuck in a culvert. After that they tried to remove his vehicle out and during that process, time was about 04:30 a.m. Thereafter, they went forward and after that, a Inspector came from the Jeep of Puranpur and stopped them and told them that now they need not go anywhere and put ambush herein in the field of paddy. After that they laid ambush there and sat there till 03:00 O'clock. Thereafter, a Constable came and asked them to return to police station Puranpur. After that they returned to police station Puranpur around 10:00 a.m. He further stated that if arrival time was shown in G.D.No. 15 dated 13.07.1991 as 15:40 hours, then it was wrong. He further stated that he and his team did not participate in the encounter related to this incident. The Investigating Officer of C.B.I. had recorded his statement.

In cross-examination, P.W.48 had stated before the trial Court that his "H' Company came in July, 1991 but he did not remember the date of its arrival. He further stated that the movement of P.A.C. was entered in G.D. He further stated that on 13.07.1991, Company Hawaldar Shri Jagmohan Singh had informed him to get prepared about 02:30 a.m.

(70) P.W.49-Dr. P.K. Singh had stated before the trial Court that on 13.07.1991, he was posted as Chief Medical Officer in District Hospital, Pilibhit. On seeing D-167 (Ext. Ka. 135), he stated that as the post-mortem was to be conducted on 13.07.1991 after 05:00 p.m., therefore, after getting permission from District Magistrate for the same and after making arrangement of suitable light, he deputed Dr. P.N. Saxena, Dr. D.B. Kausik and Dr. Vimal Srivastava for post-mortem duty. On seeing Receipt Memo D-159, he stated that this document

was handed over by him through Pharmacist Shri D.P. Awasthi to C.B.I.

(71) P.W.50-Trilok Singh had stated before the trial Court that on 12.07.1991, his duty was in Pilibhit. At around 02:00-02:15 a.m., the Major of the Company told him that he had to go to police station Puranpur for duty. Thereafter, they left for police station Puranpur and reached there at around 02:45 a.m. He further stated that arrival time shown in GD No. 60 dated 12.07.1991 of police station Puranpur as 21:55 hours was wrong. He further stated that when they reached Puranpur police station, they were informed that encounter was going on with terrorist and as such they were departed from a Constable on 13.07.1991 at around 03:45 a.m. He further stated that the departure time in G.D. No. 64 dated 12.07.1991 as 10:30 p.m., was shown wrongly. After departure from Puranpur police station, his vehicle was struck and even after great efforts, his vehicle was not taken out from the stuck. After that they went ahead and saw that a Jeep came from the front, which was of Puranpur police station, in which S.O. Puranpur was sitting. After that S.O. Puranpur asked him to lay ambush therein in the field of paddy. Thereafter, they laid ambush thereon till 08:00-08:30 a.m. After that a Constable of Puranpur Police Station came and told them to go to the police station Puranpur. After that they came to police station Puranpur around 10:00 a.m. on 13.07.1991. He stated that the arrival time in G.D. No. 25 dated 13.07.1991 as 15:40 hours was wrongly shown. His platoon did not participate in the encounter. The Investigating Officer of C.B.I. after calling him in Delhi recorded his statement.

In cross-examination, P.W.50 had stated before the trial Court that he did not remember the names of the members of platoon who went along with him at that relevant time. He also did not remember the count of how many members of platoon had left nor did he remember the number of vehicles in which he left. However, driver of the vehicle was Constable Ram Autar.

(72) P.W.51 had stated before the trial Court that in July, 1991, his one company of 15 Battalion, PAC, Agra including him was posted in Police Station Puranpur, District Pilibhit. On 13.07.1991 at around 01:30-02:00 a.m., Major Hukum Singh gathered them and asked them to go for duty. After that he along with Constable Rajvir, Head Constable Mewalal, Constable Udaiveer, Constable Om Prakash, Constable Rajendra Suman, Constable Gyan Singh, got ready after wearing the uniform. He stated that their arrival in report No. 62 of G.D. dated 12.07.1991 as 22:10 p.m. in police station Puranpur was wrongly shown.

(73) P.W.52-Balakram had deposed before the trial Court that in the year 1993, he was the Pradhan of Village Pattaboghi. A road had gone from his village to the forest. In the year 1991, he heard the sound of fire and in the morning, they went to the forest, wherein two Sikh terrorists were lying dead and police personnels were present there. After that *"panchayatnama'* of the dead-bodies was filled and his signature was obtained thereon. He proved the *"panchayatnama'* D-70/6 (Ext. Ka. 137). On seeing D-71/6 (Ext. Ka. 138), he stated that this panchayatnama was filled before him.

In cross-examination, P.W.52 had stated that at the time of the incident, Sikh terrorism was prevalent in the area and nearby area. Sikh terrorists were made for different types of action.

(74) P.W.53-Sohan Lal had stated before the trial Court that in the year 1991,

the process of *"panchayatnama'* and seal of the dead-bodies of the persons killed in the police encounter was made in his presence and he put his signature thereon. He proved his signature on *"panchayatnama'* D-70/6 and D-71/6.

(75) P.W.54-Constable Kunwar Singh had deposed before the trial Court that in July, 1991, he was posted along with his platoon headed by Platoon Commander Yudhvir Singh. His camp was in the check post of forest department. On 12/13.07.1991, he was in camp duty. Kailash Chandra Pandey was in the camp. The arrival in G.D. No. 60 dated 12.07.1991 as 21:55 hours was wrongly shown.

(76) P.W.55-Netrapal Singh had deposed before the trial Court that in the year 1990-91, he was posted as Sub-Inspector in police station Bilsanda, district Pilibhit. At that time, Shri Devendra Pandey was posted as Station Officer in Police Station Bilsanda. On 12.07.1991, he was present in police station as his duty on that date was in police station. The photocopy of F.I.R. No. 135 of 1991, under Sections 397/395 I.P.C. was shown to him, which was lodged in the police station at 10:30 p.m. After that a police party under the supervision of S.O. Devendra Pandey departed for the place of incident, in which he did not participate. He further stated that on 13.07.1991, at about 06:30 a.m., S.O. Devendra Pandey and other police personnel lodged the report in relation to Case Crime No. 136 of 1991 to 140 of 1991, in which four terrorists killed in encounter were mentioned. On 13.07.1991 at 09:30 a.m., he was sent for conducting *"panchayatnama'* of the dead-bodies of four terrorists and when he reached at Phagunnaighat, then, he saw that S.D.M., Bisalpur was already present there and on his dictation, he filled in all four *"panchayatnama'* and prepared separate memos and documents of it. He also prepared the memo of plain soil and blood stained soil and after getting sealed the dead-bodies, he sent them for post-mortem. He interrogated the peoples present there for the identification of the dead-bodies but none of them told anything about them, however, they stated that persons killed in encounter were not terrorists but Devendra Pandey had mentioned them in his F.I.R. as terrorists.

In cross-examination, P.W.55 had stated before the trial Court that Sikh terrorism was prevalent in district Pilibhit and nearby areas at that relevant time. He further stated that the name and address of Sikhs terrorists killed in encounter was not known as they belonged to outside the police station. He further stated that the gun and rifle which were looted in the case of robbery, were recovered from near the dead-bodies of those Sikhs who were killed in encounter. However, he did not remember whether the persons whose rifle and gun were looted, had identified it or not. He further stated that from the possession of one unknown terrorist (Ext. Ka.169), one rifle 315 bore number 83 AB 0507 was recovered and from another unknown terrorist (Ext. Ka. 167), SBBL No. 52390 12 bore and seven live cartridges were recovered. This rifle and gun was in relation to the case registered in respect of dacoity.

(77) P.W.56-Inspector Naresh Chandra had stated before the trial Court that on 13.07.1991, he was posted as Sub-Inspector in police station Neuria, district Pilibhit. On that date, SHO Shri Chandra Pal Singh Yadav had lodged the report in

connection with Case Crime No. 144 of 1991 to 148 of 1991, under Sections 147, 148, 149, 307 & 25 of the Arms Act. The investigation of the case was entrusted to him. After getting carbon copy of the F.I.R. and G.D., he along S.O. Shri C.P. Singh went to the place of accident at Dhamelakuan and reached there around 10:00 a.m., where they saw the dead-bodies of four unknown Sikhs who killed in encounter and also saw S.O. Gajraula, S.O Umaria and other police personnel as well as village Chowkidar and other villagers of nearby village were present. On the instruction of S.O., he brought a photographer from Neuria. After that he captured the photographs of the dead-bodies of the deceased and also conducted the *"panchayatnama'* of the dead bodies on spot. He also prepared the memos of *"panchayatnama'* and also prepared site plan. After conducting the *"panchayatnama'* of the dead-bodies, he sent the dead-bodies of four unknown Sikhs for post-mortem along with Constable Rajendra Singh, Mahipal Singh, SI Rajesh and Chowkidars through tractor. He stated that during investigation, on 14.07.1991, deceased was identified as Baljeet Singh, Jaswant Singh, Parminder Singh and Surjan Singh resident of Punjab.

In cross-examination, P.W.56 had deposed before the trial Court that from 1990 to 1994, district Pilibhit and nearby districts were badly affected from Sikh terrorism. In the year 1991, terrorism was extremely prevalent. Weapons including the weapons of police personnel were looted by the terrorists.

P.W.56 had further deposed that all four Sikhs killed in police encounter were terrorists and resident of Punjab and from their possession, illegal arms were recovered.

(78) P.W.57-Dayan Singh Lakshpal had deposed before the trial Court that on 12.07.1991, he was posted as Platoon Commander in PAC camp of police station Puranpur, district Pilibhit. On 12.07.1991, around 12:00 O'clock, he received a paper for duty to the effect that on the next date i.e. on 13.07.1991, at about 04:00 a.m., he would have to go for duty. After that he woke up his companion personnels for duty at 02:00 a.m. on 13.07.1991 and reached the police station Puranpur at 03:30 a.m., where he asked for entry of their arrival and departure for duty, then, he was told that their arrival would be noted, however, they should go for duty along with the officer of the police station. After that he went along with the Constable of P.A.C. on truck. After running about 4-5 Kms, a drain was found, whose culvert was broken, on which when his truck was taken from below, the truck got stuck. After 8-9 minutes of pushing, the truck came out. Thereafter, they went ahead, then, they found a slopping path, wherein Sub-Inspector and Inspector met in a jeep and told them that they put their force in the defense on the edge of the forest and they were on the left side. After that they stayed about 7:00-08:00 a.m. at that place. Around 8:00-08:30 a.m., a policeman came and told that they should go back to Puranpur. After that they reached from there around 09:30 a.m. at police station Puranpur and after getting the arrival there, they reached to their camp. He stated that entry of his arrival in GD No. 60 dated 12.07.1991 as 21:55 hours was wrongly shown as actually they reached police station Puranpur on 13.07.1991 at 09:30 a.m. and reached in his camp around 10:00 a.m.

(79) P.W.58-H.C.P.98 CP Harkesh Singh had deposed before the trial Court that in the year 1991, he was posted as

Constable Moharrir in police station Bisalpur, district Pilibhit. At that time, Head Constable Nem Chandra Pal, Head Moharrir Netrapal Sharma, Constable Moharrir Pramod Kumar and Bachhu Singh were working in the office along with him and therefore, they knew their handwriting and signature. On seeing G.D. No. 15 of police station Bisalpur district Pilibhit 09:10 a.m. dated 11.07.1991, he proved that this G.D. was written by Head Moharrir Nem Chandra Pal. He also proved the G.D. No. 45/21:30 dated 12.07.1991; GD 46/2230 dated 12.07.1991 and G.D.29/20:30 dated 13.07.1991.

In cross-examination, P.W.58 had deposed before the trial Court that Head Moharrir Nem Chandra Pal and Head Moharrir Netrapal Sharma were alive at that relevant time and posted in U.P. Police. He further stated that vide G.D. No. 46 time 22:30 hours dated 12.07.1991, it was informed by H.M. Nathu Singh of Police Station Bilsanda that a rifle and a gun were looted by the terrorists in the area of police station Bilsanda. After that Inspector In-charge along with police personnels reached police station Bilsanda. On this information, S.H.O. Anis along with his personal DBBL gun, Constable Ashok Kumar with one rifle and cartridges; S.I. Ramesh Chandra Bharti with one rifle and cartridges, left police station Bilsanda for necessary action and this was entered in this G.D. This departure was entered in the handwriting of Head Moharrir Nem Chandra Pal, on which there was signature of S.H.O. Mohd. Anil.

(80) P.W.59-Hind Prabhat Singh had deposed before the trial Court that in the year 1994, he was posted as Inspector in Reserve Police Line. The Deputy Superintendent of Police of C.B.I. Shri R.S. Dhanker took in custody a 303 bore rifle from him in Reserve Police Line, Pilibhit on 16.03.1994 and also prepared a memo D-175 (Ext. Ka. 57). After that on 25.09.1993, Inspector D.S. Dagar had obtained the related documents of the vehicles from him and also prepared receipt memo D-154 (Ext. Ka. 166). On seeing D-165 dated 26.09.1993, he stated that 10 rifles 303 bore in connection with this case was handed over by him to Shri D.S. Dangar. On seeing D-166, he stated that 7.62 MM A.K. 47 rifle was handed over by him to Dy. S.P. C.B.I. R.S. Punia, who thereafter prepared the receipt memo. These rifles were taken in custody by the C.B.I. and brought to them.

(81) P.W.60-Dr. G.D. Gupta had deposed before the trial Court that he retired from the post of Principal Scientific Officer, Central Forensic Science Laboratory. In the year 1994, he was posted as Senior Scientific Officer Grade-I on that place. He stated that D-97, D-100, D-133, D-136 and D-120 were prepared by him in connection with this case and all these reports were prepared on the request of S.P. C.B.I., New Delhi.

(82) P.W.61-Naresh Pal Singh had deposed before the trial Court that in the year 1991, he was posted with his Company in Pilibhit district. His camp was set up at the police station Neuria. On 10.07.1991, Superintendent of Police Badri Prasad Singh called him to the Police Line Pilibhit, After that they reached Police Line Pilibhit, entry of which was made in G.D. Report No. 47 dated 10.07.1991 at 19:50 hours. On that night, they stayed there and on the next day i.e. on 11.07.1991, vide G.D. No. 11 at 08:00 a.m., he along with Badri Prasad Singh and other police personnels reached at police station

Bisalpur through 2-3 vehicles, from where they took one Inspector and via Shajahanpur, they reached Allaganj Police Chowki around 3-4 O'Clock, wherein they had tea and snack and at about 05-06 O'clock, they walked near the river behind 3-4 Kilometers of Chowki and around 06-07 O'clock, they returned to police chowki Allaganj and stayed there whole night and also laid ambush over Ganga bridge till 4-5 p.m. on 12.07.1991. After that in the evening of 05:00 O'clock, they proceeded from Allaganj Police Chowki and reached police line Pilibhit via Puwaan Sahjahanpur forest road around 10:00-11:00 O'clock. He stated that their arrival was entered in G.D. Report No. 54 time 23:10 hours. After taking dinner, he reached to police station Neuria, entry of which was in GD Report No. 55 time 23:30 hours. He further stated that their party did not participate in any encounter.

(83) P.W.62-H.C.P. 4006 Gopal Singh had stated before the trial Court that in the year 1991, his 9th Battalion of S.P.F. was camped in the ground of Block Office in police station Puranpur. On 12.07.1991, he was in the camp after returning from Bank duty. On that night, around 01:30-02:00 O'clock, C.H.M. Jagmohan woke him up and told him that they have to go for duty now. After that all of them sat in the vehicle under the supervision of Platoon Commander Dayan Singh and reached police station Puranpur around 02:45 O'clock in the night, from where a Constable went along with them. After 6-7 Kilometers at around 03:00 O'clock, his vehicle got stuck in the mud on a narrow road near a culvert. As soon as they took out their vehicle from the stuck and moved a little further, they saw a Jeep of Police Station Puranpur coming and the police personnel who sat in the Jeep told them that there is no need to go further and they should station on the right side with ambush in the fields. After that they sat by laying ambush at a distance of around 100 yards from the road. Around 09:00-09:30 a.m., a policeman came and told them that they should return back. After that they returned to police station Puranpur at about 10:00 a.m. and after that they returned to their camp. He further stated that arrival in G.D. Report No. 60 dated 12.07.1991 was wrongly shown as 21:55 hours and similarly departure in G.D Report No. 64 dated 12.07.1991 was also shown wrongly as 22:30 hours. He and his team did not participate in any encounter in the intervening night of 12/13.07.1991 in Pattabhoji forest nor heard the sound of fire in the night. On 01.04.1994, the Investigating Officer had recorded his statement.

(84) P.W.63-Randheer Singh Punia had deposed before the trial Court that in the year 1994, he was posted as Dy. S.P. C.B.I. in S.I.C.-II Branch. On 08.03.1994, the investigation of Case RC 2(S)/1993 SIU-V/SIC-II was transferred to him from Shri R.S. Prasad Dy. S.P. and he started the investigation of the case. On 09.03.1994, he along with other C.B.I. Officer went to Pilibhit in relation to the investigation of the case. On 16.03.1994, one AK47 rifle was taken in custody from Inspector Hind Prabhat vide production memo D-166 (Ext. Ka. 168). On 17.03.1994, he stayed in Pilibhit and investigation of the case was made. During investigation, he recorded the statements of Om Raj Singh, Inspector Ram Ratan Sharma, S.I. Diwan Singh Rawal, S.I. Netrapal Singh, Constable Aran Singh Kaurgo, Constable Balwan Singh and Constable Naresh Pal. These three Constables were of U.P. P.A.C. He also recorded the statement of S.D.M. Bisalpur

Shri Ishwar Chandra Sharma, who prepared the inquest report of Lakhvinder Singh *alias* Lakha, Jaswant Singh, Kartar Singh and Randhir Singh *alias* Dhira. He also recorded the statements of Ramesh Bharti, H.C. Nathu Singh, A.S.P. Vijendra Sharma, A.S.P. Badri Prasad Singh and the then Superintendent of Police R.D. Tripathi. Thereafter, on briefing the Inspector D.S. Dagar, Inspector K.S. Thakur, Sub-Inspector Chandradeep, he instructed them to inquire into the matter. Inspector K.S. Thakur took in custody the D.B.B.L. gun of Mohd. Anis and sent it for expert enquiry in C.F.S.L., New Delhi and after that he got expert opinion of it. On 30.09.1994, on the direction of Superintendent of Police, the investigation of Case Nos. RC-1 (S)/93 SIC-II and RC-2 (S)/93/SIC-II were transferred to Shri R.S. Dhankar, Dy. S.P. because it was found from the investigation at this stage that ten Sikhs killed in encounter by the police in all three places of district Pilibhit were deboarded from bus by the police at *Kacha*laghat and thereafter, in the intervening night of 12/13.07.1991, they were killed and the police had claimed that all of them were killed in the encounter. He further stated that from the investigation of the case, it was revealed that all the ten Sikhs were kidnapped from one place and killed in fake encounters at different places, therefore, investigation of all three cases were conducted by Shri R.S. Dhankar and after completion of investigation, charge-sheet (Ext. Ka. 90) was submitted against the accused persons by Shri R.S. Dhankar, Dy. S.P.

In cross-examination, P.W.63 had deposed before the trial Court that C.B.I., Case Diary is in printed performa. The statement has been recorded in plain papers and after that it has been attached with the printed performa case diary. The description of the investigation was made in printed case diary. This printed case dairy is kept in his office and the original Case Dairy is not filed in the Court. He further stated that he took in custody the fire arms used in the commission of incident after three years of the incident and in the meantime, it must have been used anywhere else. All these fire arms were official. He further stated that he did not conduct the investigation in relation to terrorism.

(85) P.W.64-Diwan Singh Dagar has deposed before the trial Court that in 1993-94, he was posted as Inspector C.B.I., S.I.C.-II, New Delhi. On 01.01.1993, three cases i.e. RC 1 (S)/93, 2 (S)/93 and 3 (S)/93 were registered. He stated that as he was Assistant Investigating Officer, therefore, he recorded the statement of the witnesses under Section 161 Cr.P.C. On seeing Ext. Ka. 10, which was the Pilgrims Record Register of Gurudwara Langad Sahib, he stated that he seized the said register from Gurudwara and at page no. 72, he put his signature.

In cross-examination, P.W.64 had deposed before the trial Court that he was told by the Investigating Officer Shri R.S. Dhankar that some team of pilgrims went to Nanded.

(86) P.W.65-S.K. Chaddha had deposed before the trial Court that he had an experience of work as Finger Prints Expert w.e.f. 1984 to 2010. In the year 1994, he was posted as Senior Scientific Officer Grade-II in C.F.S.L., New Delhi. He had examined various documents relating to the incidents and after examination, he submitted his report to C.B.I.

(87) P.W.66-Dr. S.C. Mittal had deposed before the trial Court that he was appointed in C.F.S.L. in the year 1970 and

retired from the post of Principal Scientific Officer/Assistant Chemical Examiner on 30.11.2005. He had examined documents sent by the C.B.I. in relation to the case and after examining, he sent his report to the C.B.I.

(88) P.W.67-Satya Pal Khanna had deposed before the trial Court that he was working in C.F.S.L., New Delhi from 1969 to 2006. In relation to the case, he went along with C.B.I. Special Director to Pilibhit and also inspected various places. A report was prepared by him but it was not on the file of the Court. He was shown a mini bus, which had holes on its roof from inside to outside and was covered with putty and when he removed the putty, then he found the bullet holes in it, which were in everted margin. He further stated that these marks are made in a situation when the bullet is fired from inside to outside of the bus and they were painted but their colour was different from the colour of the rest of the bus and any one could see them, therefore, a cloth sheet from inside was put up. When he got suspicions, then he removed the veil of the cloth and then he found putty on scraping and found their colour changed. He thereafter went on the roof where the whole appeared, then, he found that area was of riveted sheet.

(vi) STATEMENTS OF CONVICTS/APPELLANTS RECORDED UNDER SECTION 313 Cr.P.C.

(89) The statements of the convicts/appellants were recorded under Section 313 Cr.P.C., denying the allegations made by the prosecution against them. They have stated that on the pressure of C.B.I., the prosecution witnesses have concocted a false story and have falsely deposed; P.W.11-Smt. Swarn Kaur and P.W.13-Smt. Balwinderjeet Kaur *alias* Laddo are the wives of respective terrorists and they themselves are terrorists, therefore, they deliberately gave false testimonies; C.B.I., in support of its case, did not produce its own G.D. or any documentary evidence; Investigating Officer of the C.B.I with the meeting of P.W.17-Kamaljeet Singh and P.W.18-Gurmej Singh, being Sikh, recorded their false statements and falsely deposed against them; the prosecution did not record the statement of Sukhdev; the concerned gun was recovered from the possession of the slain terrorists; the Investigating Officer of the C.B.I. created a false evidence out of his own free will just to improve its case and also made false testimony of the witnesses; the investigation conducted by the C.B.I. has been forged; in the case, the Investigating Officer of the C.B.I while misusing his position, cooked up false and fraudulent evidence; fake investigation was done by the C.B.I.; false evidence has also been recorded by exerting pressure upon P.A.C. and S.P.F. and intentionally, G.D. and others documentary evidence were not collected from P.A.C. and S.P.F.; in the absence of any documentary evidence, witnesses intentionally gave false evidence and made fraudulent story; F.I.Rs. lodged by them were correct and nothing was lie therein.

(vii) DEFENSE WITNESS

(90) From the side of the defense, Prahlad Singh was examined as D.W.1. in order to prove the facts that on 12.07.1991, at about 08:30 p.m., 315 bore of licensee rifle of D.W.1 and gun and cartridges of one Jagdish were looted by 7-8 Sikhs when they were returning to their home from the market of Bilsanda, for which he lodged

the report at police station Bilsanda and later on, the aforesaid rifle, gun and cartridges were found lying near the dead bodies of four terrorists in the forest of Bilsanda.

(viii) FINDINGS OF THE TRIAL COURT

(91) The trial Court, after hearing the parties and going through the evidence on record, came to the conclusion that the convicts/ appellants, while committing criminal conspiracy, abducted ten Sikh youths and killed them in fake encounter and thereafter prepared number of documents in order to convert the killings of these Sikhs into encounters and accordingly, the trial Court convicted the convicts/appellants under Section 120-B read with Sections 364, 365, 218 and 117 I.P.C. and sentenced them in the manner stated in paragraph-2 hereinabove.

(92) Heard Ms. Chinu Chauhan, learned Counsel for the appellant no.4-Veer Pal Singh in Criminal Appeal No. 549 of 2016, Shri Daya Shankar Mishra, learned Senior Advocate assisted by Shri Umesh Chandra Yadav, learned Counsel for the appellants nos. 11, 13, 15 and 16 in Criminal Appeal No. 549 of 2016, Shri Sheikh Wali-Uz Zaman, learned Counsel for the appellant no.11-Register Singh in Criminal Appeal No. 513 of 2016, Shri Nagendra Mohan and Shri Ajay Singh, learned Counsel for the other appellants in the above-captioned appeals, Shri Anurag Singh, learned Counsel for the C.B.I. and Shri I.B. Singh, learned Senior Advocate assisted by Shri Harjot Singh, Shri Vivek Kumar Rai, Shri Ajai Kumar, Shri Ishaan Baghel, Shri Sajeet Singh and Shri Avinash Singh Vishen, learned Counsel for the victim.

C. ARGUMENTS ON BEHALF OF THE CONVICTS/ APPELLANTS

(93) Challenging the impugned order dated 04.04.2016 passed by the trial Court, Shri Nagendra Mohan, learned Counsel appearing on behalf of the convicts/appellants has argued that :-

I. It is a co-incidence that three incidents took place in district Pilibhit in the intervening night of 12/13.07.1991. The first incident took place at Dhamela Kuan in Mahof Jungle falling in the jurisdiction of police station Neoria; the second at Phagunaighat falling in the jurisdiction of police station Bilsanda; and the third at Pattabojhi forest area falling in the jurisdiction of police station Puranpur.

II. In between 1989 to 1993, number of groups of Sikh militants were active in *tarai* region of district Pilibhit and nearby districts of the State of U.P. There were vigilance reports vide D-1 and D-2 that Jaswant Singh *alias* Fauji (killed in Bilsanda encounter), Baljit Singh *alias* Pappu (killed in Neoria encounter) son of Basant Singh, resident of Arjunapura, PS Dhariwal, District Gurudaspur, Punjab were terrorists and effectively active in *Tarai* region along with 6 or 7 terrorists in District Pilibhit and engaged in extortion of money from the residents of Pilibhit and neighbouring areas for providing financial support to the terrorists' gang. The Investigating Officer/C.B.I. had also mentioned the aforesaid in the charge-sheet.

In order to combat rising Sikh militancy and criminal violence in *tarai* region of district Pilibhit, a high level meeting of higher authorities of police personnel was held on the basis of the aforesaid vigilance report (D-1 and D-2) on 10.07.1991 to decide the action to be taken

against the terrorists. After that on basis of aforesaid vigilance reports (D-1 and D-2) as well as direction issued in pursuance of the higher authorities in its meeting held on 10.07.1991, the police personnel including the appellants had laid ambush in three places i.e. Dhamela Kuan in Mahof Jungle falling in the jurisdiction of police station Neoria, Phagunaighat falling in the jurisdiction of police station Bilsanda and Pattabojhi forest area falling in the jurisdiction of police station Puranpur in the intervening night of 12/13.07.1991, whereby four terrorists were eliminated in Dhamelakuan falling in the jurisdiction of police station Neoria; two terrorists were eliminated in Phagunaighat falling in the jurisdiction of Bilsanda; and four terrorists were eliminated in Pattabojhi forest area falling in the jurisdiction of Puranpur, by the police personnels including the appellants in a self-defense.

From all three places of the incident, the fire-arms used by the terrorists were seized and proper procedure was followed by the police personnel including the appellants for preparing *"panchnama'* and other documents. In this regard, thirteen F.I.Rs. were registered by the appellants separately for the incident that took place in respective three places. The competent authority i.e. S.D.M. came to the incident and conducted the inquest on the dead-bodies of ten terrorists.

The post-mortem of ten unidentified dead-bodies of the terrorists were conducted and their dead-bodies were cremated by the police at the cremation ground located by the side of police lines, Pilibhit during the night on 13.07.1991 as no person had complained any authority of the said occurrence/encounter either on 13.07.1991 or subsequent in any nature nor any one claimed the bodies of the terrorists eliminated in the encounter, even though a wide publicity as per Police Regulations 135 and 135-A were made for the unidentified terrorists and photograph of the deceased terrorists were published in newspaper on the date of occurrence. After due investigation, the local police of District Pilibhit had filed closure report 73/74/25. Submission is that action of the police personnel including the appellants to eliminate the ten terrorists were made by them in a self-defense as in all three places, the police party had first challenged the terrorists and on challenging them, the terrorists opened fire and in retaliation, the police party inlcuding the convicts/appellants had started firing. The closure reports were filed by the local police of district Pilibhit by collecting materials and proper investigation in all there F.I.Rs. and there is no infirmity in it. Till date, the said closure reports have not been challenged by anyone.

III. On the basis of a news article published in newspaper *"The Times of India'*, R.S. Sodhi, Advocate had filed a Writ Petition (Criminal) No. 1118 of 1991 before the Apex Court, wherein the Apex Court, vide order dated 15.05.1992, entrusted the investigation of the incidents to the C.B.I. After that the C.B.I., by referring the aforesaid judgments of the Apex Court, registered corresponding three F.I.Rs. viz. RC-1 (S)/93, under Sections 147, 148, 149, 307 I.P.C. and Section 25 of the Arms Act corresponding to crime no. 144 to 148/91 of police station Neoria, district Pilibhit; RC-2 (S)/93, under Sections 147, 148, 149, 307 I.P.C., Section 25 of the Arms Act and Section 3/7 of the TADA Act corresponding to Case Crime No. 136 to 140/91 of police station Bilsanda, district Pilibhit; and RC No. 3 (S)/93, under Sections 147, 148, 149, 307 I.P.C., Section 25 of the Arms Act corresponding to Case Crime No. 363 to

365 of 1991 of police station Puranpur, district Pilibhit. Submission is that the Apex Court had only entrusted the investigation to C.B.I. and had never issued direction to C.B.I. to lodge three different cases (RCs.) or for re-investigation of the case but the C.B.I., without falsifying the earlier F.I.Rs. lodged by the local police of the district Pilibhit and without looking into the closure reports submitted by the local police of the district Pilibhit, added Section 302 I.P.C. He argued that C.B.I. took up the case for investigation not on the fresh F.I.R. but on the basis of three F.I.Rs. already registered by the accused/police personnel. The investigation cannot be continued by the C.B.I. on the F.I.Rs. registered by the local police, on account of the fact that those F.I.Rs. were encounters, whereas C.B.I. took up the case for investigation after having formed the opinion that those are fake encounter. He argued that no reference was made in the impugned judgment by the trial Court about the materials which were elicited in the cross-examination of the witnesses in favour of the accused and there is no discussion on these aspects. His submission is that if fresh investigation is conducted on the basis of earlier F.I.Rs., then, the C.B.I. must have established that earlier F.I.Rs. and the investigation conducted by the local police on the basis of those F.I.Rs. was false but no evidence has been adduced by the C.B.I. to prove that the earlier F.I.Rs. and the initial investigation were fake. Therefore, all these circumstances show serious infirmities on the part of the C.B.I.

IV. The claim of the prosecution that some affidavits have been filed by the family members of the deceased/ terrorists before the Apex Court, is not reflected from the order of the Apex Court as none of the alleged affidavits said to be produced before the Apex Court was made part of the record of the Court below and further no witness to prove the content thereof was produced by the prosecution.

V. Though sanction from the State Government for prosecuting the convicts/appellants being the employees/police personnel of the State Government was mandatory but admittedly no sanction was obtained from the State Government, which itself vitiates the entire proceedings of the prosecution. Furthermore, the point relating to the non-obtaining of sanction, was argued before the trial Court but the trial Court erred in not considering it nor decided it.

VI. There were 87 accused persons, out of which 30 persons were not charge-sheeted by the C.B.I. and 57 were charge-sheeted by the C.B.I., who faced the trial. During trial, out of 57 accused persons, ten accused died and the trial was commenced against 47 accused persons. The trial Court had convicted and sentenced 47 accused persons by means of the impugned judgment and order dated 04.04.2016.

VII. Admittedly, when the C.B.I. commenced the investigation, till then the local police had conducted investigation in respect of all the three F.I.Rs. and collected the materials, but to prove the said investigation conducted during this period, no police officer was examined. Furthermore, no details were furnished as to the nature of materials collected during that period, neither C.B.I. in its investigation falsified the earlier F.I.Rs. or the materials collected during that period of investigation. Submission is that this is a very serious flaw on the part of the prosecution and proves the suppression of relevant materials collected in the initial investigation, hence it affected credibility of the prosecution case.

VIII. P.W.1-Brajesh Singh, ARTO, Bareilly, P.W.2-Ranveer Singh, Clerk of RTO Office and P.W.5-Amit

Kumar, owner of the bus have proved the list of 45 passengers. According to him, the claim of the prosecution that list of passengers was changed by the police, is absolutely perverse. He argued that it is evident from the testimonies of P.W.1, P.W.2 and P.W.5 that the passengers list attached with the permit was never changed as they have clearly stated during their examination-in-chief that the original list is always given back to the bus owner after issuance of the temporary permit. According to the list, 45 passengers, who were traveling in the bus, was valid from 30.06.1991 to 13.07.1991. The list of passengers is the same as the carbon copy which was submitted on 28.06.1991 before the R.T.O. office. Submission is that when the list of passengers with permit was already circulated to the driver, hence the allegation that list was changed by police, does not stand.

IX. There was also allegation of changing the list of passengers through Additional Superintendent of Police, Bareilly Shri Daya Nidhi Mishra. This allegation of the prosecution cannot be substantiated as the prosecution failed to prove the link that on whose request Additional Superintendent of Police Daya Nidhi Mishra on 06.07.1991 took away the carbon copy of the list from R.T.O. Office.

X. Allegation was that the list of passengers was changed by Additional Superintendent of Police Daya Nidhi Mishra on 06.07.1991. The alleged bus was said to be intercepted on 12.07.1991 and the alleged incident i.e. deboarding of passengers and encounter of the terrorists happened in the night of 12/13.07.1991, are itself contradictory with each other, as in any case it was not possible to change the list by adding the name of the terrorists on 06.07.1991 i.e. much before the alleged fake encounter. Furthermore, the Additional Superintendent of Police Daya Nidhi Mishra, Bareilly was not examined by the prosecution nor he was arrayed as accused in this case by the prosecution. Hence the plea of the prosecution in this regard is not sustainable.

XI. The trial Court had placed reliance upon the list which was alleged to be changed and had observed that junior family members of P.W.11-Smt. Swarn Kaur and P.W.13-Balwinderjeet Kaur were also travelling in the bus and as such, their names were not appearing in the list of passengers and their names are in extras, but the trial Court erred in not mentioning the name of Senior Member of the family of P.W.11 and P.W.13, behind whom their name is in extras.

XII. The allegation of the prosecution that the police acted on the news item published in the local newspaper under the heading *"Sau Sau Chuhe Khakar Billi.....',* does not stand proved by the prosecution because the police acted on the basis of the vigilance report dated 06.06.1991 and the direction issued by the higher authorities of the police in its meeting held on 10.07.1991.

XIII. The prosecution has come up with the case that 25-26 passengers were travelling in the bus but the prosecution has failed to prove the source of getting this list of 25-26 passengers nor any witness had proved the list of 25-26 passengers, however, surprisingly, only in charge-sheet, it has been shown that 24 named persons were passengers but there was no proof of it. Thus, it reflects that the story of the prosecution that named 25-26 passengers were travelling in the bus, is unreliable.

XIV. The provisions of Section 207 of the Code of Criminal Procedure, 1973 has not been complied with as though a request was made on behalf of the convicts/appellants to supply the

documents so that they may cross-examine the witnesses but the same was not provided to the convicts/appellants. The trial Court had also not considered this aspect of the matter and by ignoring this fact, the trial Court erred in passing the impugned judgment.

XV. The witnesses of fact, in their depositions, had stated that de-boarding of Sikhs from travelling bus to the police bus was at the bank of some big river but none of the witnesses of fact had stated about "Kachlaghat'. But at very later stage, "Kachlaghat' was introduced by CBI. Furthermore, the story was set up by C.B.I. that when the de-boarding of Sikhs from travelling bus to the police bus was going on, some of the Sikhs ran and villagers caught them up and again surrendered them to police but surprisingly, none of the villager residing near "Kachlaghat' was made witness for the prosecution to proof this fact. Thus, the introduction of "Kachlaghat' is doubtful.

XVI. During investigation, the Investigating Officer found the marks of bullet in the blue colour police bus. P.W.67-Sri Satya Pal Khanna, Retired Scientist, C.F.S.L., in his deposition before the trial Court, has categorically stated that the marks of firearms were present in the blue colour bus, from which ten young Sikhs were brought by the police personnel. But no blood stains were found in the bus nor anywhere it was explained that how all the marks are on the roof of the bus as no angle of firing can be imagined by which during firing all the bullets will hit roof of the bus.

XVII. In all three encounters that took place in the intervening night of 12/13.7.1991, the fire arms used by the terrorists were seized and proper procedure had been followed by the police personnel for preparing *"panchnama'* and other documents. According to him, arms and ammunition of terrorists were also recovered by the police party and CBI in its investigation had accepted that these belonged to the terrorists because no charge for the offence under Section 25 of the Arms Act for planting the weapons on the places of encounters claimed by the police was levelled upon the convicts/appellants.

XVIII. The trial Court, by means of the impugned judgment, had convicted the convicts/appellants under Sections 302, 364, 365, 218, 217 I.P.C. with the aid of Section 120-B I.P.C. but the trial Court erred in not considering the fact that there is no evidence on record to show that the convicts/appellants had committed criminal conspiracy. Thus, findings of guilt of the appellants in the said encounter by the trial Court for the offences with the aid of Section 120-B I.P.C. cannot be sustained.

XIX. P.W.16-Constable Om Prakash Yadav, C.R.P.F., had admitted the fact that C.R.P.F. was there in the police encounter. Further, in the site plan no. 148/1, the presence of C.R.P.F. and S.P.F. were shown and in the charge-sheet, it has been stated that S.P.F. participated in the encounters. His submission is that in the said encounters, along with the members of Police Arms Constabulary, members of S.P.F. and C.R.P.F. also participated but none of the members of S.P.F. and C.R.P.F. were made accused by the C.B.I., which itself creates doubt about the prosecution story.

XX. The prosecution has failed to examine any independent witness. The prosecution had only produced P.W.11 and P.W.13 as eye-witnesses of the incident who claimed to travel in the alleged pilgrims' bus. His submission is that P.W.11 and P.W.13 are the wives of the deceased terrorists, hence they are interested witnesses and their testimonies cannot be reliable. Furthermore, the prosecution had

claimed that apart from P.W.11 and P.W.13, there were alleged 23 more passengers travelling in the said bus but the C.B.I. had failed to examine the other witnesses including the driver and conductor of the bus, who have stated to have seen the police personnel taking away the deceased persons from the bus. Thus, non-examination of those independent witnesses casts doubt on the credibility of the prosecution case.

XXI. The credibility of the testimonies of the eye-witnesses P.W.11 and P.W.13 are extremely doubtful. He argued that the prosecution case is that all the passengers in the bus were Sikhs and they were all on pilgrimage, which was taken from one shrine to another, travelling for about more than eight days and as such, it is quite probable that they must have got to know each other. But P.W.11 and P.W.13 admitted in the cross-examination that they did not know anything about the other passengers, who travelled in the bus which seems to be quite artificial and proves the presence of P.W.11 and P.W.13 in the pilgrim bus is doubtful. Furthermore, P.W.11 and P.W.13 have stated that 10-11 persons belonging to Sikh community were travelling in the bus along with them and they were taken away by the police, however, on the next day their dead bodies were found but both these eye-witnesses did not identify any police personnels either in identification parade nor in Court that they were the police personnels, who took 10-11 persons belonging to Sikh community from the bus. P.W.11 and P.W.13 have also failed to disclose that who were the Sikhs who ran away while de-boarding of bus whom the villagers of nearby handed over to the police again. He also argued that P.W.29, the Deputy Superintendent of Police (C.B.I)/Investigating Officer of the case, had examined P.W.11 and P.W.13 only after a lapse of 1½ years and during this period of 1½ years, both P.W.11 and P.W.13 did not whisper anything about the incident to any person nor was any complaint lodged about the same with the local police or with the C.B.I. and even during the course of examination in the Court, P.W.11 and P.W.13 did not explain as to why they kept silence for this long period. He also argued that P.W.11 had stated that immediately after the occurrence, she sent a telegram to her father-in-law (P.W.4-Ajeet Singh), informing about the incident but P.W.4-Ajeet Singh deposed that he got the information about the death of his son through the newspaper and not through the telegram, which shows P.W.11 was not present and was a got up witness. In these backgrounds, his submission is that these two witnesses P.W.11 and P.W.13 are cooked up witnesses set up by the C.B.I. to support the prosecution case, hence their testimonies are not reliable.

XXII. The C.B.I. introduced the story of pilgrims tour and the main witness Talwinder Singh who was the organizer of this pilgrim tour and the permit etc. disappeared and story of the 11th terrorist was introduced by the C.B.I. But the C.B.I. has failed to establish the death of 11th Sikh which itself falsifies the story of prosecution.

XXIII. There is no motive on the part of the convicts/appellants to kill the deceased terrorists in fake encounter. His submission is that the trial Court had made assumption that the convicts/appellants appear to have encountered for promotion but this finding of the trial Court is erroneous and contrary to the promotion rules as the promotion rule came into existence on 03.02.1994.

XXIV. No question was put to the convicts/appellants in their statements

recorded under Section 313 Cr.P.C. regarding change of list of 25-26 passengers to 45-46 passengers; de-boarding of terrorist from pilgrim bus to police bus; and the appellant entering in criminal conspiracy.

XXV. The chain of the prosecution case that the terrorists killed in encounter by police are the same persons who were de-boarded from the traveller bus, is not complete.

XXVI. P.W.29-J.C. Prabhakar, the Investigating Officer of the case, had admitted criminal history of the deceased terrorists; case diary is not on prescribed form; original case diary was not produced before the Court below; the list of passengers which had been proved and filed does not contain the name of terrorists; passengers list filed in record is fake; no identification of the accused was done; through informant he came to know about the presence of Balvinder Jeet Kaur in the bus; and Head Constable Kulvinder Singh of Punjab Police, Police Station Dhariwal, District Gurdaspur, Punjab told him the criminal history of five terrorists and gave paper regarding criminal history. P.W.42-Dhruv Kumar Singh, Inspector, had proved the list of D1 and D2, where the name of terrorists were given. P.W.43-Jitendra Sonkar admitted the fact that special and final report of the case was handed over to C.B.I.

XXVII. The onus lies on prosecution to prove its case unless the defense had taken a new plea other than the story of prosecution but the prosecution had failed to prove its case beyond reasonable doubt, hence the impugned judgment passed by the trial Court is liable to be set-aside.

XXVIII. Lastly, it has been argued that the convicts/appellants are the police personnels and they, while performing the official duty on the direction of the higher officials, eliminated the deceased terrorists in the encounter and that too in self defense and there is no motive or previous plan to eliminate the deceased terrorists in encounter, hence some lenient view is liable to be taken while awarding sentence to the convicts/appellants.

(94) Shri Sheikh Wali-Uz-Zaman, learned Counsel for the appellant no.11-Register Singh in Criminal Appeal No. 513 of 2016 has adopted the arguments advanced by Shri Nagendra Mohan. In addition, he only stated that the conviction of the convicts/appellants was made only on the basis of suspicion and, therefore, their conviction cannot be sustained. He placed reliance upon the judgment of the Apex Court in **Ram Niwas Vs. State of Haryana : Criminal Appeal No. 25 of 2012, decided on 11th August, 2022.**

(95) Ms. Chinu Chauhan, learned Counsel for the appellant no. 4-Veerpal Singh in Criminal Appeal No. 549 of 2016 has also adopted the arguments advanced by Shri Nagendra Mohan. In addition, her submission is as under :-

I. Highlighting the testimonies of P.W.26-Constable Rampal Singh and P.W.61-Naresh Pal Singh, she argued that on 11.07.1991, two police parties left the police line vide G.D.18. The first party was lead by Additional Superintendent of Police Shri Badri Prasad Singh and the second party was lead by Additional Superintendent of Police Brijendra Sharma. The G.D. of police line (D-18) shows that on 11.07.1991, at 08:00 a.m., Veerpal Singh (convict/appellant no.4) along with Constable Naresh Pal Singh (P.W.61) and Additional Superintendent of Police Badri

Prasad Singh left Pilibhit and reached Allaganj police chowki via Shahjahanpur at about 03:00-04:00 p.m. on 11.07.1991, wherein the police party made patrolling and also laid ambush on Ganga bridge till 12.07.1991 at 04:00-05:00 p.m. and after that on 12.07.1991, the police party left Allaganj police chowki and reached police line Pilibhit via Shahjanpur forest area in the night of 10:00-11:00 p.m. on 12.07.1991. Thereafter, in the night of 12.07.1991, S.I. Anis Ahmad was dropped at police station Bisalpur, whereas Veerpal Singh was dropped at police station Bilsanda. In these backdrops, she argued that the alleged incident was of the intervening night of 12/13.07.1991 and the distance between Shahjanpur to Bilsanda is 123 Kms, which even by modern infrastructure requires at least four hours to reach Bilsanda from police chowki Allaganj via Shahjahanpur. She also argued that in the charge-sheet, it was mentioned that SI Veerpal Singh reached at Police Station Bilsanda at 10:10 p.m. vide G.D. entry no. 45 on 12.07.1991. The distance between "Kachlaghat' to "Allaganj' is 123 Kms. Thus, it is quite improbable that convict/appellant Veerpal Singh was present at the place of the incident at Bilsanda or Kachlaghat and the presence of appellant no.4-Veerpal Singh at the place of the incident is highly doubtful.

II. The story of the prosecution about the incident that took place at "*Kacha*laghat' is extremely doubtful.

III. The team headed by Additional Superintendent of Police Badri Prasad Singh with whom the convict/appellant Veerpal Singh left for Allaganj, should also have been made accused but he was not made accused by the Investigating Officer nor his statement was recorded.

IV. Throughout the case, three fake encounters were described by the prosecution, wherein no police officer was killed or murdered but in fact in the intervening night of 12/13.07.1991, fourth encounter also took place across the river of Banda police station adjoining to district Pilibhit, wherein one Inspector, Driver, 3 PAC Constables were killed and one got injured and their arms and ammunitions were looted by the terrorists/murderers. The F.I.R. of the incident was made through a letter by a PAC Constable but the Investigating Officer (C.B.I.) had neither taken care of the aforesaid incident nor was pointed it out by the prosecution before the trial Court.

V. Two out of four terrorists were named in vigilance report D-1 and were having a criminal background. The prosecution witnesses had admitted the same. There was vigilance report to the aforesaid effect. Thus, the encounter made in police station Bilsanda cannot be said to be a fake encounter as the police party had eliminated four terrorists in encounter in self defense.

VI. The material collected and witnesses of the three F.I.Rs. lodged by the local police were not examined by the Investigating Officer,

VII. The investigation of the case is highly tainted.

VIII. Hence, she prays that benefit of doubt ought to have been granted to the appellant no.4-Veerpal Singh as the prosecution had failed to prove its case in respect of appellant no.4-Veerpal Singh beyond reasonable doubt, hence the impugned judgment and order in respect of appellant no.4 is liable to be set-aside.

(96) Shri Daya Shanker Mishra, learned Senior Advocate assisted by Shri Umesh Chandra Yadav, learned Counsel appearing on behalf of the appellants nos. 11, 13, 15 and 16 in Criminal Appeal No.

549 of 2016 has also supported the arguments advanced by Shri Nagendra Mohan and in addition, he argued as under :-

I. In between 1989-1994, terrorism was prevalent in district Pilibhit and around areas as is evident from the testimonies of P.W.46-Pratap Singh Pangati, P.W.51-Mahendra Singh Chandel, P.W.52- Balakram, P.W.55-Netrapal Singh, P.W.56-Naresh Chandra, P.W.58-Harkesh Singh but the trial Court has failed to take note of this fact.

II. Though the report of the Commission of Justice K.P. Singh is admissible as evidence in view of Section 3 of the Indian Evidence Act but the same was not produced by the prosecution to prove its case. In support of his submission, he placed reliance upon **Zakia Ahsan Jafri vs The State Of Gujarat : 2022 LiveLaw (SC) 558.**

III. The provisions of Section 207 of the Code of Criminal Procedure, 1973 has not been complied with by the trial Court. In support of his submission, he relied upon the judgment of the Apex Court in **Manoj & others Vs. State of Madhya Pradesh : 2022 (0) SC 500.**

IV. No where in the impugned judgment of the trial Court, the statement of defense witness i.e. D.W.1- Prahlad Singh has been discussed or mentioned by the trial Court.

V. Though in three encounters, members of C.R.P.F., S.T.F. and P.A.C. were involved but none of the members of S.T.F. and C.R.P.F. were made accused.

VI. The convicts/appellants being a members of the discipline force, obeyed the direction of the higher authorities of the police and laid ambush in three places i.e. Neoria, Bilsanda and Puranpur on the report of vigilance and in all three places, police personnels including the convicts/appellants eliminated ten terrorists in encounter in self-defense. His submission is that the action of the convicts/appellants were as per the direction of the higher authorities of the police coupled with the vigilance report. He argued that if they disobeyed the direction of the higher authorities, they ought to have been punished in terms of Section 7 of the Police Act, 1861.

VII. The incriminating evidences under Section 313 of the Code of Criminal Procedure was put forward to the accused to explain but the trial Court had dealt with it in a very casual and cursory manner. According to him, the statement of accused recorded under Section 313 Cr.P.C. is the conversation of the Court with the accused but that has not been followed by the trial Court. In support of his submission, he relied upon the judgment of the Apex Court in **Jai Prakash Tiwari Vs. State of Madhya Pradesh :** 2022 (0) SC 646.

VIII. In respect of three encounters, due investigation was conducted by the local police and after due investigation, closure report was submitted in all three F.I.Rs but the C.B.I., on entrustment of the investigation of the case by the Apex Court, instead of making fresh investigation for the three incidents for which closure report was already submitted or instead of filing protest petition against the closure report, had started re-investigation of the case by lodging three F.I.Rs. corresponding to the thirteen F.I.Rs. lodged by the local police. His submission is that re-investigation of the case is unlawful and cannot be sustained.

IX. There is no motive of the convicts/appellants to eliminate the ten Sikhs in encounter. His submission is that the convicts/appellants being police personnel eliminated ten Sikh terrorists in encounter in self-defense.

X. The convicts/appellants were convicted on the basis of circumstantial

evidence but the prosecution had failed to link the chain of circumstances and the trial Court has failed to consider this aspect of the matter.

XI. The convicts/appellants, while performing their official duties being police officers, had not made any criminal conspiracy, hence Section 120-B I.P.C. cannot be applied against the convicts/appellants.

XII. The prosecution had also failed to prove the facts that the convicts/appellants had incorrectly framed any record with intent to save any person from punishment and also failed to prove the fact that convicts/appellants had abetted any commission of crime, hence the offences punishable under Sections 218 and 117 I.P.C. are not applicable.

XIII. There is a serious dispute about the list of number of the alleged passengers travelling from the pilgrims bus. But the trial Court had not dealt with this aspect of the matter while passing the impugned order.

XIV. the story set up by the prosecution of "*Kacha*laghat' has not been proved by the prosecution beyond reasonable doubt as except two alleged passengers i.e. P.W.11 and P.W.13, the prosecution had failed to produce any passengers/driver of bus/conductor of bus or any other eye-witnesses to prove its case and further the testimonies of P.W.11 and P.W.13 are contradictory to each other. The testimonies of P.W.11 and P.W.13 are not reliable as they are highly interested witnesses as they are the wives of two terrorists who were eliminated in the encounter and on the story set up by the prosecution, they were granted compensation from the State.

XV. The provisions of Section 364 I.P.C. and 365 I.P.C. are also not applicable under the facts and circumstances of the case.

XVI. Hence the impugned judgment and order passed by the trial Court is liable to be set-aside.

XVII. So far as the sentence is concerned, he argued that as the convicts/appellants were performing their official duties with utmost delinquency, hence lenient view ought to have been granted to the convicts/appellants.

(D) ARGUMENTS ON BEHALF OF VICTIM

(97) Shri I.B. Singh, learned Senior Advocate, assisted by Shri Sajeet Singh, Shri Avinash Singh Vishen, Shri Vivek Rai, Shri Harjot Singh, Shri Ishan Baghel, appearing on behalf of the victim has vehemently opposed the aforesaid submissions advanced by the learned Counsel for the convicts/appellants and argued as under :-

I. on 20.06.1991, Talwinder Singh, aged about 17-19 years, resident of Shahjahanpur, contacted the bus owner, namely, Amit Kumar (P.W.5), and booked his bus for pilgrimage and also submitted a list of 25 passengers for pilgrimage. On 28.06.1991, Amit Kumar (P.W.5) was granted temporary permit vide serial No. 872 for the period 30.06.1991-13.07.1991 for bus No. UP26/0245. On 29.06.1991, the bus was plying from Pilibhit to Bareilly to take passenger alongwith Talwinder Singh and then after taking passengers therefrom, the bus was plying from Bareilly to Nanakmatta. Thereafter, the bus reached in the evening of 29.06.1991 at Pilibhit, wherefrom Talwinder Singh along with 25-26 passengers left Pilibhit for pilgrims tour from Nanak Mattha Sahib, Sitaarganj,

Varanasi, Patna Sahib, Huzur Sahib and Nanded Sahib.

On 10.07.1991, the Superintendent of Police, Pilibhit called an urgent meeting with the Station House Officers of three police stations of Pilibhit, namely, Neoria, Bilsanda and Puranpur.

On 11.07.1991, a news article *"100-100 chuhe kha kar bili.....'* was published in the local newspaper. However, the aforesaid news item was not exhibited before the trial Court as it was the photocopy of the newspaper.

On 12.07.1991, the pilgrims' bus was returning and as soon as it reached on the barrier of bridge at about 09:00-11:00 a.m. in the morning, the police officers stopped the bus at a bridge and deboarded 10-11 young Sikhs and only left ladies and children in the bus. After that the deboarded 10-11 young Sikhs were taken away on the blue police bus and few police personnels kept on roaming the bus around in which the passengers were sitting and in the evening dropped the remaining passengers in the bus at the Pilibhit Gurudwara.

Thereafter, it was not in dispute that within police station Neoria, on 13.07.1991, at 04:00 a.m., a police encounter took place in which three Sikhs alleged terrorists were killed; within police station Bilsanda, on 13.07.1991, at 04:30 a.m., a police encounter took place in which four Sikhs alleged terrorists were killed; and within police station Puranpur, in the intervening night of 12/ 13.07.1991, a police encounter took place, in which two Sikhs alleged terrorists were killed.

Thereafter, in regard to the incident which took place within police station i.e. Neoria, Bilsanda and Puranpur, separate F.I.Rs. i.e. total 13 F.I.Rs. were registered in three police stations.

After that within five days of the incident, a news item was published in "Times of India' newspaper to the effect that ten innocent Sikhs have been killed in a fake encounter by Pilibhit Police. On the basis of the aforesaid news article and at the instance of P.W.4-Ajeet Singh, on 18.07.1991, Mr. R.S. Sodhi had filed writ petition (criminal) before the Apex Court, wherein initially the Apex Court directed the Additional Chief Judicial Magistrate, Pilibhit to make an inquiry and submit its report.

On 30.03.1992, Station Officer Bilsanda, Pilibhit identified four deceased who were allegedly killed in the police encounter and submitted that they were terrorists and accordingly submitted final report.

After that in the year 1992, a judicial inquiry was conducted by a retired Judge of this High Court. Thereafter, considering all the material, the Apex Court, vide order dated 15.05.1992, decided the writ petition (Criminal) No. 1118 of 1991 on 15.05.1992 and directed C.B.I. investigation in the matter.

Thereafter, C.B.I. registered three F.I.Rs. i.e. RC 1 (S)/93-SIU.V., RC 2 (2)/93-SIU.V. and RC3(S)/93-SIU-V. The C.B.I., after due investigation, filed the charge-sheet on 09.06.1995.

The trial Court, after appreciating the evidence on record, had rightly convicted and sentenced the appellants by means of the impugned judgment and order.

II. After placing the aforesaid facts, it has been argued by the learned Senior Counsel for the victim that the names of 25 passengers including Talwinder Singh, who was missing, were shown in the charge-sheet itself. He further argued that list of passengers ought to be attested/approved by M.P./M.L.A./Block Pramukh but the same has not been done. P.W.22-Ravindra Singh Yadav had denied

his stamp and his signature on the list of passengers. The trial Court had also taken note of the aforesaid facts and on finding that the conduct of Daya Nidhi Mishra, who went to the RTO Office, was suspicious, had rightly directed for departmental inquiry against him. Thus, it is conclusive proof that list of passengers was changed. Therefore, the contention of the convicts/ appellants in regard to the list of passengers has no substance.

III. The contention of the convicts/appellants that no eye-witnesses, who had seen the incidence, were produced, is absolutely wrong as the eye-witnesses P.W.17-Kamaljeet Singh, P.W.18-Gurumej Singh, P.W.20-Bhagwat, P.W.34-Milkha Singh, P.W.38-Mahendra Singh, P.W.40-Major Singh, in their depositions, had clearly deposed that they had seen the Sikhs with hair open, hands tied in police vehicles including blue bus surrounded by policemen at around 05:00 p.m. near railway crossing.

IV. The police knew the names of the persons who were killed in fake encounter but even then the police personnel had shown them in panchayatnama and post-mortem report as unidentified and hurriedly disposed off the dead body of ten deceased who were killed in fake encounter as unidentified dead bodies. To substantiate his submission, he had drawn our attention to P.W.21-Brijesh Kumar, who was the Head Wireless Operator at Pilibhit. He argued that P.W.21, while seeing the photocopy of essentially certified radiogram D-88/2, had stated before the trial Court that a copy of this radiogram message was sent by Superintendent of Police, Pilibhit at 08:36 a.m. on 13.07.1991 and it was transmitted to all police stations at around 09:40 a.m. and 10:30 a.m., wherein the name of two deceased, namely, Baljit Singh *alias* Pappu and Jaswant Singh *alias* Fauji, was stated. Thus, it is clear that the police though knew the names of the deceased persons but even then the police had shown the dead bodies of ten young Sikhs as unidentified and disposed them off in a hurried manner on 13.07.1991.

V. The convicts/appellants have admitted that they had used arms and ammunition for killing of ten young Sikhs in encounter.

VI. So far as the plea of the convicts/appellants that Additional Superintendent of Police and Superintendent of Police under whose direction the encounter took place, were not made accused, is concerned, his submission is that those Additional Superintendent of Police and Superintendent of Police were made accused but as no evidence was found against them, they were exonerated. However, the trial Court had opined that their conduct was suspicious and should be investigated further.

VII. In district Pilibhit, there was a camp of 15 battalion P.A.C.; a camp of 32 battalion P.A.C.; and some police officers. From the aforesaid police personnel, a team was made, namely, Special Police Force and not Special Task Force (STF) as the Special Task Force (STF) came into existence in the year 1998 and there was no any STF in the year 1991. Therefore, the contention of the convicts/appellants that members of STF also participated in the incident, has no substance.

VIII. Ten deceased persons were not terrorists but they were innocent civilians. To substantiate his submission, he has drawn our attention to P.W.45-Diwan Singh Rawal, who was the Investigating Officer of the F.I.R. Nos. 136 of 1991 to 140 of 1991 and submitted the final report on 30.03.1992, has failed to state any cases registered against the ten deceased persons,

hence the plea of the convicts/ appellants that deceased were terrorists, is without any basis.

IX. No shoes, no purse, no rupees were found from the spot. This puts light on the fact that they were tortured before the encounter.

X. Panch witness deposed that panchayatnama was not done in front of them and their signature was taken on blank papers. Only one panchayatnama was done by the Magistrate while others were done by the police officers. Furthermore, no efforts were made by the police to identify the bodies which is mandated under the Police Regulations Act. Thus, panchayatnama of the deadbodies of the deceased appears to be doubtful.

XI. In the year 1991, out of turn promotions were provided to police personnel for doing extra courageous job such as encounter. Therefore, in order to get the said benefit, the convicts/appellants being the police personnel had killed ten young sikhs by showing them to be killed in encounter.

XII. So far as the plea of the convicts/appellants that no compliance of Section 207 of the Code of Criminal Procedure was made, he argued that this plea of the convicts/appellants are contrary to record as all the documents were provided to the convicts/ appellants.

XIII. So far as the plea of the convicts/appellants that the report of the Commission is neither provided to the convicts/appellants nor it was exhibited, learned Senior Counsel appearing on behalf of the victim has place reliance upon the judgment of the Apex Court in **T.T.Antony vs State Of Kerala & Ors** : 2001 (6) SCC 181, and has argued that the report of the Commission was a fact finding meant only to instruct the mind of the Government without producing any document of a judicial nature and those findings of the Commission of Inquiry were not definitive like a judgment.

XIV. The driver of the bus Musharraf Hussain had filed an affidavit before the Apex Court, stating therein about the kidnapping/abduction of Sikh youths by the police party from Kacchla Ghat but he could not be located and examined during the course of investigation.

XV. The convicts/appellants have failed to tender any plausible explanation as to how the deceased suffered abrasion/contusion injuries.

XVI. The number of fire arms allegedly used by the police personnel in the three alleged encounters could not be connected with the empty catridges recovered from the spot.

XVII. Convict/appellant no. 4-Veerpal Singh had admitted the fact that he had fired four rounds. He, in his statement recorded under Section 313 Cr.P.C., also admitted his presence on the spot.

XVIII. Since criminal acts committed by the convicts/ appellants do not form the part of discharge of their duties and as such, sanction for prosecution under Section 197 Cr.P.C. is not required. Even otherwise, the Investigating Officer had made efforts to get the the sanction under Section 197 Cr.P.C. from the Government Uttar Pradesh. This has been established from the charge-sheet itself.

(E) ARGUMENTS ON BEHALF OF THE INVESTIGATING AGENCY/C.B.I.

(98) Shri Anurag Kumar Singh, learned Counsel appearing on behalf of the C.B.I. has opposed the contentions of the learned Counsel for the convicts/appellants and argued that

I. the convicts/appellants alleged that the encounter was committed by them

in self-defence but the convicts/appellants have failed to show that they had committed the encounter in a self-defense as the onus is on the convicts/appellants to prove the aforesaid facts. In support of his submission, he relied upon the judgment of the Apex Court in **Om Prakash and others Vs. State of Jharkhand and another** : (2012) 12 SCC 72 and **Rizan and another Vs. State of Chhattisgarh** : 2003 (2) SCC 661.

II. The amount of ammunition fired during encounter by the police personnel to the recovered empty cartridges is too much, which shows that it was planted.

III. The plea of the learned Counsel for the convicts/appellants that the C.B.I. had made re-investigation, which is not permissible under law, is concerned, pursuant to the order of the Apex Court, the C.B.I. took the investigation of the case and had registered three F.I.Rs corresponding to 13 F.I.Rs. registered by the local police, therefore, no permission from the Magistrate for investigation is necessary.

IV. The trial Court has rightly convicted and sentenced the convicts/appellants by means of the impugned judgment and order and there is no illegality or infirmity in the impugned order. Hence the above-captioned appeals are liable to be dismissed.

(F) ANALYSIS

(99) This Court has examined the submissions advanced by the learned Counsel for the parties and perused the statements of the prosecution witnesses, defense witnesses, the material exhibits tendered and proved by the prosecution, the statements of the appellants recorded under Section 313 Cr.P.C. and the impugned judgment.

FIRST INFORMATION REPORTS

(100) Three separate F.I.Rs. were lodged in respect of the alleged encounter occurred at three different places of district Pilibhit in the intervening night of 12/13.07.1991, which were as under :-

A. First Place of Incident : Dhamela Kuan in Mahof Jungle falling in the jurisdiction of police station **Neoria**, in the intervening night of 12/13.07.1991 :-

Name of police personnel/accused participated in encounter as well as Arms & Ammunition used by them in encounter (as per police records mentioned in charge-sheet)	**F.I.R. lodged by local police**	**F.I.R. lodged by C.B.I**	**Name of Deceased**
1. Chander Pal Singh, SO police station Neoria, fired 47 rounds from AK 47 rifle no. 6048 out of which 3 empties recovered. 2. Rajinder Singh SO PS Amaria fired 48 rounds from his AK 47 No. 4372 and recovered 8 empties. 3. Harpal Singh SO PS Gajraula fired 24 rounds from his AK 47 No. 1017 and recovered 12 empties 4. Brahmpal Singh SI PS Sungadi fired 4 frounds from .38 revolver of which no empty could be recovered. 5. Satinder Singh HC PS Neoria fired 17 rounds from SLR and recovered 2 empties. 6. Subhash Chander Const. P.S. Sungadi fired 10 rounds from SLR No. 569 and recovered 5 empties.	1. 144/91 2. 145/91 3. 146/91 4. 147/91 5. 148/91	RC (1) (S) /93-SIU.V	1. Baljit Singh *alias* Pappu s/o Basant Singh, resident of village Arjunpura PS Dhariwal District Gurdaspur. 2. Jaswant Singh *alias* Jassa son of Basant Singh resident of village Arjunpura police station Dhariwal, District Gurdaspur. 3. Surjan Singh *alias* Bittoo son of Karnail Singh

7. Nazim Khan Const. No. 481 PS Barkehra fired 12 rounds from SLR No. 6214 and recovered 2 empties. 8. Shamsher Ahmed Const. No. 375 PS Amaria fired 7 rounds from 303 rifle and recovered 5 empties 9. Ram Swaroop Const. No 35 P.S. Gajraula, fired 5 rounds from 303 rifle No. 8350 and recovered 2 empties. 10. Gyan Giri Const. No. 231 PS Sungadi fired 4 rounds from 303 rifle No. 9427 and recovered 1 empty. 11. Krishan Veer Singh Const. No. 27, PS Gajraula fired 6 rounds from 303 rifle No. 2475 and recovered 2 empties. 12. Sukhpal Singh Const. No. 71 Police Station Neoria fired 15 rounds from 303 rifle No. 8612 and recovered 10 empties. 13. Badan Singh Const. No. 247 Police Station Neoria fired 17 rounds from 303 rifle No. 9021 and recovered 16 empties. 14. Narayan Dass Const. No. 428 Police Station Gajraula fired 9 rounds from 303 rifle No. 9664 and recovered 2 empties. 15. Lakhan Singh Const. No. 410 Police Station Hazara fired 6 rounds from 303 rifle and recovered 3 empties 16. Karan Singh Const. No. 30 PS Gajraula fired 2 rounds from 303 rifle of which no empty could be recovered. 17. Rakesh Kumar Const.			resident of village Manepur, police station Dhariwal, district Gurdaspur. 4. Harminder Singh *alias* Minta son of Ajit Singh resident of village Satkoha, Police Station Dhariwal, district Gurdaspur.

No. 125 PS Amaria fired 8 rounds from 303 rifle No. 15919 and recovered 3 empties 18. Nem Chand Const. No. 465, Police Station Amaria fired 9 rounds from 303 rifle No. 31959 and recovered 6 empties.			

B. Second Place of Incident : Phagunai Ghat in the jurisdiction of police station **Bilsanda** in the intervening night of 12/13.07.1991 :-

Name of police personnel/accused participated in encounter as well as Arms & Ammunition used by them in encounter (as per police records mentioned in charge-sheet)	**F.I.R. lodged by local police**	**F.I.R. lodged by C.B.I.**	**Name of Deceased**
1. Devendra Pandey SO Police Station Bilsanda fired 15 rounds from AK 47 rifle No. 92171 and recovered 3 empties. 2. Mohd. Anis, SHO PS Bisalpur fired 4 rounds from his personal DBBL .12 bore gun No. 52136 and recovered all the 4 empties. 3. Ramesh Bharti, SI Pilibhit Police Lines, fired 5 rounds from 303 rifle No. 9800 and recovered all the 5 empties 4. Veerpal Singh, SI Police Station Bilsanda fired 4 rounds from 303 rifle No. 2927 and recovered all the 4 empties 5. Nathu Singh HC No. 9 PS Bilsanda fired 5 rounds from 303 rifle No. 9067 and recovered all 3 empties.	1. 136/91 2. 137/91 3. 138/91 4. 139/91 5. 140/91	RC 2(S)/93-SIU.V	1. Lakhwinder Singh *alias* Lakha s/o Gurmej Singh r/o Jagat, Police Station Amaria, District Pilibhit 2. Kartar Singh s/o Ajaib Singh r/o Roorkhera, Police Station Kila Lal Singh, Police District Batala. 3. Jaswant Singh, s/o Ajaib Singh,

6. Dhani Ram Const. No. 567 PS Bilsanda fired 3 rounds from 303 rifle No. 9067 and recovered all 3 empties. 7. Ugarpal Singh Const. of police station Bilsanda fired 3 rounds from 303 rifle No. 66235 and recovered 3 empties. 8. Sugam Chand Const. No. 540 Police Station Bilsanda fired 8 rounds from 303 rifle No. 9472 and recovered 6 empties. 9. Const. Collector Singh of Police Station Bilsanda fired 5 rounds from 303 rifle No. 8791 and recovered 7 empties. 10. Const. Kunwar Pal Singh of Police Station Bilsanda fired 4 rounds from 303 rifle No. 9154 and recovered 2 empties 11. Shyam Babu Const. of Police Station Bilsanda fired 8 rounds from 303 rifle No. 9017 and recovered 5 empties. 12. Ashok Kumar Const. of Police Station Bisalpur fired 7 rounds from 303 rifle No. 6705 and recovered all the 7 empties. 13. Banwari Lal HC, PAC 32nd Bn. fired 2 rounds from SLR but could not recover any empties. 14. Dinesh Singh, Const. PAC fired 10 rounds from SLR and recovered 6 empties 15. Sunil Kumar Dixit, Const. PAC fired 6 rounds from SLR and			resident of village Roorkhera, Police Station Kila Lal Singh, District Batala. 4. Randhir Singh Dheera s/o Sunder Singh r/o Meer*kacha* na, district Batala.

recovered 2 empties. 16. Arvind Kumar Singh Const. PAC fired 4 rounds from SLR and recovered 2 empties. 17. Ram Nagina Const. PAC fired 8 rounds from SLR and recovered 7 empties 18. Vijay Kumar Singh Const. PAC fired 2 rounds from SLR of which one empty could be recovered			

C. Third Place of Incident : Pattabhoji Jungle in the jurisdiction of Police Station **Puranpur,** in the intervening night of 12/13.07.1991 :

Name of police personnel/accused participated in encounter as well as Arms & Ammunition used by them in encounter (as per police records mentioned in charge-sheet)	**F.I.R. lodged by local police**	**F.I.R. lodged by C.B.I.**	**Name of Deceased**
1. Vijendra Singh, SHO Police Station Puranpur fired 38 rounds from AK 47 rifle, one shot of VLP which missed and recovered 3 empties 2. MP Vimal SI Police Station Puranpur fired 18 rounds from SLR and recovered 2 empties 3. MC Durga Pal SI PS Puranpur fired 17 rounds from SLR and recovered 4 empties 4. R.K. Raghav SI,	1. 363/91 2. 364/91 3. 365/91	RC 3 (S)/93 - SIU. V	1. Narendra Singh *alias* Ninder son of Darshan Singh, r/o Pishtor, Police Station Amaria, District Pilibhit. 2. Mukhwinder Singh *alias* Mukha

Police Station Puranpur fired 5 rounds from .303 and could not recover any empty 5. Surjit Singh SI PS Puranpur fired 45 rounds from stern and recovered 5 empties 6. U.P. Singh SI Police Station Puranpur fired 7 rounds from .303 rifle and recovered 2 empties. 7. Munna Khan Const. 473, Police Station Puranpur fired 18 rounds from .303 rifle and recovered 10 empties 8. Dur Vijay Singh, Const. 584, Police Station Puranpur fired 15 rounds from .303 rifle and recovered 9 empties. 9. Manish Khan, Const. 23, Police Station Puranpur fired 2 rounds from .303 and recovered one empty. 10. Mahavir Singh, Const. 128, PS Puranpur fired 17 rounds from .303 rifle and recovered 8 empties. 11. Gaya Ram, Const. 30, fired 3 rounds from .303 rifle and recovered 2 empties 12. Register Singh Const. 371, Police Station Puranpur fired 2 rounds from			son of Santokh Singh r/o Roorkhera, District Gurdaspur,	.303 rifle and recovered one empty. 13. Rashid Hussain, Const. 80, Police Station Puranpur fired 2 rounds from .303 rifle and recovered one empty. 14. Dur Vijay Singh Const. 470 fired 14 rounds from SLR and recovered 4 empties. 15. Sayed Ale Raza Rizvi, Const./Driver, Police Station Puranpur fired 4 rounds from his personal .315 bore rifle and recovered 4 empties. 16. Rajesh Chander Sharma, SO, Police Station Madho Tanda fired 6 rounds from .38 revolver No. 788739 and recovered 6 empties. 17. M P Singh SI Police Station Madho Tanda fired 15 rounds from AK 47 rifle No. 36153 and recovered 10 empties. 18. S.P. Singh SI Police Station Madho Tanda fired 6 rounds from .303 rifle No. 9303 and 7 rrounds from .9 pistol Nol 1133 and recovered 4 and 5 empties respectively. 19. Harpal Singh, Const. 37 PS Madho Tanda fired 3 rounds from .303 rifle No. 92373 and recovered 2 empties.			

20. Ram Chander Singh, Const. 429 PS Tanda fired 2 rounds from .303 rifle No. 2908 and recovered one empty. 21. Kishan Bahadur, Const. 165 Police Station Madho Tanda fired 6 rounds from .303 rifle No. 26210 and recovered 4 empties 22. Surajpal Singh Const. 257 Police Station Kotwali, Pilibhit fired 3 rounds from his .12 bore SBBL gun No. BE-826/1983 and recovered 3 empties.			

APELLANTS' VERSION

(101) The aforesaid police personnel/appellants had admitted the facts that they eliminated/killed ten Sikh terrorists in encounter in the incident that took place in the intervening night of 12/13.7.1991 in Dhamelakuan forest falling in the jurisdiction of Neoria; Phagunaighat falling in the jurisdiction of police station Bilsanda; and Pattabojhi forest falling in the jurisdiction of police station Puranpur, in district Pilibhit. Their case was that there was vigilance report to the effect that hardcore terrorists of "Khalistan Liberation Front' were in adjoining areas and they might have committed heinous crimes like murder, loot, land grabbing etc. and have created panic in the public. In this regard, ambush was laid by the police personnel including appellants as well as members of C.R.P.F. & S.P.F. on the date of the incident i.e. in the intervening night of 12/13.07.1991 in three different places in district Pilibhit i.e. Dhamelakuan forest falling in the jurisdiction of Neuria; Phagunaighat falling in the jurisdiction of police station Bilsanda; and Pattabojhi forest falling in the jurisdiction of police station Puranpur, in district Pilibhit. During the course of ambush, 5-6 Sikh terrorists appeared in Dhamelkuan forest and challenged the police team, upon which in retaliation, four Sikh terrorists were eliminated in Dhamelkuan forest by the police party, whereas in Phagunaighat forest, 4-5 Sikh terrorists appeared and challenged the police party, whereby in retaliation and in self-defense, three Sikh terrorists were killed and in Pattabojhi forest area of police station Puranpur, two Sikh terrorists were killed.

THE CASE OF THE PROSECUTION

(102) Public Interest Litigation No. 1118 of 1991 was filed by Shri R.S. Sodhi, Advocate, before the Apex Court, wherein the Apex Court, vide order dated 15.05.1992, entrusted the investigation of the cases relating to three incidents in district Pilibhit to C.B.I. In compliance of the order dated 15.05.1992 passed by the Apex Court, C.B.I. took over the investigation and started investigation of the case and registered three cases, as stated hereinabove.

(103) The case of the prosecution is that ten young Sikhs, who were eliminated by the police personnel/convicts in encounter, were not terrorists but they along with others (total 25-26 persons) had gone as pilgrims for paying obeisance in Huzur Sahib, Patna Sahib and Nanded from a bus, bearing registration No. UP 26/0245, on 29.06.1991. On 12.07.1991, at about 10-11 a.m., when they were returning from

pilgrimage and reached "Kachla Ghat' falling within the jurisdiction of police station Kotwali Soron, district Etah, the armed police personnel (convicts/appellants) intercepted the aforesaid bus; got into the bus; deboarded eleven Sikh persons; and boarded them in sky blue police bus. After that, some police personnel got into the passenger's bus and kept the bus moving around throughout the day and left this bus at a Gurudwara in Pilibhit in the night. In the meanwhile, 11 Sikh youths, who were deboarded from the bus, were divided into three parts and in the intervening night of 12/13.07.1991, they were killed by the police personnel /appellants in the night itself and after that further action showing the encounter with the terrorists, FIRs in connection with the encounter in police station Neoria, Police Station Bilsanda and Police Station Puranpur were registered.

FINDING OF THE TRIAL COURT

(104) The trial Court believed the testimonies of two witnesses, namely, P.W.11-Smt. Swarnjeet Kaur and P.W.13-Balwinderjeet Kaur and convicted and sentenced the appellants by means of the impugned judgment and order in the manner as stated hereinabove in paragraph-2, on coming to the conclusion that ten Sikh youths were killed in fake encounter after being kidnapped from the pilgrims' bus by the police personnel/appellants.

QUESTION

(105) From the rival submissions of the parties and also going through the record, there is no dispute that ten Sikhs youth were killed in three different places of the district Pilibhit as stated hereinabove, but question is that whether ten Sikh youths were actually killed in encounter by the police personnel/appellants as ten deceased persons were terrorists or whether ten Sikh youths/deceased persons were killed in fake encounter after kidnapping them from the pilgrim's bus by the police personnel/appellants.

RELIABILITY OF THE EVIDENCE OF BOOKING OF BUS, BEARING NO. UP26/0245 BELONGING TO PW5-AMIT KUMAR FOR PILGRIMS

(106) P.W.5-Amit Kumar was the owner of the bus, bearing No. UP 26/0245. His evidence shows that one Talwinder Singh (missing) had approached him for a bus for pilgrimage w.e.f. 29.06.1991 to 12.07.1991. After that he applied for temporary permit of his bus No. UP 26/0245 from 30.06.1991 to 13.07.1991 for plying it from Bareilly to Sitarganj (empty) and from Sitarganj to Patna Sahib and Huzur Sahib by enclosing two sets of the list of passengers. Pursuant to his aforesaid application, permit was granted to him from the office of R.T.O., Bareilly for plying his bus w.e.f. 30.06.1991 to 13.07.1991 in the aforesaid route. After that on 29.06.1991, Talwinder Singh came to his office and he handed over a copy of the temporary permit and list of passengers to him (P.W.5-Amit Kumar) as well as driver of the bus, namely, Musharraf. Thereafter, his bus went to pick up the passengers in Sitarganj and after picking up passengers, the bus returned to his office, wherein there were around 25-26 passengers in the bus. Thereafter, driver Musharraf returned around 08:00-08:30 a.m. on 13.07.1991 and told him that the bus was parked near the office.

(107) The testimony of P.W.5-Amit Kumar also established the fact that Talwinder Singh (missing) had booked the bus of P.W.5, bearing No. UP 26/0245, for

pilgrims w.e.f. 29.06.1991 to 12.07.1991 as is evident from the Receipt of New Hindustan Travels belonging to P.W.5 dated 20.07.1991, which was exhibited as Ext. Ka-7. From perusal of Ext. Ka.7, it transpires that bus of the P.W.5-Amit Kumar was booked by Talwinder Singh (missing) for pilgrims for plying it from Bareilly to Sitarganj (empty) and from Sitarganj to Patna Sahib and Huzur Sahib and also there was signature of Talwinder Singh in the Receipt (Ext. Ka.7).

(108) The testimonies of P.W.1-Brajesh Singh, who was the A.R.T.O., Bareilly at that relevant time and P.W.2-Ranvir Singh, who was the Senior Clerk in the office of R.T.O. Office, also shows that P.W.5-Amit Kumar applied for temporary permit of his bus No. UP 26/0245 from 30.06.1991 to 13.07.1991 for plying it from Bareilly to Sitarganj (empty) and from Sitarganj to Patna Sahib and Huzur Sahib by enclosing two sets of the list of passengers. Pursuant to his aforesaid application, permit was granted to him from the office of R.T.O., Bareilly for plying his bus w.e.f. 30.06.1991 to 13.07.1991 on the aforesaid route.

(109) From the testimonies of P.W.1-Brajesh Singh, P.W.2-Ranvir Singh and P.W.5-Amit Kumar, it is established that permit was granted to P.W.5-Amit Kumar for plying his bus, bearing No. UP26/0245 w.e.f. 30.06.1991 to 13.07.1991, from Bareilly to Sitarganj (empty) and Sitarganj to Patna Sahib and Huzur Sahib and also copy of permit along with list of passengers was provided to P.W.5-Amit Kumar from the office of R.T.O., Bareilly.

RELIABILITY OF THE EVIDENCE OF LIST OF PASSENGERS TRAVELING IN THE AFORESAID BUS, BEARING No. UP26/0245, BELONGING TO P.W.5-AMIT KUMAR

(110) Having dealt with the facts that bus of P.W.5-Amit Kumar was booked by Talwinder Singh (missing) for pilgrims and permit of bus, UP26/0245, was granted to the owner of the bus, namely, P.W.5-Amit Kumar for plying his bus, bearing No. UP26/0245 w.e.f. 30.06.1991 to 13.07.1991, from Bareilly to Sitarganj (empty) and Sitarganj to Patna Sahib and Huzur Sahib and also copy of permit along with list of passengers was provided to P.W.5-Amit Kumar from the office of R.T.O., Bareilly, now it is necessary to dwell upon the contentions put forth by the learned Counsel for the appellants which pertains to the acceptability and reliability of the factum of the list of passengers travelling in the bus, bearing No. U.P.26/0245.

(111) The contention of the learned Counsel for the appellants is that the list of passengers travelling in the bus belonging to P.W.5-Amit Kumar is highly doubtful and cannot be believable as the prosecution has failed to prove the facts that the list of passengers was the same which was provided to P.W.5-Amit Kumar by R.T.O. Office, Bareilly as the original list of passengers were missing and copy of the list of passengers produced by the prosecution is not readable. Their contention is that P.W.1-Brajesh Singh and P.W.2-Ranveer Singh had clearly stated in their depositions that the then Superintendent of Police (Rural), Bareilly, namely, Dayanidhi Mishra came to his R.T.O. office and enquired about the permit of the bus as well as list of passengers and after that on the request of Dayanidhi Mishra, the then Superintendent of Police,

photocopy of the original carbon copy of the list of passengers was provided to him. Later on, P.W.-2 Ranvir Singh made a complaint to the effect that from the file of permit, original carbon copy of the list of passengers is missing. Thus, the list of passengers produced by the prosecution is not reliable and is highly doubtful as list of passengers, which was placed on record by the prosecution, was also not legible, therefore, the prosecution's story of kidnapping ten Sikh youths from the pilgrims' bus cannot be believable. Furthermore, the prosecution though very well knew the fact that the then Superintendent of Police (Rural), Dayanidhi Mishra, took away the carbon copy of the list of passengers even though he had no concern with the same but it neither interrogated nor examined him. The prosecution has failed even to show the reason as to why the then Superintendent of Police (Rural) Dayanidhi Mishra was not examined by the prosecution. According to the appellants, except in the composite charge-sheet filed against the accused persons/appellants, none of prosecution witnesses had stated complete names of the persons said to have been travelled in the bus, therefore, the list of passengers produced by the prosecution cannot be believable and trustworthy.

(112) Refuting the aforesaid contention of the learned Counsel for the appellants in regard to list of passengers, Shri I.B. Singh, learned Counsel for the victim as well as learned Counsel for the C.B.I have drawn our attention to the charge-sheet and contended that the C.B.I., after due investigation, mentioned the names of the each passengers in the charge-sheet. Shri I.B. Singh, learned Senior Counsel, appearing on behalf of the victim, however, has stated that though Dayanidhi Mishra has no concern with the list of passengers but the Investigating Officer of C.B.I. had made serious lacunae by not examining Dayanidhi Mishra as prosecution witness.

(113) In response, learned Counsel for the C.B.I. has failed to show any cogent evidence which establishes the reason for not examining the then Superintendent of Police Dayanidhi Mishra as prosecution witness in order to testify the actual list of passengers who were said to have been travelling in the bus as pilgrims.

(114) It transpires from the evidence on record as well as rival submissions advanced by the parties that original list of passengers were not available either with the owner of the bus i.e. P.W.5-Amit Kumar or in the office of R.T.O., Bareilly during the course of investigation or during the course of trial as is evident from the evidence of P.W.1-Brajesh Singh and P.W.2-Ranvir Singh. P.W.1-Brajesh Singh had stated before the trial Court that after sometime of issuing the temporary permit to P.W.5-Amit Kumar, the then S.P. (Rural) Dayanidhi Mishra came to his office and inquired about the said permit and bus and requested to supply copy of permit of the bus, upon which copy of the permit was supplied to him. However, on the next day Ranvir Singh (P.W.2) made a complaint to R.T.O., Bareilly that original list of passengers were not tagged with the file, upon which R.T.O., Bareilly called an explanation from him.

(115) Ex Ka.5, which is an explanation sought by R.T.O. Bareilly to A.R.T.O. (E), Bareilly mentioned in the temporary application form, reads as under :-

"A.R.T.O. (E), cjsyh

परमिट लिपिक ने बताया है कि याची सूची की कार्बन कॉपी आप ले गये थे। जो फोटो

कॉपी संलग्न है वह अत्यन्त धॅधूली है। कॉर्बन कॉपी के बारे मे स्थिति से अवगत
कराये।

R.T.O.,बरेली
4/12/1991

(116) Ex. Ka. 1, which is the reply of A.R.T.O. (E), Bareilly in response to the aforesaid explanation, reads as under :-

"स0 परिवहन अधि. बरेली,
महोदय,
सूचित करना है कि ैण्च्ण् ;त्द्वए ठसल के चाहने पर मैने तथा पान्डेय जी ने यात्री सूची
की उपलब्ध कार्बन कॉपी की फोटो कापीयॉ राजन चपरासी के द्वारा करायी गयी थीं।
परमिट श्शाखा से दूसरे दिन ज्ञात हुआ कि मूल कॉर्बन कॉपी वहा वापस नही पहुॅची।
मैने तत्काल ैण्च्ण् ;त्।द्ध से सर्म्पक साधा तो उन्होने बताया कि उनके पास केवल फोटो
कॉपी है कार्बन कॉपी नही है।

A.R.T.O. (E), Bareilly
4/12/91"

(117) It transpires from Ex. Ka.1 and Ex. Ka.5 coupled with the depositions of P.W.1-Brajesh Kumar and P.W.2-Ranveer Singh that though the then Superintendent of Police (Rural) Dayanidhi Mishra had no concern with the list of passengers but even then he went to R.T.O. Office, Bareilly and took it but the prosecution has failed to examine Dayanidhi Mishra in order to testify the list of passengers nor the prosecution had tendered any explanation as to why the then S.P. (Rural), Dayanidhi Mishra was not produced before the trial Court for adducing evidence. Thus, it is quite apparent from the evidence of P.W.1 and P.W.2 that original list of passengers travelling the bus was missing and the copy of the list of passengers which was available was not legible.

(118) It is pertinent to mention at this juncture that Talwinder Singh, who booked the bus w.e.f. 30.06.1991 to 12.07.1991 for pilgrimage; Mushrraf, driver of the bus; and cleaner of the bus, were not examined by the prosecution as they were said to be missing during trial and it appears that the C.B.I. had not investigated the missing of the aforesaid persons, though they are the most valuable witnesses.

(119) P.W.11-Swarnjeet Kaur, who is the wife of deceased Harminder Singh *alias* Minta and P.W.13-Smt. Balwinderjeet Kaur *alias* Lado, who is the wife of deceased Baljeet Singh *alias* Pappu and sister-in-law of deceased Jaswant Singh. Both these witnesses stated in their testimonies that they were travelling with their relatives in the bus. P.W.11-Swarnjeet Kaur, in her cross-examination, had deposed that bus was big and 25-26 passengers were travelling but she did not know whether the bus was filled with passengers or not. P.W.11 had also stated that she did not know that out of 25-26 passengers, how many males; how many females; and how many children were travelling. P.W.11 had further stated that though she boarded from Nanakmatta but she did not know about other passengers and about the place of their boarding in the bus.

(120) P.W.13-Balwinderjeet Kaur *alias* Lado, in her examination-in-chief, had stated before the trial Court that total 25-26 passengers were travelling in the bus and out of 25-26 passengers, 10-11 young Sikh, 2-3 old persons, 2-3 children and others women were travelling in the bus.

(121) It transpires from the evidence of P.W.11-Swarnjeet Kaur and P.W.13-Balwinderjeet Kaur *alias* Lado that both these witnesses though stated to have

travelled along with them as pilgrims in the bus for about 13 days in different places, but even then, in their testimonies, both of them could not name each other or any other passengers travelling in the bus. It appears that both these witnesses though stated that 25-26 passengers were travelling in the bus for about 13 days but even then they did not know each other nor knew the name of other passengers.

(122) Taking into consideration the evidence of P.W.1, P.W.2, P.W.5, P.W.11 and P.W.13 in connection with the list of passengers coupled with the evidence of Investigating Officer Shri J.C. Prabhakar (P.W.29) and also the fact that 25-26 passengers were said to have been travelling in the bus, but the prosecution had only produced P.W.11 and P.W.13 as the persons travelling in the bus and the prosecution had also failed to show as to why other passengers were not examined, it transpires that the list of passengers mentioned only in the charge-sheet appears to be not trustworthy. It also transpires that except mentioning the names of the passengers in the charge-sheet, none of the prosecution witnesses had stated the facts that the name of the passengers mentioned in the charge-sheet were the same passengers travelling in the bus in question at the time of the occurrence. Furthermore, the prosecution had only examined P.W.11 and P.W.13 as the witnesses travelling in the bus but even they did not know the names of the passengers. The prosecution had not produced other passengers in the witness box nor tendered any explanation for not producing them as prosecution witnesses.

RELIABILITY OF THE EVIDENCE OF P.W.11-SWARNJEET KAUR, P.W.4- AJIT SINGH, P.W.13-BALWINDERJEET KAUR *ALIAS* LADO

(123) Now, we have considered the evidence of P.W.11-Swarnjeet Kaur, P.W.4-Ajit Singh, who is the father-in-law of P.W.11 and P.W.13-Balwinderjeet Kaur *alias* Lado. The evidence of P.W.11-Smt. Swarnjeet Kaur shows that she along with her husband Harminder Singh *alias* Minta (deceased) were boarded in the bus from Nanakmatta on 29.06.1991 for darshan of Nanakmatta, Patna Sahib, Huzur Sahib and other places and returned on 12.07.1991. According to her, when they were returning on 12.07.1991, the police stopped their bus near the barrier of a big river's bridge and after that several police personnel boarded on their bus and deboarded 10-11 young Sikhs and only 2-3 old persons, children and women were left in the bus. After that some police personnel boarded on the bus and some police personnel boarded 10-11 young Sikhs in police bus. Thereafter, the police personnel kept moving their bus here and there and in the evening, rest of the passengers were left in Pilibhit Gurudwara. In the night, she stayed in the Gurudwara and in the next morning, through a *Sewadar*, she sent a telegram to her father-in-law, upon which her father-in-law came from Punjab and when she was brought by her father-in-law to home, then, her father-in-law told her that her husband was killed by the police.

(124) The evidence of P.W.4-Ajit Singh, who is the father-in-law of P.W.11, shows that his son Harminder *alias* Minta (deceased) went along with his wife Swarnjeet Kaur (P.W.11) for pilgrimage tour from Nanakmatta, from where his son sent a telegram to the effect that they would go for Huzur Sahib and return on 15th or 16th. He stated that he came to know from

the newspaper that some pilgrims while returning from Huzur Sahib were killed, in which name of his son Harminder was also there. After 2-3 days of reading the newspaper, he went along with his daughter-in-law to Pilibhit and after that he went to leave his daughter-in-law to home from Pilibhit. He further stated that he came to know about the death of his son in police encounter from newspaper on 14th - 15th July, 1991.

(125) From the evidence of P.W.4-Ajit Singh and P.W.11-Swarnjeet Kaur, it transpires that statement of P.W.11-Swarnjeet Kaur that from a *Sewadar* of Pilibhit Gurudwara, she sent a telegram to her father-in-law (P.W.4-Ajit Singh), upon which her father-in-law (P.W.4-Ajit Singh) came and she was taken away to home where her father-in-law stated that her husband was killed, whereas P.W.4-Ajit Singh had stated before the trial Court that from the newspaper, he knew the killing of his son in a police encounter and thereafter he went along with his daughter-in-law (P.W.11) to Pilibhit. Thus, from the reading of the aforesaid, it is apparent that the statements of P.W.11-Swarnjeet Kaur and her father-in-law P.W.4-Ajit Singh are contradictory to each other, therefore, their statements in this regard cannot be said to be trustworthy.

(126) The evidence of P.W.13-Balwinderjeet Kaur *alias* Lado shows that on 29.06.1991, she along with her husband Baljeet Singh *alias* Pappu (deceased), her brother-in-law Jaswant Singh (deceased) and mother-in-law Surjeet Kaur, went for pilgrimage tour of Nanakmatta, Patna Saheb, Huzur Sahib etc. on a bus and after 12-13 days of tour, they were returning on 12.07.1991 and while returning, the police had stopped their bus near a bridge and after that 8-10 police personnel boarded from both the door of the bus and deboarded 10-11 young Sikhs including her husband and brother-in-law from the bus and boarded them in blue colour police bus. After that police personnel sat in their bus and kept moving their bus here and there whole day and in the evening, their bus was left in Pilibhit Gurudwara. The policemen told them that they deboarded the Sikh terrorists from the bus, therefore, they should not tell anyone about this. She also stated that while deboarding Sikhs, 2-3 Sikhs tried to run but they were caught by the villagers and handed over to the police.

(127) It transpires from statements of both P.W.11-Swarnjeet Kaur and P.W.13-Balwinderjeet Kaur that their bus left them in the evening of 12.07.1991 at Pilibhit Gurudwara but they did not tell anyone about alleged kidnapping or abduction of their husband or brother-in-law to anyone nor made any complaint either to police, even though according to their testimonies, large number of *Sewadar* and other pilgrims were present there.

(128) From the aforesaid as well as from careful reading of the evidences of P.W.11-Swarnjeet Kaur and P.W.13-Balwinderjeet Kaur coupled with the evidence of P.W.4-Ajit Singh, it appears that the presence of P.W.11 and P.W.13 in the pilgrims bus are doubtful.

CRIMINAL CONSPIRACY

(129) Now, this Court intends to address the issue which pertains to criminal conspiracy. The appellants before this Court were, charge-sheeted for the offence of criminal conspiracy within the meaning of Section 120B IPC apart from other offences. The trial Court found all the

appellants guilty of the offences under Section 120B IPC and awarded sentence in the manner as stated in paragraph-2 hereinabove.

(130) Before analyzing the present facts with reference to Section 120B IPC in order to find out whether the charge of criminal conspiracy is proved in respect of each of the appellants, it is pertinent to note that Section 120B I.P.C. which is reproduced below :-

"120B. Punishment of criminal conspiracy - (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

(131) A perusal of the above shows that in order to constitute an offence of criminal conspiracy, two or more persons must agree to do an illegal act or an act which if not illegal by illegal means.

(132) The Apex Court on several occasions has explained and elaborated the element of conspiracy. In **Noor Mohammad Mohd. Yusuf Momin vs State of Maharashtra** : (1970) 1 SCC 696, the Apex Court has observed:

"Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107, I.P.C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested, quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence."

(133) In **E.G. Barsay v. State of Bombay : AIR 1961 SC 1762,** the following was stated :-

"..... The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.

(134) A three-Judge Bench in **Yash Pal Mittal v. State of Punjab : (1977) 4**

SCC 540 had noted the ingredients of the offence of criminal conspiracy and held:

"10. The main object of the criminal conspiracy in the first charge is undoubtedly cheating by personation. The other means adopted, inter alia, are preparation or causing to be prepared spurious passports; forging or causing to be forged entries and endorsements in that connection; and use of or causing to be used forged passports as genuine in order to facilitate travel of persons abroad. The final object of the conspiracy in the first charge being the offence of cheating by personation, as we find, the other offences described therein are steps, albeit, offences themselves, in aid of the ultimate crime. The charge does not connote plurality of objects of the conspiracy. That the appellant himself is not charged with the ultimate offence, which is the object of the criminal conspiracy, is beside the point in a charge under Section 120-B IPC as long as he is a party to the conspiracy with the end in view. Whether the charges will be ultimately established against the accused is a completely different matter within the domain of the trial court.

11. The principal object of the criminal conspiracy in the first charge is thus "cheating by personation", and without achieving that goal other acts would be of no material use in which any person could be necessarily interested. That the appellant himself does not personate another person is beside the point when he is alleged to be a collaborator of the conspiracy with that object. We have seen that some persons have been individually and specifically charged with cheating by personation under Section 419 IPC. They were also charged along with the appellant under Section 120-B IPC. The object of criminal conspiracy is absolutely clear and there is no substance in the argument that the object is merely to cheat simpliciter under Section 417, IPC."

(135) As already stated, in a criminal conspiracy, meeting of minds of two or more persons for doing an illegal act is the *sine qua non* but proving this by direct proof is not possible. Hence, conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. Moreover, it is also relevant to note that conspiracy being a continuing offence continues to subsist till it is executed or rescinded or frustrated by the choice of necessity. In **K. R. Purushothaman v. State of Kerala : (2005) 12 SCC 631,** the Apex Court has made the following observations with regard to the formation and rescission of an agreement constituting criminal conspiracy:

"To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary ondition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by

reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is *sine qua non* for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement."

(136) From the law discussed above, it becomes clear that the prosecution must adduce evidence to prove that :-

(i) the accused agreed to do or caused to be done an act;

(ii) such an act was illegal or was to be done by illegal means within the meaning of IPC; and

(iii) irrespective of whether some overt act was done by one of the accused in pursuance of the agreement.

(137) In the instant case, the prosecution has examined PW-11 Swarnjeet Kaur and P.W.13-Balwinderjeet Kaur to prove the charges of conspiracy in the bus on the date of the incident. They were presented to support the prosecution case that immediately preceding the fateful incident, when they were returning from pilgrimage through a bus, police personnel including the appellants had, in execution of their conspiracy, stopped the bus near the bridge of the river; deboarded 11 Sikhs youths from the bus and boarded them in a blue colour bus; some police personnel were boarded in the bus and their bus were roaming here and there whole day and in the evening they were dropped in Pilibhit Gurudwara.

(138) The defence has controverted the testimony of PW-11 and P.W.13 on several aspects which has already been discussed hereinabove. It has been alleged that P.W.11 and P.W.13 are the interested and tutored witnesses and their presence in the bus at the time of the incident as well as in Pilibhit Gurudwara is doubtful. P.W.11 and P.W.13 were brought in by the Investigating Officer to fill the lacunae, if any, in their investigation and to further make a strong case against the appellants. The defence has further denied the presence of appellants on the bus.

(139) First of all, in order to prove kidnapping and abduction of ten Sikhs from the pilgrimage bus, the prosecution has relied upon the testimony of PW-11 and P.W.13. As stated hereinabove, the testimonies of the P.W.11 and P.W.13 shows that their presence on the said pilgrimage bus at the time when the alleged 10 Sikhs youths were deboarded from the bus is extremely doubtful.

(140) During the trial, the identification of the appellants were not done by the prosecution from P.W.11 and P.W.13 and further the prosecution witnesses have claimed that 25 persons/passengers were travelling in the pilgrimage bus but the prosecution has failed to show any reason as to why only two passengers i.e. P.W.11 and P.W.13 out of 25 passengers were produced by them in order to prove its case.

(141) From the aforesaid, it transpires that the testimonies of P.W.11 and P.W.13 about kidnapping of 10-11 Sikhs by the police personnel appears to be not probable. It also transpires from statements

of prosecution witnesses that except P.W.11 and P.W.13, the prosecution has failed to produce any other witnesses viz. other passengers travelling in the bus. The villagers who caught 2-3 young Sikhs while they tried to run in order to escape and handed them over to the policeman, have not been examined. No independent witnesses with regard to kidnapping of 10-11 young Sikhs were examined by the prosecution. It also transpires from the record that none of the prosecution witnesses had identified the convicts/appellants by stating that they were the appellants who kidnapped and abducted 10-11 Sikhs from the pilgrimage bus. Even no identification was made by the prosecution nor P.W.11 and P.W.13 had identified the convicts/appellants to the effect that they were the appellants who kidnapped or abducted their husbands/deceased.

(142) From the aforesaid, it is quite apparent that the prosecution has failed to prove the facts that the police personnel had kidnapped or abducted 10-11 Sikh persons and after that by making criminal conspiracy with common intention, bifurcated them in three groups and killed them at three separate places i.e. Neoria, Bilsanda and Pooranpur. Thus, from the consideration in totality of circumstances and the evidence in the case, this Court is not inclined to accept that the prosecution had established the fact that the appellants committed criminal conspiracy in the kidnapping, abduction and murder of ten Sikh youths, hence conviction and sentence of appellants under Sections 302/120-B, 364/120-B, 365/120-B, 218/120-B, 117/120-B I.P.C. are not at all just and proper.

(G) CONVICTION

(143) Now, the question then would be what offence is made out. We have given our anxious thought to this question.

(144) The case of the appellants was that they killed ten terrorists persons as they eliminated them in self defense because when they saw the terrorists came out from the forest area, then, they challenged them and all of a sudden, the terrorists opened fire and in retaliation and in self-defense, the appellants had opened fire and in that way, ten terrorists persons were killed in the firing.

(145) The claim of the appellants that they killed ten terrorists persons in self-defense does not corroborate with the medical evidence as from perusal of the ante-mortem injuries of four deceased persons out of ten deceased persons killed in the forest area of Phagunai Ghat within the jurisdiction of Police Station Bilsanda, District Pilibhit, it transpires that apart from injuries of fire arm, lacerated and abrasion wounds as well as amputation were found on the body of the four deceased persons. The appellants have failed to explain/prove the lacerated wounds, abrasions and amputation caused on the body of the deceased.

(146) It is not the duty of the police officers to kill the accused merely because he/she is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial.

(147) From the aforesaid, we are of the opinion that the case of the appellants would be covered by Exception 3 to Section 300 of the I.P.C., which provides that culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement

of public justice, exceeds the powers given to him. by law, and causes death by doing an act which he, in good faith, thinks to be lawful and necessary for the due discharge of his duty as a public servant without ill-will towards the person whose death he has caused.

(148) Admittedly, it appears from the entire evidence and the material on record that the higher authorities on the basis of confidential police reports believed that there were some terrorists, who were travelling with the passengers/pilgrimage to Nanakmatta, Patna Sahib, Huzur Sahib, were intercepted by the appellants and out of those passengers travelling in the bus, 10-11 young Sikhs were taken in the police bus and they were killed by the appellants, who are police personnel in three different places i.e. Neoria, Bilsanda and Puranpur. The prosecution has shown criminal antecedents of four to six deceased who were involved in various terrorist activities in Punjab and they in order to promote the Liberation of Khalistan were also operating in the *tarai* region of district Pilibhit and nearby areas, were eliminated in police encounters by the appellants who have also admitted this fact in their statements under Section 313 of the Cr.P.C. before the trial Court. They participated in the three respective police teams which shot dead ten Sikh terrorists within the jurisdiction of three police stations Neoria, Bilsanda and Puranpur.

(149) The act of the appellants in eliminating the terrorists who were involved in various criminal cases of murder, loot, TADA activities as has been demonstrated from the criminal antecedents of some of the deceased, namely, Baljit Singh *alias* Pappu, Jaswant Singh, Harminder Singh *alias* Minta, Surjan Singh *alias* Bittu, Lakhvinder Singh but the appellants have failed to lead any defence against the other deceased whether they were also involved in terrorist activities with the four to six deceased and it was only argued by the appellants Counsel that other deceased who were shot in encounter were the companions of the four deceased, hence they were also killed in encounter but this contention of the learned Counsel for the appellants is not at all acceptable as act of the appellants cannot be justified to kill innocent persons along with some terrorist taking them to be also terrorists.

(150) In the present case, there was no ill-will between the appellants and the deceased persons. The appellants were public servants and their object was the advancement of public justice. No doubt, appellants exceeded the powers given to them by law, and they caused the death of the deceased by doing an act which they, in good faith, believed to be lawful and necessary for the due discharge of their duty. In such circumstances, the offence that was committed by the appellants, was culpable homicide not amounting to murder punishable under Section 304 of I.P.C. Thus, we are of the view that the appellants should have been convicted under Section 304 Part-I I.P.C. instead of Section 302 I.P.C.

(H) CONCLUSION

(151) For reasons stated hereinabove, the above-captioned appeals are **partly allowed.** The conviction and sentence of the appellants under Sections 302/120-B, 364/120-B, 365/120-B, 218/120-B, 117/120-B I.P.C. by means of the impugned judgment and order dated 04.04.2016 passed by the trial Court are hereby set-aside. However, this Court convicts the

appellants under Section 304 Part I of the Indian Penal Code and sentences them to seven years' rigorous imprisonment along with fine of Rs.10,000/-, which this Court considers adequate in the circumstances of the case. In default of payment of fine of Rs.10,000/-, appellants shall undergo additional imprisonment of three months.

Appellants Devendra Pandey and Mohd. Anish of Criminal Appeal No. 549 of 2016; appellants Vijendra Singh, M.P. Vimal, R.K. Raghav, Surjeet Singh, Rashid Hussain, Syed Aale Raza Rizvi, Satya Pal Singh of Criminal Appeal No. 513 of 2016; and appellants Harpal Singh, Subhash Chandra of Criminal Appeal No. 551 of 2016, are on bail and shall be taken into custody forthwith to serve out their sentence as directed hereinabove.

The other appellants, namely, Ramesh Chandra Bharti, Veer Pal Singh, Nathu Singh, Sugam Chand, Collector Singh, Kunwar Pal Singh, Shyam Babu, Banwari Lal, Dinesh Singh, Sunil Kumar Dixit, Arvind Singh, Ram Nagina and Vijay Kumar Singh in Criminal Appeal No. 549 of 2016; appellants Udai Pal Singh, Munna Khan, Durvijay Singh, Gaya Ram, Register Singh, Durvijay Singh son of Dila Ram, Harpal Singh and Ram Chandra Singh in Criminal Appeal No. 513 of 2016; and appellants Rajendra Singh, Gayan Giri, Lakhan Singh, Nazim Khan, Narayan Das, Krishan Veer, Karan Singh, Rakesh Singh, Nem Chandra, Shamsher Ahmad, Sailendra Singh, are in jail and shall serve out the sentence as directed hereinabove.

(152) Office is directed to transmit the lower Court record along with a copy of the judgment to the Court concerned forthwith.

(2022) 12 ILRA 111
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 21.12.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 657 of 1982

Raj Kumar & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sanjai Srivastava, R.N.S. Chauhan

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 148, 149 & 302 - Challenge to-Conviction- P.W.-1, the complainant ,witnesses P.W.-4 and P.W.-5 stated that the deceased was going to the shop of Doctor for bandage -when the complainant alongwith his brother) reached in front of the shop five accused assaulted collectively upon the deceased severed his head from the body, the head and body was put on fire and set-ablazed-P.W.-1 brother of deceased, his evidence could not be thrown aside merely on the ground that he is brother of deceased. He categorically explained how the accused dragged his brother (deceased), severed his head and again dragged the body and head towards the field -The manner in which murder is committed leads to the conclusion that no independent witness can dare to come forward and deposed in the court against appellants-Therefore, in these circumstances it is not expectation of law to demand corroboration of evidence by independent witness or villager-Thus the evidence of P.W.-1 is natural and reliable-During the cross examination too the witness corroborated the incident, in consonance with the evidence of P.W.-1 -There is no material contradictions in the evidence of P.W.-1

and P.W.-4.-Therefore, the evidence of P.W.-4 cannot be discarded only on the ground that he was inimical witness and co-accused in the murder of grand son and the son of his brother-in- the police officials recovered the body of deceased in semi burnt stage- It is also evident from the evidence on record that the accused were more than five in numbers and they have motive to murder, as the deceased was accused in the murder of grand son and the son of his brother-in-law- Prosecution proved motive, place of occurrence and injuries on the corpse of deceased by the cogent evidence.-Injuries are corroborated by the witnesses of fact and doctor. Accused-appellants are said to have used Gun, Banka, Kanta and Ballam in the incident and the injuries of all the four arms are found on the body of deceased- Severed head of deceased and the body separated were recovered in the semi burned condition in the field-Learned trial court has given very clear and convincing reasoning elucidated all the evidences. There is no infirmity or perversity in the judgment and order passed by learned trial court. (Para 19 to 24)

B. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now wellsettled that a related witness cannot be said to be an "interested' witnesses merely by virtue of being a relative of the victim. This court has elucidated the difference between "interested' and " related' witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused. (Para 18)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Kartik Malhar Vs St. of Bih. (1996) 1 SCC 614

2. Rameshwar Vs St. of Raj. (1952) SCR 377= AIR 1952 SC 54

3. Mohd. Rojali Vs St. of Assam (2019) 19 SCC 567

4. St. of Raj. Vs Kalki (1981) 2 SCC 752

5. Amit Vs St. of U.P. (2012) 4 SCC 107

6. Gangabhavani Vs Rayapati Venkat Reddy (2013) 15 SCC 298

7. Ganapathi Vs St. of T.N. (2018) 5 SCC 549

8. Dalip Singh Vs St. of Punj. (1954) SCR 145

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

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. The present Criminal Appeal has been filed under Section 374(2) Cr.P.C. against the judgment and order passed by IIIrd Additional Sessions Judge, Sitapur, on 28.08.1982, convicting the appellants Raj Kumar, Jagannath and Mullu in Sessions Trial No.100 of 1980 and sentencing them to rigorous imprisonment for life and fine of Rs.1000/- each under section 149 read with section 302 IPC, rigorous imprisonment of six months in default of payment of fine and one year rigorous imprisonment under section 148 IPC.

2. Wrapping the facts in brief, complainant alongwith his brother Krishna Behari @ Krishna (deceased) was going for bandage to Ganj Bazar, as deceased had sustained sprain in his foot. When they reached near the shop of Dr. Nisar at about 12.30 p.m. the accused Rajkumar @ Babu son of Bhabhuti armed with Ballam, his brother Jagannath armed with Kanta, Mullu son of Jagannath armed with Banka and Dinesh son of Kameshwar armed with gun, dragged the deceased and reached in front

of liquor shop, where Kameshwar Pradhan son of Raghuveer armed with Banka, his brother Ram Autar having Lathi, Kaushal Kishore @ Karna son of Ram Autar having Banka, Ram Lakhan son of Shriram armed with gun and his brother Kanshiram having Katta(pistol) and Sriram son of Jagnu armed with Gandasa were standing. The accused Kameshwar Pradhan sought and abated to kill the deceased by severing the head of the deceased. Thereafter all the accused assaulted collectively on deceased with the arms in their hands. The complainant raised alarm then Om Prakash son of Ram Gopal, Virendra @ Babu son of Jai Daya, Chandrika son of Matadeen, Premsagar son of Channu Lal, Darbari Lal son of Asharfi Lal, Mangu Lal son of Rameshwar reached and witnessed the incident. They raised alarm, then the accused aimed the gun at them and threatened them to kill if they come forward, therefore, the complainant could not save the deceased. The accused severed the head of his brother (deceased). The accused Kameshwar Pradhan picked up the severed head and remaining accused dragged the body of deceased by his legs towards the field via road and grove of Vednath Taula. They followed the accused to some distance. Many villagers gathered there and the accused ablazed the dead body of the deceased. Elder brother of the complainant Pyare Lal and the ladies of his house and other villagers arrived and challenged the accused at the spot, then the accused took to their heels towards the field of sugar cane. The complainant Radhey Shyam and others extinguished the fire and took out the body and the head of deceased Krishna Behari @ Krishna from fire and brought the dead body of deceased to his home. It is also stated in the FIR that the complainant and the deceased were named in the murder of grand son Kameshwar Pradhan and the son of his brother-in-law (Sadhu) namely Subhkaran and they had previous enmity on this account with the accused.

3. On the basis of written report (Ex. Ka-1), a case of murder was registered on G.D. No.20(Ex. Ka-2) on 05.02.1979 at 14.00 p.m. The investigation was conducted by S.I. Shesh Ram Singh. He reached on the spot at 3.15 p.m. conducted inquest proceedings and prepared inquest report (Ex. Ka-6). Sealed the dead body and handed it over to Constable Ram Prasad at 4.15 p.m. He prepared Challan Lash (Ex. Ka-7), Photo Lash (Ex. Ka-8), Sample of the seal (Ex. Ka-9) and letter to the C.M.O. (Ex. Ka-10), inquest report and the copy of the FIR (Ex. Ka-11) and handed over these documents to the constable. The special report of the occurrence was forwarded from the police station at 2.50 p.m. through constable Rameshwar Prasad vide G.D. No.21(Ex. Ka-23). The investigating officer, S.I. Shesh Ram Singh recorded the statement of witnesses at police station and sent other police force in the search of the accused persons and he himself proceeded to inspect the place of occurrence. Prepared site plan (Ex. Ka-16) on the pointing out of complainant. Collected ash of the leaves from the field of Ram Sagar, sealed it and prepared recovery memo (Ex. Ka-12), prepared the recovery memo of unburnt leaves (Ex. Ka-14), collected blood stained and plain earth from the place of occurrence, sealed and prepared recovery memo (Ex. Ka-13), collected blood stained and semi burnt clothes of deceased, sealed the same and prepared recovery memo (Ex. Ka-15) and then recorded the statements of Om Prakash, Darbari Lal, Satrohan Lal, Pyare Lal, Surajdin, Chandrika Mangu Lal and Virendra. The investigating officer also

recorded the statements of Premsagar and Pyare Lal. However, the statements of Nisar and other shop keeper could not be recorded at that time due to their unavailability. The statements of Kamla Devi, Smt. Rajrani, Swami Dayal, Ram Sahai, Ved Nath Taula, Nisar Ahmad, Mewa Lal, Ram Sagar and Chedu were also recorded later on during the investigation. After recording the statements of witnesses and collecting sufficient evidence against the accused persons, adopting the result of postmortem report, the charge sheet has been submitted by the investigating officer in the court.

4. Trial court framed the charges against the accused under sections 147. 148, 302, 201, IPC against all the 10 accused persons. The accused abjured from the charges and claimed to be tried.

5. The prosecution examined 10 witnesses in support of prosecution case. P.W.-1, Radhey Shyam, P.W.-4 Premsagar and P.W.-5, Virendra, are witnesses of facts. P.W.-3 Dr. R. V. Singh, P.W.-2 Head Constable Bansi Lal, who registered the case, P.W.-6 Ram Autar Singh, A.S.I., who received the case property in the Malkhana and had issued it for being sent to chemical examiner, P.W.-7 Constable Ram Prakash, who carried the dead-body to the mortuary, P.W.-8 Constable Ayodhya Prasad, who had deposited the case property in the Sadar Malkhana, P.W.-9 Sri V. K. Tandon, Clerk of Sadar Hospital, who sent the case property for the Chemical Examination. P.W.-10 Shesh Ram Singh, who investigated the case. After conclusion of the prosecution witlessness the statement of accused were recorded under section 313 Cr.P.C. Only one witness i.e. D.W.-1 constable Harishankar Mishra was adduced in defence evidence. During the trial the accused Dinesh son of Kameshwar had expired and the case was abated against him.

6. Having perused the evidence on record and hearing the submissions advanced by the State Counsel and the counsel for the accused, the trial court reached to the conclusion that complainant Radhey Shyam who was with the deceased could not commit a mistake in identification of accused, as they were armed with Gun, Banka, Kanta and Ballam. These weapons can account for all the injuries found at the person of deceased. As regard to the assailants the evidence is consistent that accused were in front of liquor shop and had participated in the assault. It was also concluded that even though there were reliable evidence that there were number of assailants who were loaded with gun and involved in firing. There is reasonable doubt that those assailants included the other six also besides Ram Kumar, Jagannath, Mullu and Dinesh, therefore, learned trial court acquitted six of the assailants Ram Autar, Kaushal Kishor, Ram Lakhan, Kashiram, Kameshwar and Shri Ram, of the charges levelled against them and convicted to the accused Raj Kumar, Mullu and Jagannath of the charges under sections 149 read with section 302 IPC and section 148 IPC. Accused Dinesh expired during the course of trial & case was abated against accused Dinesh. Aggrieved with the judgment and order dated 27.08.1982 passed by learned trial court, the present appeal is filed.

7. We have heard the submissions of Sri R. N. S. Chauhan, learned counsel for the appellants and Ms. Smiti Sahay, learned Additional Government Advocate for the State and perused the material brought on record.

8. Learned counsel for the appellants argued that the statements of witnesses are contradictory inter se and medical evidence do not corroborate the oral evidence. The appellants are innocent and falsely implicated in the case. The sentence awarded to them is too severe and im-proportionate to the crime. Therefore it is prayed to allow the appeal and acquit the appellants.

9. On the other hand, contrary to it the learned AGA for the State-respondent vehemently opposed and argued that this is case of very brutal murder and all the accused armed with Gun, Banka, Kanta and Ballam assaulted the deceased, as they have a suspicion that the deceased murdered the grand son of village pradhan Kameshwar. The head of deceased was severed from his body and holding the severed head in his hand, accused Kameshwar wandered in whole of the village along road and grove and the remaining part of dead body was dragged with legs by the other assailants. Therefore, the judgment passed by the learned trial court is in consonance with the evidence on record. Therefore, it is prayed to reject the appeal filed by the appellants.

10. To recapitulate the evidence produced by the prosecution, P.W.-1, the complainant Radhey Shyam, witnesses P.W.-4 Premsagar and P.W.-5 Virendra have stated that the deceased was going to the shop of Dr. Nisar Ahmad for bandage at about 12.30 p.m., when the complainant alongwith his brother Krishna Bihari (now deceased) reached in front of the shop of Dr. Nisar Ahmad, the accused Raj Kumar, Jagannath, Mullu and Dinesh reached. The accused Raj Kumar with Ballam, Jagannath with Kanta, Mullu with Banka and Dinesh with gun, assaulted collectively upon the Krishna Bihari (deceased), severed his head from the body, the head and body was put on fire and set-ablazed, it is to be examined as to how far the prosecution case is corroborated by medical evidences. P.W.-3 Dr. R. B. Singh conducted autopsy on the dead-body of the deceased and found following injuries on his person:-

"1. Incised wound 5 cm. x 1.5 cm. x bone deep on the left side of top of head, 5.5 cm. above the left eye brow.

2. Fire arm wound of entry 4 cm. x 3 cm. x bone deep on the left eye, margins were ragged.

3. Fire arm wound multiple in number in an area of 5 cm. x 5 cm. around injury no.2, each measuring 0.2 cm. x 0.2 cm. x skin deep.

4. Lacerated wound 3.5 cm. x 1.5 cm. x bone on the right side of the back of the head, 9.5c.m. behind the right ear.

5. Incised wound 10 cm. x 1.5 cm. x bone deep (cut) starting behind the right ear from the head.

6. Incised wound 10 cm. X 1.5 cm. x bone deep (cut) on the back side of head and 0.5 below injury no.5.

7. Incised wound (with four blows) 19 cm. x 14 cm. x thickness, starting from occipital bone to lower border of lower jaw, head severed from the neck of the the level of second, cervical vertebra (body cut) wound smeared in dust and earth.

8. Incised wound 18 cm. x 13 cm. joint thickness of neck, body of second cervical vertebra cut.

9. Incised wound 9 cm. x 2 cm. x bone deed in front of neck 5 cm. below injury no.8.

10. Incised wound 12 cm. x 2 cm. x muscle deep, the left side of neck, 1 cm. below injury no.1.

11. 5 incised wounds all muscle deep in an area of 13 cm. x 9 cm. on the

back of neck, all place one blow the other, largest one was 10 cm. x 1.5 c.m. x muscle deep and the smallest was 8.3 c.m. x 1.5 c.m. x muscle deep.

12. Incised wound on the top of right shoulder 5 cm. x 2 cm. x muscle deep.

13. Stab wound 1.5 cm. x 1 cm. x cavity deep in front of abdomen 5 cm. above amblicus.

14. Punctured wound 1 cm. x 1 cm. x bone in the mid-line of back, 1 cm. above the lumbo sacrel joint.

15. Multiple abrasion in front of chest and abdomen in an area of 28 cm. x 23 cm.

He further stated that on internal examination he found the following facts:-

Occipital, right temporal bones with linear fracture and frontal bone was fracture into pieces. The brain membrance was lacerated, brain membrance in the frontal lobe was lacerated, 7 pellets were plunged in the brain and were recovered, right middle and left anterior cranial foesa were fractured. Second vertebra of neck was cut. The spinal cord was wholly cut at the level of second vertebra of neck. The larynx, trachea, and the neck vessels were cut. The abdomen peritonium etc. were punctured, mesentery was lacerated and there was 1 pound blood in the cavity. There was 80 ounce food in the stomach and the stomach was perforated near the pyloric end. The small intestine was full. The large intestine and the rectum were empty. The doctor was of the opinion that the death was the result of shock and haemorrhage due to the above mentioned injuries."

According to the doctor, after death there were burns on the head and the body, pubic hair, eye brows and scalp hair etc. and head was blackened by smoke. The head was severed from the body at the level of second neck vertebra.

11. P.W.-2 Constable Banshilal appeared and deposed in the court and proved G.D. No.21, time 14.50 p.m. dated 05.02.1979 (Ex. Ka-3). P.W.-6 Assistant Sub-Inspector Ram Autar Singh appeared in the court and has stated that the case property of the deceased was submitted by Constable Ayodhya Prasad to the Malkhana and it was send for chemical examination by the same constable Ayodhya Prasad. The witness proved the entry of the case in register at Sl. No.402. P.W.-7 Constable No.494 Ram Prasad deposed in court that he received the dead body of the deceased Krishna in sealed condition and submitted it alongwith requisite papers to the Police Line Sitapur, which was entered in G.D.No.22 at 10.30 a.m. on 06.02.1979. The dead body remained in sealed condition during the period it was in his custody. P.W.-8 Ayodhya Prasad deposed in the court that he has submitted the case property in Sadar Malkhana and re-submitted it in C.M.O. Office Sitapur and the case property remained in sealed condition during this period. P.W.-9 V.K. Tandon, the clerk in District Hospital Sitapurt appeared and deposed in the court that he received the case property in sealed condition from C.P. No.366 Ayodhya Prasad and send the same for chemical examination to Agra through railway department. P.W.-10, Sub-inspector Shri Shesh Ram Singh appeared in court and proved the FIR Ex. Ka-1, inquest report (Ex. Ka-6), Challan Lash (Ex. Ka-7), Photo Lash (Ex. Ka-8), Sample of the seal (Ex. Ka-9) and letter to the C.M.O.(Ex. Ka-10), copy of chek report (Ex. Ka-11), Ex. Ka-6 to Ka-11 and handed over these documents. Witness proved recovery memo of cloths Ex. Ka-12 and half burnt leaves and clothes of the deceased Ex.Ka-14. Recovery memo of half burnt pieces of Tahmad, shirt, blood stain vest of deceased, Ex. Ka-15 and

material exhibit as well. P.W.-10 proved site plain Ex. Ka-16 and also proved the charge sheet Ex. Ka-17 as a secondary evidence. It transpires from the FIR that incident took place in broad day light at 12.30 p.m. on 05.02.1979 and the report was lodged orally at 14.00 p.m. on the same day.

12. The distance between the place of occurrence and the police station is 5 Km., therefore, there is no delay in lodging the FIR. From the contents of FIR it is also clear that accused Rajkumar, Jagannath, Mullu and Dinesh are named in the FIR itself. The role assigned to Kameshwar Pradhan, Ram Auta, Kaushal Kishor, Ram Lakhan, Shri Ram and Kashiram is of exhortation.

13. It argued on behalf of appellant that the time of death is not ascertained by the evidence of prosecution and the time of death could vary by six hours. In this contest it is pertinent to mention that the FIR of the incident was lodged at police station at 14.00 p.m., inquest was started at 15.15 p.m. and concluded at 16.15. p.m. The postmortem of the deceased was conducted on 06.02.1979 at 11.00 a.m. at District Hospital, Sitapur. P.W.-3 Dr. R. V. Singh deposed that he conducted postmortem of the deceased at 11.00 p.m. on 06.02.1979. In his cross examination P.W.-3 stated that dead body had arrived at 10.00 a.m. on 06.02.1979. Duration of time of death may vary six hours either way. As per postmortem report small intestine was filled with faecal matter and large intestine and rectum were empty. It is argued that if the death of deceased is presumed at 12.30 p.m. then he must have taken food before six hours prior to his death. Without entering to the petty controversy we are of the view that the prosecution version is corroborated by medical report, regarding the date and time of the death of deceased at about 12.30 a.m. to 1.00 a.m. on 05.02.1979. Learned counsel for the appellant further argued that the place of occurrence is not fixed by prosecution. From the FIR version itself it is clear that the incident occurred in front of the shop of Dr. Nisar Ahmad. It transpires from the site plan that deceased was caught by the accused from road in front of the shop of Dr. Nisar Ahmad and severed the head of deceased in front of liquor shop. P.W.-10 deposed in court that he collected blood stain and plain earth from the place shown in his map by letter-B. The deceased was dragged by his legs along the road and blood was collected by the investigating officer from the place shown in his map by letter-C. Investigating officer also shown the place-D in site plan where dead body and severed head was lying in the field of Ram Sagar. Thus there is no doubt in the place of occurrence, as the plain earth and blood stain earth was collected by investigating officer from the places B and C shown in the map and recovered the body from place D. There are four places of occurrence. "A"- The point where the deceased was caught, "B"- where the deceased was murdered, "C"- where the blood was found and dead body of deceased was dragged, "D"- where the deceased was set-ablazed, and all the four points were proved by witnesses. The blood stained and plain material of Kharanja (Ex. Ka-8, 9, 10 and 11) were produced and proved in the trial court. The material collected was send for chemical examination. The chemical report Ex. Ka-5 is on record, as per FSL report human blood was found on the piece of Tahmad, Baniyan and blood stain earth. The witness stated that he found blood stains in the field of Ram Sagar and as per Ex. Ka-5, the

large quantity of blood was found in blood stain earth, which was collected from the fields of Ram Sagar. Therefore, the prosecution proved by ample evidence that Krishna Bihari (deceased) was caught from road side in front of the shop of Dr. Nisar Ahmad, dragged by accused to the shop of liquor and his head was chopped at place "B' and as it is the prosecution case that accused dragged him from the legs along the road and in front of north western corner of the grove of Vednath Taula and finally took him to the fields of Ram Sagar and set his dead body and head ablazed.

14. It is version of prosecution case that the deceased was assaulted by Ballam, Kanta, Banka and Gun by the accused. P.W.-1, 4 and 5 are the witnesses of facts proved the prosecution case in this regard, which is further corroborated by medical evidence. As per postmortem report Ex. Ka-4, 7 pellets were recovered from the body of the deceased, which were sent to S.P. Sitapur in sealed cover through the accompanying constable. Occipital and right temporal bone was found linearly fractured and frontal bone fractured in pieces. The membrane of head were lacerated and the brain membrane in the frontal lobe was lacerated and pellets were recovered from brain. As per postmortem report the second cervical vertebra was cut. The spinal cord was also cut at the level of second cervical vertebra. The larynx, trachea and neck vessels were also found cut. Punctured wound were found in the whole peritoneum in cavity of abdomen. Stab wound 1.5 cm. x 1 cm. cavity deep and puncture wound of 1 cm. x 1 cm. bone is also detected by doctor at the time of postmortem. The injury stated by prosecution witness is fully corroborated by the medical evidence and it is fully proved that sharp edged weapon, pointed weapon, fire arm weapons were used to cause the death of deceased. Doctor opined that the death of deceased was due to shock and hemorrhage as a result of antemortem injuries. In the external examination it is opined by the doctor that left side lacerated head blackened due to smoke, body senured in dust, scalp hair and left eye brow were burnt and charring on head, right and left forearms lower neck and back pubic hair and head separated from the body at the level of second cervical vertebra.

15. P.W.-10 Shri Shish Ram Singh stated that he found the head of Krishna Bihari severed from the body when he visited the fields of Ram Sagar, after lodging of the FIR and he found the injuries, corresponding to the injuries noticed by the doctor and the burn injuries were also found on the body and head. Therefore, there is no scope to dispute that the deceased was killed in some other manner, than that of prosecution case and evidence of prosecution established beyond any shadow of doubt that the deceased was assaulted with sharp edged, pointed, blunt object and was also fired by the appellant-accused.

16. It is also argued on behalf of appellants that bare reading of the statement of P.W.-4 and P.W.-5 shows that the witnesses were not present on the spot at the time of occurrence and they appeared and deposed before the court because they are interested witnesses and P.W.-1 is real brother of deceased, other witnesses are close relative to the deceased and their presence at the spot is only by the chance.s

17. We have to go through the veracity of witnesses and further to the facts whether their evidence is liable to be

thrown away at the very outset. There are various guidelines of Hon'ble Supreme Court on this point.

18. In *Kartik Malhar Vs. State of Bihar* (1996) 1 SCC 614, the Hon'ble Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relative were not independent witnesses. Speaking through Vivian Bose, J., the Court observed :

We are unable to agree with the learned Judges of High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan [1952] SCR 377= AIR 1952 SC 54. We find, however, that it is unfortunately still persist, if not in the judgments of the Courts, at any rate in the arguments of counsel."

In this case, the Court further observed as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

In another case of ***Mohd. Rojali Versus State of Assam: (2019) 19 SCC 567,*** *the Hon'ble Apex Court in this regard has held as under:-*

"As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now wellsettled that a related witness cannot be said to be an "interested' witnesses merely by virtue of being a relative of the victim. This court has elucidated the difference between "interested' and '' related' witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see ***State of Rajasthan v. Kalki (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 Scc 107; and Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298).*** *Recently, this difference was reiterated in* ***Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549,*** *in the following erms, by referring to the three Judge bench decision in State of Rajasthan v. Kalki (supra): "14. "Related" is not equivalent to "interested". A witness may be called "interested' only when he or she derives*

some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case cannot be said to be "interested"..."

11. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal case was made by this Court in ***Dalip Singh v. State of Panjab 1954 SCR 145****, wherein this Court observed:*

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

12. In case of related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and conistent. We may refer to the observations of this Court in ***Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199;***

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witnesses cannot be ignored or shown out solely because it comes from the mouth of a person who is closely related to the victim."

19. In the preview of above case law, it is to be analyzed whether the witnesses produced are interested witnesses and they could not be relied upon. According to FIR deceased was going with his brother, P.W.-1 Radhey Shyam when he was dragged by the accused-appellants and murdered brutally. Radhey Shyam is brother of deceased, his evidence could not be thrown aside merely on the ground that he is brother of deceased. He categorically explained how the accused dragged his brother Krishna (deceased), severed his head and again dragged the body and head towards the field of Ram Sagar. P.W.-1 stated that Kameshwar Pradhan exhorted to severe the head of the deceased and all the accused started beating the deceased with their arms. He could not save the deceased due the fear. Accused dragged the body of his brother from legs towards the field of Ram Sagar, he could do nothing except following his brother alongwith his family members. His brother Pyare Lal, ladies of the house and others relatives were weeping and following the dead body. The manner in which murder is committed leads to the conclusion that no independent witness can dare to come forward and deposed in the court against appellants. Therefore, in these circumstances it is not expectation of law to demand corroboration of evidence by independent witness or villager. Thus the evidence of P.W.-1 is natural and reliable.

20. It is argued that P.W.-4 Premsagar was co-accused with the deceased in the murder of grand son Kameshwar Pradhan

and the son of his brother-in-law (Sadhu) namely Subhkaran and, therefore, he deposed against the accused-appellants, but this argument is not tenable, as P.W.-4 stated that he was near the shop of Dr. Nisar Ahmad, accused Dinesh, Mullu, Raj Kumar and Jagannath, was standing there. As soon as the deceased reached there all the accused caught and dragged the Krishna (deceased) and severed his head near the liquor shop. During the cross examination too the witness corroborated the incident, in consonance with the evidence of P.W.-1 Radhey Shyam. There is no material contradictions in the evidence of P.W.-1 and P.W.-4. Therefore, the evidence of P.W.-4 cannot be discarded only on the ground that he was inimical witness and co-accused in the murder of grand son Kameshwar Pradhan and the son of his brother-in-law(Sadhu) namely Subhkaran. The learned trial court however was reluctant to rely upon the evidences of P.W.-4 Virendra and P.W.-5 Premsagar, but there is no material contradictions in the statement of P.W.-4 and P.W.-5. It is also pertinent to mention here that the police arrived at the place of occurrence when the dead body was set to fire by the accused-appellants in the fields of Ram Sagar and the police officials recovered the body of deceased in semi burnt stage. The head of deceased was found separated from the body. The murder has taken place a broad day light in the noon that too on main road in main market. The numbers of injuries of various weapons were found on the body of deceased and the use of various weapons was confirmed by the witness of facts. It is also evident from the evidence on record that the accused were more than five in numbers and they have motive to murder, as the deceased was accused in the murder of grand son Kameshwar Pradhan and the son of his brother-in-law (Sadhu) namely Subhkaran.

21. Prosecution proved, motive, place of occurrence and injuries on the corpse of deceased by the cogent evidence. Injuries are corroborated by the witnesses of fact and doctor. Accused-appellants are said to have used Gun, Banka, Kanta and Ballam in the incident and the injuries of all the four arms are found on the body of deceased. Severed head of deceased and the body separated were recovered in the semi burned condition in the field of Ram Sagar.

22. Learned trial court has given very clear and convincing reasoning elucidated all the evidences. There is no infirmity or perversity in the judgment and order passed by learned trial court, hence we do not find any ground to intervene in the judgment and order dated 28.08.1982 passed by learned trial court in Sessions Trial No.100 of 1980, whereby convicting and sentencing the accused Raj Kumar, Mullu and Jagannath to rigorous imprisonment for life and fine of Rs.1000/- each under section 149 read with section 302 IPC, rigorous imprisonment of six months in default of payment of fine and one year rigorous imprisonment under section 148 IPC.

23. Accused Dinesh expired during the course of trial and the case has already been abated by the learned trial court. Appellant no.1 Raj Kumar @ Babu and appellant no.3 Mullu have died ten years back, as per report dated 24.08.2016 of Chief Judicial Magistrate, Sitapur. Therefore appeal is dismissed as abated against the appeallnt no.1 Raj Kumar @ Babu and appellant no.3 Mullu vide order dated 05.09.2016. Therefore, at the stage of appeal only appellant no.2 Jagannath survived and the judgment of trial court is upheld only with regard to the appellant no.2 Jagannath.

24. On the basis of above discussion, the appeal filed by the appellant Jagannath is liable to be dismissed and is accordingly **dismissed.**

25. Accused appellant no.2 Jagannath is directed to surrender before the court concerned with 15 days from today. Failing which the appellant Jagannath shall be taken into custody by the court concerned and sent him to jail to serve out the sentence awarded by the trial court and confirmed by this Court.

26. Let the copy of judgment and order as well as the records of trial court be transmitted to the trial court concerned forthwith for necessary information and compliance of this order.

(2022) 12 ILRA 122
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.12.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 1318 of 2007

Ajab Narain Baranwal & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sheo Prakash Singh, Aditya Narayan, Anurag Tilhari, Brij Mohan Sahai, Dashrath Singh, Kapil Misra, Nagendra Mohan, RP Misra, R.B.S. Rathaur, Rajendra Prasad Mishra, S.S. Mishra, Shiv Shankar Mishra

Counsel for the Respondent:
Govt. Advocate, Amarjeet Singh Rakhra, S.P. Pandey, Santosh Bhatt

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860-Sections 147, 302, 325, 323, 307, 504 & 506 -Challenge to-Conviction- the medical report transpires that the victim also sustained injuries on their heads and those were kept under observation-Prosecution proved the injuries of all the injured and the post-mortem by cogent evidence-The prosecution case is well corroborated by the medical evidence-Lathi and danda were recovered from the possession of the accused-appellants and recovery memo thereof is proved by P.W.-9- P.W.-2 and P.W.-3 were injured witness and it cannot be said that they deposed in Court only because they are interested in the case but as an injured witness, they proved the entire prosecution case-Their presence at the place of occurrence is very natural and they inspire confidence in such a way that the accused-appellants can be convicted on the evidence of these witnesses-Learned trial court has given very evince and valid reasons and elucidated all the evidence and left no stone unturned in analyzing the evidence-Hence, no infirmity or perversity in the judgment and order passed by the trial court.(Para 38 to 45)

B. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.(Para 37)

The appeal is dismissed. (E-6)

List of cases cited:

1. Kartik Malhar Vs St. of Bih. (1996) 1 SCC 614

2. Rameshwar Vs St. of Raj. (1952) SCR 377= AIR 1952 SC 54

3. Mohd. Rojali Vs St. of Assam (2019) 19 SCC 567

4. St. of Raj. Vs Kalki (1981) 2 SCC 752

5. Amit Vs St. of U.P . (2012) 4 SCC 107

6. Gangabhavani Vs Rayapati Venkat Reddy (2013) 15 SCC 298

7. Ganapathi Vs St. of T.N. (2018) 5 SCC 549

8. Dalip Singh Vs St. of Punj. (1954) SCR 145

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

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. The Present Criminal Appeal under section 374(2) Cr.P.C. has been filed by the convicted appellants against the Judgment and Order dated 29.05.2007 passed by Sri S.P. Nayak, the then Additional Sessions Judge, Court No.4, District Sultanpur in Sessions Trial No.428 of 1999 (State Vs. Ajab Narain And Ors.) arising out of Case Crime No.177 of 1999, under Sections 147, 302, 325, 323, 307, 504, 506 I.P.C., Police Station Peeparpur, District Sultanpur whereby convicting and sentencing all the appellants under Section 147 I.P.C. to undergo one year R.I. Further convicting and sentencing them under Section 302/149 I.P.C. to undergo imprisonment for life and a fine of Rs.10,000/- each. Further convicting and sentencing them under Section 307/149 I.P.C. to undergo five years R.I. and fine of Rs.3,000/- each. Further convicting and sentencing them under Section 325/149 I.P.C. to undergo three years R.I. and a fine of Rs.1,000/- each. Further convicting and sentencing them under Section 323/149 I.P.C. to undergo six months R.I. Further convicting and sentencing them under Section 504/149 I.P.C. to undergo six months R.I. and also convicting and sentencing them under Section 506/149 I.P.C. to undergo one year R.I. and all the sentences were run concurrently and in default of payment of fine all the appellants have to undergo two years' additional rigorous imprisonment.

2. Wrapping the facts of the case in brief that on 16.05.1999 at about 9:00 p.m., the father of the complainant Ramashankar Baranwal (Deceased) was returning after meeting his counsel Shri Kamta Prasad Sharma when he reached in front of the house of accused Shivbahadur Yadav and Ramkaran Yadav, all the eight accused obstructed his way by standing cot and motorcycle in front of him and started beating his father by lathi and danda. When his father raised alarm, complainant Arvind Kumar Baranwal and his brother Sunil Kumar Baranwal, his uncles **Ram Anuj** and **Ram Nayak** rushed towards the place of occurrence, then accused started beating them too and after hearing the chaos, witnesses Ram Nayan and Ramesh reached to the place of occurrence and witnessed the incident and rescued them. They saw the incident in the light of pole and the light which was coming from the house of accused. Accused were threatening to life and abusing the injured and deceased. Scriber of F.I.R., Hargovind scribed the F.I.R. on the dictation of complainant at the shop of Ramroop and went to lodge the F.I.R. along with injured by Jeep.

3. On the basis of written report Ext. Ka-3, the case was registered by Constable Ramesh Kumar Yadav on 16.05.1999 at about 23:15 p.m. as Case Crime No.177 of 1999,under Sections 147, 323, 307, 504, 506 I.P.C., Police Station Peeparpur, District Sultanpur. Chik report Ext. Ka-13

was prepared and case was entered in G.D. No.39 at the same time and date on 16.05.1999 at about 23:15 p.m. All the injured were referred for medical examination at P.H.C., Ramganj, Sultanpur. The case was entrusted for investigation to S.I. Shri K.P. Tiwari, who prepared the copy of written report and prepared site plan Ext. Ka-15 on the pointing of the witnesses and recorded the statements of witnesses Arvind Kumar Baranwal and Sunil Kumar Baranwal under Section 161 Cr.P.C. and prepared the recovery memo of blood-stained and plain earth recovered from the place of occurrence Ext. Ka-16 and on the basis of amended G.D. No.10 Ext.-9, recorded in the case diary the medical examination of all the injured and the injuries of Ramashankar Baranwal who died while taking to hospital and after preparing recovery memo Ext. Nos.16-21 submitted the charge-sheet in the court concerned. Subsequently, on the basis of above, Investigating Officer has submitted the Charge-sheet No.42 in Case Crime No.177 of 1999, under Sections 147, 323, 307, 504, 506 I.P.C., Police Station Peeparpur, District Sultanpur.

4. After taking cognizance of the case, the C.J.M. concerned committed the case to the Court of Sessions. Learned Sessions Court on the basis of case diary and other documentary evidence, framed charges and read over against all the accused under Sections 147, 323, 302, 504, 506, 149 I.P.C., Police Station Peeparpur, District Sultanpur. Accused appellants denied all the charges and claimed to be tried.

5. In order to prove the case, prosecution adduced following witnesses:-

- P.W.-1 Dr. S.N. Rai
- P.W.-2 Arbind Kumar
- P.W.-3 **Ram Anuj**
- P.W.-4 Dr. A.K. Singh
- P.W.-5 Dr. Subodh Kumar
- P.W.-6 Head Moharrir Ranjit Kumar Pandey
- P.W.-7 Dr. Anil Kumar Gupta
- P.W.-8 Constable Ramesh Kumar Yadav
- P.W.-9 Shri K.P. Tiwari
- P.W.-10 S.O. J.N. Shukla

6. After conclusion of prosecution evidence, statements of accused were recorded under Section 313 Cr.P.C. Accused were provided the opportunity to adduce defence witness. The defence witnesses were produced, which are as follows:-

- D.W.-1 Dayaram Yadav
- D.W.-2 Paras Nath
- D.W.-3 Mohan Kumar (Record Keeper)
- D.W.-4 Retd. C.O. Paras Nath Dwivedi and
- C.W.-1 Ramesh Chandra. witnesses.

7. Learned trial court perusing all the documentary and ocular evidence in Court and after hearing the submission of learned counsel for accused and Prosecuting Officer reached to the conclusion that P.W.-2 Arvind Kumar Baranwal complainant of the case, P.W.-3 **Ram Anuj** Baranwal proved the prosecution story very well and formal witnesses proved the police papers as well. P.W.-2 and P.W.-3 were injured, who appeared in Court and their injuries were corroborated by the evidence of P.W.-1 Dr. S.N. Rai, P.W.-5 Radiologist Dr. Subodh Kumar and P.W.-7 Dr. Anil Kumar Gupta and Court convicted and punished all the seven accused by the impugned judgment and order dated 29.05.2007.

8. Being aggrieved with the judgment and order dated 29.05.2007, convicted appellants have approached this Court by way of filing the present appeal on the ground; that the judgment is bad on the eyes of law and facts. The F.I.R. is ante-timed and has been lodged after due deliberations and consultations. The prosecution had failed to fix the place of incident as alleged by the prosecution. The learned trial court erred in disbelieving the defence version. There were eight accused persons alleged to have assaulted the deceased with lathis but the deceased have received only one fatal injury resulting in death and it is not known that out of eight accused persons, who had caused the said injury. There is no evidence on record to indicate that there was prior meeting of mind among the accused persons and the object of the accused persons was to cause death, hence, the accused persons could not be convicted u/s 302 I.P.C. with the aid of Section 149 I.P.C. The accused persons were alleged to have been armed with the lathis and the injuries to the injured are not of such nature which warrants their conviction u/s 307 I.P.C. At the most, the case would not travel beyond offence u/s 325/149 I.P.C. from the evidence on record. No independent witness mentioned in the F.I.R. has been examined by the prosecution and only one witness of the F.I.R. has been examined. Court Witness had also not supported the prosecution case. The sentences passed by the learned trial court are too severe and is liable to be dismissed.

9. We have heard, Shri Jyotindra Mishra, Senior Advocate assisted by Shri Anurag Tilahari, learned Counsel for appellant nos.1 and 2, Shri Shiv Shankar Mishra, learned Counsel for appellant nos.3 and 5, Shri R.B.S. Rathaur, learned Counsel for appellant nos.4 and 7, Shri Amarjeet Singh Rakhra and Shri Vashisth Muni Mishra, learned Counsel for the complainant and Shri **Umesh** Chandra Verma, learned A.G.A. for the State-respondent and perused the record of this Court as well as the record of trial Court.

10. Learned counsel for the appellants argued before this Court that the F.I.R. is lodged ante-timed and after due deliberations and consultations, no independent witness was adduced in trial court, trial court without applying its mind and without discussing the injuries of appellants passed the order, which is perverse and bad in the eyes of law and is liable to be set-aside, therefore, it is requested to set-aside the judgment and order passed by the trial court dated 29.05.2007.

11. On the contrary, learned A.G.A. argued that learned trial court discussed each and every evidence in the judgment and order and the prosecution has proved its case beyond reasonable doubt. F.I.R. is lodged without delay and there are five injured in this case. The place of occurrence is not doubtful. The animosity between the parties is admitted and injured Ramashankar Baranwal died due to the injuries sustained during the incident. The judgment and order passed by the trial court is in consonance with the law and facts, hence, the appeal is liable to be rejected.

12. Before analyzing the evidence on record, it is desirable to mention the statements of witnesses in brief:-

P.W.-1 Dr. S. N. Rai, Medical Officer, Primary Health Centre, Ramganj, District Sultanpur stated on oath that he

examined injured P.W.-2 **Arvind Kumar**, who was brought by C.P. 537, Mahesh Narayan Dubey and following injuries were found on his person:-

Injury No.1- Lacerated wound 6 x 0.1 c.m. x scalp deep on the upper side of head. Above 9 c.m. from the ridge of nose. Advised for X-ray.

Injury No.2- Lacerated wound 3 x 0.8 c.m. x scalp deep on the left side of head above 5 c.m. from left ear.

Injury No.3- Complain of swelling and pain 6 x 3 c.m. in the back side of forearm and 20 c.m. below right elbow. Advised for X-ray.

Injury No.4- Contusion 12 x 1.5 c.m. on the back of ribs below 7 c.m. from left scapula red in colour.

Injury No.5- Complain of pain in left forearm.

Injury No.6- Complain of pain in left leg.

Injury No.7- Contusion 7 x 1.05 c.m. on right thigh, 8 c.m. above in patella bone red in colour.

Injury No.8- Complain of pain in right leg.

Injury No.9- Complain of pain in left toe.

All the injuries were opined simple in nature, except injury nos.1 and 3, which were advised for X-ray and all the injuries were caused by hard and blunt object and fresh.

On the same day, Dr. S. N. Rai, has examined injured **Sunil Kumar Baranwal,** who was brought by C.P. 537, Mahesh Narayan Dubey and following injuries were found on his person:-

Injury No.1- Lacerated wound 1 x 0.5 c.m. x scalp deep on the right side of head. Above 5 c.m. right ear.

Injury No.2- Abrasion 2.5 x 0.8 c.m. below mastoid process in the right part of neck.

Injury No.3- Complain of swelling and pain 7 x 4 c.m. on the back of left palm 10 c.m. above the left ring finger. Advised for X-ray.

Injury No.-4 Contusion 7 x 1.5 c.m. 10 c.m. below on the left scapula bone red in colour.

All the injuries were opined simple in nature, except injury no.3, which was advised for X-ray and all the injuries were caused by blunt object and fresh.

P.W.-1 admitted in his cross-examination by the accused counsel, Shri Vijay Bahadur Singh that he also examined the injured accused **Umesh** and **Ram Karan** on 17.05.1999 at about 8:40 p.m. and 8:30 p.m., respectively. Injured accused **Umesh** has sustained following injuries on his person:-

Injury No.1- Lacerated wound 3 x .5 c.m. x scalp deep in the right side of head 9 c.m. above right ear.

Injury No.2- Contusion 8 x 01.5 c.m. on the right shoulder 9 c.m. inside the right

shoulder joint, which was red in colour.

Injury No.3- Complain of pain in left hand.

All the injuries were simple in nature and were caused by blunt object within 24 hours.

Injured accused **Ram Karan** has sustained following injuries on his person:-

Injury No.1- Abrasion 2 x 1.05 c.m. into outer part of left hand 9 c.m. above humerus bone of lateral condyle, which was red in colour.

Injury No.2- Complain of pain in back of ribs.

All the injuries were simple in nature and were caused by blunt object within 24 hours.

13. **P.W.-2** Arvind Kumar complainant/injured witness of the case

stated on oath that his father was returning from Bhat Ke Purwa after meeting his counsel in connection with the case of consolidation, which was going on with Ajab Narain, Suresh and others and when he reached before the house of Shivbahadur and Ramkaran, accused Ajab Narain, Suresh Chandra, **Umesh** Chandra, Girish, Ramkaran, Shivbahadur, Rambali and Rampal obstructed his way by standing cot and motorcycle, started beating his father with lathi and danda when he, his brother Sunil, uncles **Ram Anuj** and **Ram Nayak** reached to save his father the accused started beating them also and when they made hue and cry, the villagers Ram Nayan and Ramesh reached at the place of occurrence and rescued them. He further stated that he recognized the accused in the light of bulb. He along with his brother Sunil, uncles **Ram Anuj**, **Ram Nayak** and his father Ramashankar went to the police station by Jeep and lodged F.I.R. on the basis of written report scribed by Hargovind on his dictation (Ext. Ka-3). He further stated that he and his brother Sunil were medically examined in P.H.C, Ramganj and his father and both uncles **Ram Anuj** and **Ram Nayak** were referred to District Hospital, Sultanpur for medical examination.

14. **P.W.-3 Ram Anuj** who is also an injured witness of the incident corroborated the statement of P.W.-2 and stated that on the noise of Arvind Kumar and Sunil Kumar, he along with his brother **Ram Nayak** reached at the place of occurrence and they too were inflicted injuries on their person by the accused persons. The witnesses, Ramesh, Parshuram, Ram Nayan reached and rescued them and they recognized the accused in the light of bulb. He also stated that a civil case was pending between his brother Ramashankar and Suresh Chandra and accused persons were trying to get illegal possession over the grove land of Babool on which, his brother wanted to get stay from the Court. This witness accompanied P.W.-2 while F.I.R. was lodged by him. He was medically examined in District Hospital, Sultanpur.

15. **P.W.-4** Dr. A. K. Singh, Medical Officer, District Hospital, Sultanpur has conducted the autopsy of the dead-body of the deceased **Ramashankar** and following injuries were found on his corpse:-

Injury No.1- Both eyes were out and corners of eyes were black.

Injury No.2- Blood was oozed from both the nostrils and ears.

Injury No.3- Lacerated wound 2 x 1 c.m. on the back side of left ear.

Injury No.4- Abrasion 3 x 3 c.m. on left knee.

Internal Examination.

In the left side of head demporo parital bone found fractured. Membrane of brain found contracted. Sub dural Haemotoma was present all over the brain. 100 m.l. liquid was present in stomach and gases were found in intestine and the cause of death of the deceased was opined due to shock of the head injury and unconsciousness.

16. **P.W.-5** Dr. Subodh Kumar, Radiologist, District Hospital, Sultanpur appeared and deposed that on 17.05.1999, he conducted the X-ray of the left hand paw of injured **Sunil Kumar Baranwal,** whose fifth metacarpal bone was found fractured. No callus was present.

On the same day i.e. on 17.05.1999, he conducted the X-ray of the right shoulder, right forearm and chest of injured **Ram Anuj,** whose scapula bone was found fractured and

no callus was present. Ulna bone of forearm was found fractured and no callus was present. Sixth and seventh ribs were found fractured and no callus was present.

On the same day i.e 17.05.1999, he conducted the X-ray of injured **Ram Nayak,** whose no bone was found fractured.

All the X-ray films and their reports were proved by P.W.-5.

17. **P.W.-6** Head Moharrir Ranjeet Kumar Pandey appeared and proved G.D. No.10 Ext. Ka-9 dated 17.05.1999 at about 7:45 a.m. and the case of Case Crime No.177 of 1999 was converted under Sections 147, 323, 307, 302, 504, 506 I.P.C. on the basis of medical report.

18. **P.W.-7** Dr. Anil Kumar Gupta, District Hospital, Sultanpur has stated on oath that he examined injured **Ram Anuj** on 17.05.1999 at about 2:45 a.m., who was brought by C.P. 537, Mahesh Narayan Dubey and following injuries were found on his person:-

Injury No.1- Lacerated wound 6 x .4 c.m. bone deep 9 c.m. above right and blood was oozing.

Injury No.(1B)- Lacerated wound 3 x .3 c.m. bone deep 7 c.m. above left ear upto scalp.

Injury No.2- Lacerated wound 2.5 x .7 c.m. on the right forehead 1 c.m. above right eye-brow bone deep.

Injury No.3- Lacerated wound 3.5 x .4 c.m. bone deep 9 c.m. above left ear upto scalp.

Injury No.4- Surgical Emphysema on the back of right scapula and advised for X-ray.

Injury No.5- Complaint of swelling 19 c.m. above left elbow and advised for X-ray.

Injury No.6- Complaint of swelling 15 c.m. below left elbow.

Injury No.7- Multiple contusion 45 x 23 c.m. on back area, which was 4 x 3 c.m. in the starting and 10 x 3 c.m. to the end.

Injury No.8- Complain of hardness in left part of the chest and advised for X-ray.

Injury No.9- Abrasion 3 x 0.5 c.m., 7 c.m. below on the patella bone of the left leg.

Injury No.10- Abrasion 9 x .5 c.m. on the right thigh 9 c.m. above right knee joint.

Injury No.11- Abrasion .5 x .5 c.m. below 10 c.m. on right foot.

Injury Nos.4, 5, 6 and 8 were kept under observation and advised for X-ray and referred to general surgeon for examination of Injury No.8. All the rest injuries were simple in nature and caused by blunt object and six hours old.

P.W.-7 examined injured **Ram Nayak** also on the same day i.e. on 17.05.1999 at about 3:20 a.m. brought by C.P. 537, Mahesh Narayan Dubey and following injuries were found on his personon:-

Injury No.1- Lacerated wound 2.5 x 4 c.m. bone deep 6 c.m. above right ear in the shape of english capital "H'.

Injury No.2- Lacerated wound 3.5 x .2 c.m., 2.5 c.m. above nose bone deep. Blood was oozing and advised for X-ray.

Injury No.3- Complaint of blackening and swelling on the right eyelid.

Injury No.4- Complaint of blood oozing from right ear.

Injury No.5- Contusion 5 x .3 c.m. on the right side of neck, 1.5 c.m. below right ear.

Injury No.6- Contusion 12 x 10 c.m. on the right shoulder, containing two

abrasions measuring 5 x 2.5 c.m. and 2.5 x 1 c.m. and advised for X-ray.

Injury No.7- Contusion 2 x 1 c.m. on the hand 2.5 c.m. below right elbow.

Injury No.8- Abrasion 4 x .3 c.m. inner right thigh 12 c.m. above left knee.

Injury No.9- Contusion 6 x 2 c.m. on the right thigh, which was written twice by doctor at serial no.7.

Injury No.10- Contusion 2.5 x 2.5 c.m. on left knee, which was written twice by doctor at serial no.8.

Injury No.11- Contusion 6 x 2.5 c.m. X 10 x 2.5 c.m. on the back including abrasion 8 x 5 c.m. below left lungs. All these injuries are in area of 35 x 40 c.m. on the back, which was written by doctor at serial no.9.

Injury Nos.2 to 6 were kept under observation and advised for X-ray and referred to Orthopedic. All the remaining injuries were simple in nature and were caused by blunt object and six hours old.

Doctor proved the injuries of both the injured as Ext. Ka-10 and Ext. Ka-11.

This witness mentioned that the injured Ramashankar had died before reached to the hospital. He arranged to keep the dead-body in the mortuary and informed Police Station Kotwali Nagar by a letter, which is marked as Ext. Ka-12.

19. **P.W.-8** Constable Ramesh Kumar Yadav, G.R.P. Kanpur Central, who proved Chik Report as Ext. Ka-13 and G.D. as Ext. Ka-14.

20. **P.W.-9** S.I. Shri K. P. Tiwari, Incharge D.C.R.B., Siddharth Nagar conducted the entire investigation of the case and proved Site Plan as Ext. Ka-15, G.D. No.10 as Ext. Ka-16, Recovery Memo as Ext. Ka-17, Memo of Information as Ext. Ka-18 & Ka-19 and recovery of blood stained clothes of injured as Ext. Ka-20. This witness proved N.C.R. No.77 of 1999 on 24.05.1999, its G.D. and the description of order to send the report in the Court and the statements of Constable Moharrir Ramesh Kumar Yadav and Head Moharrir Ranjeet. This witness noted the information of surrender of accused Rampal, Girish @ Arunkant and on that day noted the description of X-ray report and X-ray plate of injured **Ram Nayak**, Arvind Kumar and Sunil Kumar and recorded the statements of witnesses S.I. Jai Narayan Shukla and Constable Ram Saran Singh and recorded the statements of accused Girish @ Arunkant, Suresh Chandra, Ajab Narain, Shivbahadur and Rambali and after collecting evidence against them, submitted the Charge-sheet No.42 Ext. Ka-22. This witness proved the case property recovered from the place of occurrence and the body of the deceased and sent those to F.S.L. for examination.

21. **P.W.-10** Station Officer, Shri J. N. Shukla has stated on oath that on the date of incident, he was posted as a Chowki Incharge and the inquest of the dead-body of the deceased was prepared in his presence and in the presence of Constable Ram Saran Singh and handed over the dead-body of the deceased in the sealed condition to the above-mentioned constable and prepared Inquest Ext. Ka-23, Photo Nash Ext. Ka-24, Sample Seal Stamp Ext. Ka-25, Letter to R.I. for post-mortem Ext. Ka-26, Letter to C.M.O. Ext. Ka-27 and Challan Nash Ext. Ka-28.

22. After the conclusion of prosecution witnesses, statements of accused were recorded u/s 313 Cr.P.C.. Accused denied from all the allegations and evidences produced against them and stated that they have been falsely implicated in the case due to previous animosity. It is

also stated in the statements recorded u/s 313 Cr.P.C. that Ram Aadhar Yadav organized dinner in his house and Ram Karan and **Umesh** Chandra were also invited. The deceased Rama Shankar and injured Sunil Kumar, Arvind Kumar, **Ram Anuj** and **Ram Nayak** were also present there and suddenly hot exchanges started between both the parties and the deceased and other injured started beating Ram Karan and **Umesh** Chandra. The crowd assaulted the deceased Ramashankar and injured Sunil Kumar, Arvind Kumar, **Ram Anuj** and **Ram Nayak**. The accused were also medically examined. No incident occurred on the door of the accused Shivbahadur Yadav. The police lost his non-cognizable report and falsely implicated them.

23. Accused were given opportunity to adduce defence witness. D.W.-1 Daya Ram and D.W.-2 Paras Nath corroborated the statements of accused recorded u/s 313 Cr.P.C.

24. **D.W.-3** Mohan Ram deposed that he was Record Keeper in the Office of Superintendent of Police, Sultanpur and the application (N.C.R.) of Jagesar dated 15.05.1999 has been destroyed, as the limitation period to retain it in the record room is only two years, which is recorded in the Weeding Register at Serial No.11 of 1992-99.

25. **D.W.-4** Paras Nath Dwivedi, who was C.O. of the Case Crime No.165 of 1999, under Sections 323, 504, 506 I.P.C. & Sections 3(1)(10) S.C./S.T. Act, Police Station Peeprpur, District Sultanpur and stated on oath that after investigation, he submitted final report in Case No.133 of 2004 (Jagesar Vs. **Ram Nayak**), under Sections 323, 504, 506 I.P.C. & Sections 3(1)(10) S.C./S.T. Act, Police Station Peeprpur, District Sultanpur in Court No.18 of the A.C.J.M. Court.

26. After defence evidence, Court summoned Ramesh Chandra S/o Parshuram as a Court witness, who denied the entire occurrence.

27. After perusing the evidence on record and hearing the arguments of the D.G.C. and the accused, learned trial court convicted accused Ajab Narain, Suresh Chandra, **Umesh** Chandra, Ram Karan, Shivbahadur Yadav, Rampal Yadav and Rambali Yadav. Accused Girish Chandra @ Arunkant has been declared juvenile and he is facing trial separately. Accused-appellant no.5 Shivbahadur Yadav has expired during the pendency of the appeal and the appeal has been dismissed as abated against him.

28. Learned counsel for the appellants has argued that the F.I.R. is ante-timed and has been lodged after due deliberations and consultations. In this context P.W.-2 Arvind Kumar stated that he along with his brother Sunil Kumar, his uncles **Ram Anuj**, **Ram Nayak** and his father Ramshankar went to the police station to lodge the F.I.R. It is suggested to this witness that the F.I.R. was lodged on the next day of the incident after consultation with Sub-Inspector C.P. Sharma and endorsed in G.D. ante-timed, to this witness clearly refused. P.W.-9 Shri K.P. Tiwari stated on oath that the case was registered in his presence on 16.05.1999 and the investigation was entrusted upon him. He started investigation immediately and reached to the place of occurrence at 12:00 a.m. in the mid night. P.W.-10 S.O. J.N. Shukla deposed in Court that he reached to the District Hospital, Sultanpur on 17.05.1999 at 12:00 a.m. and he conducted the inquest of the deceased from

12:00 a.m. to 13:30 a.m. The evidence of P.W.-9 and P.W.-10 proved that when the F.I.R. lodged in the police station on 16.05.1999 immediately after lodging the F.I.R., it was endorsed in G.D. and P.W.-9 S.I. Shri K.P. Tiwari along with P.W.-10 S.O. J.N. Shukla reached to the District Hospital, Sultanpur, therefore, it cannot be said that case was registered and entered ante-timed in the police record. In this context it is also pertinent to mention here that as per chik report, the date and time of occurrence was shown 16.05.1999 at about 9:00 p.m. and the case was registered on the same day at about 23:15. The distance of place of occurrence is 10 kms. from police station and it was stated by P.W.-2 that he reduced in writing the written report in village *Bhadar* by Ramroop and the fact is also proved by the letter written by Station Officer on the same day on 16.05.1999, which was written to Medical Officer (Incharge), P.H.C. by which the injured Ramashankar was sent for medical examination of the injuries inflicted upon his body. In this letter Case Crime No.177 of 1999, under Sections 147, 323, 307, 504, 506 I.P.C., Police Station Peeparpur, District Sultanpur was mentioned. The letter further revealed that the accused was referred to District Hospital, Sultanpur on 17.05.1999 and the injured Ramashankar was declared dead by the doctor at 2:45 a.m. on 17.05.1999. Further the injured Arvind Kumar Baranwal and Sunil Kumar Baranwal both sons of Ramashankar, **Ram Anuj** and **Ram Nayak** were sent for medical examination by police with two letters of Station Officer dated 16.05.1999 and in both the letters, case crime number was mentioned and the injured were examined in the hospital on 17.05.1999. Meaning thereby, when the injured were sent to the hospital on 16.05.1999, the case was already registered in police station, therefore, there is no strength in the arguments of learned counsel for the appellants that report was lodged ante-time. Learned counsel for the appellants also argued that I.O. had mentioned Section 302 I.P.C. at the same stroke of a pen when he inspected and prepared the site plan. In this context P.W.-9 stated in his statement that when he was preparing the site plan, he was informed about the death of injured Ramashankar and only because of this reason he mentioned Section 302 I.P.C. at the same stroke of a pen. He further stated that when he endorsed first parcha of case diary Section 302 I.P.C. was not mentioned therein, whereas when he received amended G.D. and injury report of injured, he mentioned Section 302 I.P.C. in continuation, therefore, argument of learned counsel for the appellants is not tenable that the F.I.R. was lodged in police station when the death of Ramashankar was confirmed by doctor. The investigation was conducted as per due procedure.

29. It has been argued by learned counsel for the appellants that prosecution could not fix the place of occurrence. Learned counsel for the appellants submitted that the witnesses have admitted in their cross-examination that the incident occurred in *Purwa Majre Gokul* in the village of *Dharaura Mishra* in the house of Ramadhar Yadav, who organized *Jagganath Ji Ka Bhaat* and invited both sides i.e. complainant and appellants. Complainant Arvind Kumar Baranwal, Sunil Kumar Baranwal, **Ram Nayak**, **Ram Anuj** and Ramashankar started beating appellants Ram Karan Yadav and **Umesh** Chandra and the crowd beated complainants during intervention. Appellants produced D.W.-1 Dayaram Yadav and D.W.-2 Paras Nath to prove this fact that complainant and his family

members were assaulted by the crowd during the *Jagganath Ji Ka Bhaat*. In this context the statement of I.O. K.P. Tiwari is relevant, who inspected and prepared the site plan Ext. Ka-15 on the pointing out of Arvind Kumar Baranwal (complainant) and Sunil Kumar Baranwal. From the perusal of the site plan, it transpires that the place of occurrence is in the front of the house of Ramadhar Yadav. It is the case of prosecution and defence both that the incident occurred between the parties as they were invited by Ramadhar Yadav, who attend *Jagganath Ji Ka Bhaat*. I.O. collected bood-stained earth from the place of occurrence shown in map by letter A, B, and C and sent it to F.S.L. and in the report of F.S.L., human blood was found in the blood-stained earth, which further corroborates that the place of occurrence was in front of the house of Ramadhar.

30. One of the appellant, Ram Karan moved an application against complainant, which was submitted in P.S. as N.C.R. No.77 of 1999 dated 18.05.1999 at about 13:50 p.m. In this application, the place of occurrence was shown in front of house of Ram Karan. It transpires from the record that Station Officer moved an application before the A.C.J.M. concerned to the intent that cross F.I.R. was registered in police station as Case Crime No.177 of 1999, therefore, permission be granted to investigate this N.C.R. also but the same was rejected by A.C.J.M. concerned. Learned counsel for the appellants raised objection that this N.C.R. was not written by Ram Karan as it was not signed by him but the appellant cannot blow hot and cold at the same time. On the one hand, the N.C.R. was registered and on the other hand, it was denied by Ram Karan on the ground that the same was not signed by him. This N.C.R. has been destroyed, as the N.C.R. was kept in the police record only for two years. The N.C.R. Ext. Kha-3 is admissible as per confessional statement of Ram Karan that the place of occurrence was in front of his house, which was also corroborated by P.W.-9 by the deposition in Court and further proved by the site plan.

31. Learned counsel for the appellants submitted that one Jagesar S/o Vipath, R/o Village Parsoiya, P.S. Peeparpur, District Sultanpur lodged an F.I.R. bearing Case Crime No.165 of 1999, under Sections 323, 504, 506 I.P.C. & Sections 3(1)(10) S.C./S.T. Act, Police Station Peeprpur, District Sultanpur, which was investigated by Sub-Inspector Paras Nath Dwivedi who appears in Court and deposed that he investigated the Case Crime No.165 of 1999 and after investigation, he submitted final report in that case. This file was summoned from Court No.18 of A.C.J.M. Court during the course of trial by Sessions Judge. Learned counsel for the appellants submitted that they were doing pairavi of complainant Jagesar against accused of the case **Ram Nayak**, Ramashankar and Surendra Sharma, therefore, they are falsely implicated in the present case.

32. Learned A.G.A. argued that Investigating Officer, Paras Nath Dwivedi had already submitted final report in that case, therefore, there is no reason for animosity between the parties on account of the Case Crime No.165 of 1999, under Sections 323, 504, 506 I.P.C. & Sections 3(1)(10) S.C./S.T. Act, Police Station Peeprpur, District Sultanpur and falsely implicated the appellants.

33. It is also submitted by learned counsel for the appellants that P.W.-2 Arvind Kumar Baranwal admitted in his cross-examination that all the accused-

appellants Ajab Narain Baranwal, Suresh Chandra Baranwal, **Umesh** Chandra Baranwal and Girish Chandra Baranwal (Juvenile) are his *pattidar* and the case was pending in Consolidation Court and on account of this case accused-appellants have inimical relationship with the complainant side. It transpires from the oral evidence that witness stated on oath that accused-appellant Ajab Narain wanted to grab grove of *Junglee Babool* and forest land through other Yadav accused persons, therefore, they lodged F.I.R. against the complainant's father Ramashankar through Jagesar under S.C./S.T. Act. All these incidents shows that there was inimical relationship exists between both the parties. However, N.C.R. resulted in final report but animosity was proved by the statements of the witnesses. The witness produced on behalf of the accused-appellants in defence themselves admitted that the incident arose when the persons of both the parties went in *Jagganath Ji Ka Bhaat* regarding the management of generator, therefore, place of occurrence, date, time and the manner of incident were not doubtful.

34. Learned counsel for the appellants stated that the injuries of **Umesh** Chandra and Ram Karan Yadav were not explained. If we go through the defence evidence produced by accused-appellants in the trial court, the defence witnesses themselves deposed that the dispute arose regarding the regulation of generator set and accused-appellants started abusing and complainant side started beating **Umesh** Chandra and Ram Karan Yadav. The injury report of **Umesh** Chandra and Ram Karan Yadav were proved in trial court, therefore, presence of accused-appellants was established. Moreover the accused-appellants stated in their bail application that these injuries were caused to them by Police Officers at the time of their arrest, therefore, when the injuries were admitted by accused-appellants in their bail applications being caused by the Police, then there is no need that these injuries should be explained by the prosecution.

35. It is also stated by learned counsel for the appellants that the incident occurred in public place but no independent witness was produced by the prosecution. P.W.-2 and P.W.-3 are interested witness. The veracity of these witnesses cannot be relied upon for proving prosecution case.

36. We have to go through the veracity of witness and further to the facts whether their evidence is liable to be thrown away at the very outset. There are various guidelines of Hon'ble Supreme Court on this point.

37. In *Kartik Malhar Vs. State of Bihar* (1996) 1 SCC 614, the Hon'ble Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relative were not independent witnesses. Speaking through Vivian Bose, J., the Court observed :

We are unable to agree with the learned Judges of High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we

know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan [1952] SCR 377= AIR 1952 SC 54. We find, however, that it is unfortunately still persist, if not in the judgments of the Courts, at any rate in the arguments of counsel."

In this case, the Court further observed as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

In another case of ***Mohd. Rojali Versus State of Assam: (2019) 19 SCC 567,*** *the Hon'ble Apex Court in this regard has held as under:-*

"As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well settled that a related witness cannot be said to be an "interested' witnesses merely by virtue of being a relative of the victim. This court has elucidated the difference between "interested' and " related' witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see ***State of Rajasthan v. Kalki (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 Scc 107;*** *and* ***Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298).*** *Recently, this difference was reiterated in* ***Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549,*** *in the following terms, by referring to the three Judge bench decision in State of Rajasthan v. Kalki (supra): "14. "Related" is not equivalent to "interested". A witness may be called "interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case cannot be said to be "interested"."*

11. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal case was made by this Court in ***Dalip Singh v. State of Panjab 1954 SCR 145,*** *wherein this Court observed:*

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

12. In case of related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and conistent. We may refer to the observations of this Court in ***Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199;***

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witnesses cannot be ignored or shown out solely because it comes from the mouth of a person who is closely related to the victim."

38. From the entire evidence, it is clear that P.W.-2 Arvind Kumar Baranwal and P.W.-3 **Ram Anuj** were injured witness and it cannot be said that they deposed in Court only because they are interested in the case but as an injured witness, they proved the entire prosecution case, therefore, their evidence cannot be brushed aside on the ground that they are interested witness. Their presence at the place of occurrence is very natural and they inspire confidence in such a way that the accused-appellants can be convicted on the evidence of these witnesses.

39. Learned counsel for the appellants argued that there was no prior meeting of mind and prosecution did not prove that who caused the fatal blow, which resulted in the death of Ramashankar. Learned counsel for the appellants draw our attention to the statement of P.W.-4 that doctor himself admitted that injury no.4 can be sustained by falling and injury no.3 may be the result of injury nos.1 and 2 because injury nos.1 and 2 are not separate injury.

40. It is evident from the record that eight accused persons collectively assaulted the deceased with lathi and danda and the doctor opined in his statement that blow was so forceful due to which demporo and parital bone fractured and membrane of brain contracted and the injuries were caused by lathi. Doctor also stated that the injuries sustained to the deceased cannot be caused by bricks or stones. But P.W.-4 stated that accused hit on the head from back side and this blow was so forceful that his eyes came out and blood oozed out from nose and ears, therefore, the theory of falling down on earth and getting injured itself smashed. Moreover, no such suggestion was given to this witness of fact that these injuries were sustained to deceased by falling at hard and blunt object.

41. It is also stated by the learned counsel for the appellants that there was animosity between the parties, therefore, it is not natural for the deceased to pass in front of the house of the accused-appellants, as alternative way was available. P.W.-1 and P.W.-2 were not cross-examined on this point of issue. However, P.W.-3 stated at page 6 that there was no alternative way available at the time of occurrence, as this chakbandi road was established after chakbandi.

42. From the perusal of the the medical report, it transpires that the victim also sustained injuries on their heads and those were kept under observation. Arvind Kumar Baranwal sustained nine injuries,

including two lacerated wounds on his head, which were duly proved and opined by the doctor that the injuries were grievous in nature and fatal to the life and one of the injured succumbed to death on account of the injuries sustained during this occurrence, hence, prosecution proved the case under Sections 147, 302, 325, 323, 307, 504, 506 I.P.C.

43. Prosecution proved the injuries of all the injured and the post-mortem by cogent evidence. The prosecution case is well corroborated by the medical evidence. Lathi and danda were recovered from the possession of the accused-appellants and recovery memo thereof is proved by P.W.-9.

44. Learned trial court has given very evince and valid reasons and elucidated all the evidence and left no stone unturned in analyzing the evidence. There is no infirmity or perversity in the judgment and order passed by the trial court, hence, we do not find any reason to interfere with the judgment and order of trial court passed by Additional Sessions Judge, Court No.4, District Sultanpur in Sessions Trial No.428 of 1999 (State Vs. Ajab Narain And Ors.) arising out of Case Crime No.177 of 1999, under Sections 147, 302, 325, 323, 307, 504, 506 I.P.C., Police Station Peeparpur, District Sultanpur whereby convicting and sentencing all the accused-appellants i.e. Ajab Narain Baranwal, **Umesh** Chandra Baranwal, Ramesh Chandra Baranwal S/o Ram Kripal, Ram Karan S/o Mangru, Ram Pal and Ram Bali S/o Ram Newaj.

45. In view of the above, the appeal is accordingly **dismissed**.

46. Accused-appellant no.3, 4 and 7 namely; Umesh Chandra Baranwal, Ram Karan Yadav and Rambali, respectively are in jail. They shall serve out the sentence awarded by trial court and confirmed by this Court.

47. Accused-appellant nos.1, 2 and 6 namely; Ajab Narain Baranwal, Suresh Chandra Baranwal and Ram Pal, respectively are on bail. Their bail bonds stand cancelled and sureties discharged. They shall surrender before trial Court concerned within 15 days from today, failing which, they shall be taken into custody by the trial court and be sent to jail to serve out the sentence awarded by trial court and confirmed by this Court.

48. Let a copy of this judgment and order as well as record of trial court be transmitted to the concerned trial court forthwith for necessary information and compliance of this order.

(2022) 12 ILRA 136
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2022

BEFORE

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

Criminal Appeal No. 2600 of 2018

Balveer Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Apul Misra, Sri Abhishek Mayank, Sri S.K. Verma

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian

Penal Code,1860-Section 302-Challenge to-Conviction-the incident occurred when the accused came to the place of incident 100 rupees were demanded which he had taken from the deceased and there was a quarrel between the deceased and accused and the accused fired at the deceased and this occurred heat of the moment-The evidence shows that it was not a premeditated cold blooded murder-PW-1 did not see the deceased shooting at the deceased-PW-2 and PW-3 turned hostile-The gun was recovered at the instance of the accused from a place which was known only to him- death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. (Para 15 to 32)

B. Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. (Para 30 to 32)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Stalin Vs St. Reptd. by the Insp. of Police CRLA No.577 of 2020 {SLP (Crl) No.3171 of 2019}

2. Dauvaram Nirmalkar Vs St. of Chht. CRLA No. 1124 of 2022 {SLP No.2481 of 2022}

3. Ajmal Vs St. of Ker. CRLA No.1838 of 2019

4. St. of U.P. Vs Subhash @ Pappu) CRLA No.436 of 2022

5. Chherturam @ Chainu Vs St. of Chht. CRLA No.1317 of 2022

6. Suresh Singhal Vs St. (Delhi Admin.) CRLA No.1548 of 2011

7. Tukaram & ors.Vs St. of Mah. (2011) 4 SCC 250

8. B.N. Kavatakar & anr. Vs St. of Karn.(1994) SUPP (1) SCC 304

9. Veeran & ors.Vs St. of M.P. (2011) 5 SCR 300

10. Khokan@ Khokhan Vishwas Vs St. of Chatt. (2021) LawSuit (SC) 80

11. Anversinh Vs St. of Guj. (2021) 3 SCC 12

12. Pravat Chandra Mohanty Vs St. of Ori. (2021) 3 SCC 529

13. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

14. Gautam Manubhai Makwana Vs St. of Guj. CRLA No.83 of 2008

15. Krishan Vs St. of Hary. (2013) 3 SCC 280

16. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

17. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

18. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

19. Jameel Vs St. of U.P. (2010) 12 SCC 532

20. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734

21. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

22. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

23. Raj Bala Vs St. of Har. (2016) 1 SCC 463

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

1. Heard Sri Abhishek Mayank, learned counsel for appellant and Sri Vikas Goswami, learned counsel for State.

2. This appeal has been preferred by the accused-appellant against the judgment and order dated 17.4.2018, passed by learned Additional Sessions Judge, Court No.10, Aligarh in Sessions Trial No.241 of 2016 (State of Uttar Pradesh Vs. Balveer Singh) connected with Sessions Trial No.242 of 2016 arising out of Crime No.261 of 2015 connected with Crime No.05 of 2016 convicting the accused - appellant under Sections 302 of Indian Penal Code, 1860 (in brevity 'IPC'), Police Station Dadon, District Aligarh and sentenced the accused-appellant to undergo imprisonment for life with fine of Rs.20,000/- and in case of default of payment of fine, further to undergo simple imprisonment for a period of six months.

3. The prosecution story in brief is as follows, that on getting the information, it was scribed by Rajendra Singh s/o Har Prasad, Ext.Ka-1 written-complaint was submitted in police-station Dadon, District Aligarh by the complainant Itwari Singh s/o Neksey r/o Ramnagar P.S.-Ramnagar P.S.-Dadon District-Aligarh on 18.11.2015 wherein it was mentioned that "Today on 18.11.2015, my brother Kundan aged around 45 years was sitting at his home and Balveer Singh s/o Bhurey Singh, son of my father's elder brother, was also present there. My brother had borrowed Rs.100/- from Balveer Singh, over the return of which, a dispute arose between Balveer Singh and Kundan. On hearing hue and cry, when my wife Smt. Manoj Devi and he came out of the room, Balveer Singh son of my father's elder brother shot my brother Kundan in my presence and my wife at 9 p.m. and ran away. While running away, Balveer Singh took away the *tamancha (country made gun)* with him. On raising alarm by me, people from the surrounding area gathered there, who saw Balveer Singh running away. The information of the occurrence was conveyed on Number-100. My brother's dead body is lying at the spot. Please take appropriate action by lodging my report."

4. On the basis of First Information Report, Itwri Singh's and also written-complaint, case crime no.261 of 2015 u/s 302 IPC against Balveer Singh was registered in police-station Dadon. Entry of the case was made in the concerned G.D. of the police-station. During the investigation, Ext.Ka-7 inquest-report was prepared by taking, the dead body of deceased Kundan in custody of police and dead body of the deceased was sent for post-mortem.

5. During the investigation, accused Balveer was arrested by In-charge of police-station Dadon on 13.01.2016 and on being frisked, one country-made pistol 315 bore and one live cartridge were recovered from Balveer.

6. During investigation, the investigator inspected the place of occurrence and prepared the site plan Ext. ka-11 & ka-14 and recorded the statements of the witnesses. After investigation, the investigator finding the prima facie case under section- 302 IPC & Section-25 Arms Act against the accused namely Balveer Singh submitted charge sheet Ext. ka-16 & ka-15 respectively in both cases.

7. On completion of investigation, charge-sheet u/s 302 I.P.C. against the

accused was filed. The cognizance was taken on the charge-sheet by the concerned Magistrate and the case was committed to the court of session under section 302 of I.P.C. .

8. On being summoned, the accused-appellant pleaded not guilty and wanted to be tried, hence, the trial commenced and the prosecution examined about 11 witnesses who are as follows:

1	Deposition of Manoj Devi	PW
2	Deposition of Rajendra	PW
3	Deposition of Rajnesh alias Kallu	PW
4	Deposition of Satveer	PW
5	Deposition of Itwari Singh	PW
6	Deposition of constable Amar Singh	PW
7	Deposition of S.I. Ramkant Pachauri	PW
8	Deposition of Dr. Ikrar Ahmad	PW
9	Deposition of S.I. Sadan Singh	PW
10	Deposition of H.C. Naresh Singh	PW
11	Deposition of Inspector B.R. Dikshit	PW

9. In support of ocular version following documents were filed and proved:-

1	Written report	Ex.Ka.
2	Chik of FIR	Ex.Ka.
3	Copy of G.D	Ex.Ka.
4	Police form no.-13	Ex.Ka.
5	Letter to R.I.	Ex.Ka.
6	Letter to C.M.O.	Ex.Ka.
7	Inquest report	Ex.Ka.
8	Photo of dead body	Ex.Ka.
9	Chik of FIR	Ex.Ka.
10	Post-mortem report	Ex.Ka.
11	Copy of G.D.	Ex.Ka.
12	Recovery memo of plain earth and blood stained earth	Ex.Ka.
13	Recovery memo of one country made pistol 315	Ex.Ka.
14	Site-plan	Ex.Ka.
15	Police Form No.-33	Ex.Ka.
16	Charge-sheet	Ex.Ka.

10. On completion of the prosecution evidence, the statement of the accused person u/s. 313 Cr.P.C. were recorded, wherein the accused stated that owing to factionalism in the village, the false case has been lodged against him. The murder of the deceased was caused by some unknown criminals and time has been sought for the defence evidence.

11. Learned counsel for the appellant has submitted that the trial court vide order dated 17.4.2018 convicted the accused - appellant under Section 302 of IPC and sentenced the accused to imprisonment of life with fine of Rs.20,000/- in default one year of incarceration. Learned counsel has contended that this is a case of no evidence most of the witnesses have not supported the prosecution story.

12. Learned counsel for the appellant has relied on the following decisions of Apex Court in **(a) Criminal Appeal No.577 of 2020 (Arising out of SLP (Crl) No.3171 of 2019 (Stalin Vs. State represented by the Inspector of Police) decided on 9.9.2020, Criminal Appeal No.82 of 2015 (arising out of SLP (Crl) No.9447 of 2012) decided on 14.1.2015, Criminal Appeal No. 1124 of 2022 (arising out of Special Leave Petition (Criminal) No.2481 of 2022) (Dauvaram Nirmalkar Vs. State of Chhattisgarh) decided on 2.8.2022, Criminal Appeal No.1838 of 2019 (Ajmal Vs. The State of Kerala) decided on 12.7.2022, Criminal Appeal No.436 of 2022 (The State of**

Uttar Pradesh Vs. Subhash @ Pappu) decided on 1.4.2022, Criminal Appeal No.1317 of 2022 (Chherturam @ Chainu Vs. State of Chhattisgarh) decided on 13.9.2022 and Criminal Appeal No.1548 of 2011 (Suresh Singhal Vs. State (Delhi Administration) decided on 13.9.2022 so as to contend that the accused has not committed any offence and in alternative to contend that case of committing murder is not made out against the accused.

13. Learned counsel for the appellant after submitting for clean acquittal submitted that if the Court is not convinced he may not press the appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh as the incident occurred without premeditation. Learned counsel also submitted that appellant is in jail since 14.1.2016. and prays for conversion of sentence from Section 302 of IPC to Section 304(Part-I or Part II) of IPC.

14. Sri Vikas Goswami, learned counsel appearing on behalf of State contended that the appeal is merit less. The evidence of all the witnesses prove the involvement of the accused . The accused had committed the offence which has been proved by pleading cogent evidence. The death of the deceased was a homicidal death. All the evidence is against the appellant- accused and it has been proved that the accused and accused alone was the perpetrator of death and he has purposefully inflicted the injury on the deceased. He did not even care to take her hospital which shows to a culpable mind and has requested for dismissal of appeal.

15. The scrutiny of prosecution evidence reveals that PW-1 Mrs Manoj Devi has stated on oath that deceased Kundan was elder brother of her husband(Jeth). Accused Balveer Singh is younger brother of her husband(Devar). No quarrel took place between deceased and accused in front of her. Incident occurred on 18th at 9 PM. She did not know the month and day thereof, it was the month of Kartikya as per Hindu calendar. Thereafter there was turncoat on her part and witnesses stated that she has not seen incident. She reached the place of offence after deceased had succumbed to his injuries. She cannot state as to who fired the gunshot. She had not seen accused-Balveer Singh shooting deceased-Kundan. This witness was declared hostile on the basis of application of prosecution and there was nothing which would prove any case against the accused.

16. PW-2 Rajendra has stated on oath that deceased Kundan happens to be his brother by way of family relations. On 18-11-2015 at about 9 P.M. ,he was present at his home, then only he came to know that someone has mortally shot Kundan. On hearing this news, he reached the spot, Kundan was lying dead in his house. His body was lying in the varendah. Several individuals from the village and Mohalla had gathered on the spot. He stated all had gone together to the police station. He had written the complaint at the police station as per the advice of sub inspector and villagers. The complaint was submitted to the sub inspector having written the same. He had neither written the complaint on the dictation of Itwari Singh nor had he read over the same to Itwari Singh after writing it. This witness has proved written complaint Ex Ka-1 by his evidence. This

witness was declared hostile on the application of prosecution.

17. PW-3 Rajnesh alias Kallu has stated on oath that he came to know on 18.11.2015 at about 9:30 in the night that someone has killed Kundan by shooting him. He saw body of Kundan lying outside varendah when he reached the spot. Several villagers had gathered there. Police from Dado police station had reached the spot in the night and took the body for post mortem after completing the inquest report. Sub inspector had obtained my signature on a blank page. Nothing was written on the paper nor anything was written on it in front of me, nor memo was read over by sub inspector. Blood stained earth and plain earth was not collected in box by sub inspector in front of me. This witness was declared hostile on the application of prosecution.

18. PW-4 Satyaveer has stated on oath that deceased Kundan happens to be his Chacha(younger brother of father) by way of family relations and his house is at a distance of about 300 metres from the house of the deceased. He came to know on 18.11.2015 at 8-9 in the night that some one had killed Kundan by shooting him. He had reached the spot. The police from police station Dado had arrived in the night itself. The Sub inspector prepared the inquest report wherein he too was appointed as panch and my signature was obtained. The witness verified his signature present on the inquest report. The police took the dead body in sealed and stamped condition for post mortem. The sub inspector did not record my statement in relation to the incident nor did he interrogate me nor did the fact of Balveer Singh firing the shot was stated by me. This witness was declared hostile on the application of prosecution.

19. In his statement on oath, PW-5 Itwari Singh has stated that the incident had occurred around one year and four months ago. The incident had occurred at around 9 pm. He was at home at that time. Kundan and Balveer Singh were sitting in the verandah. There was a dispute between them on a transaction involving 100 rupees. All of a sudden Balveer Singh opened fire with a country made pistol on the neck below the ear of my brother Kundan. He had clearly seen in the light of an electric bulb Balveer Singh opening a shot at Kundan. He opined that his brother Kundan died immediately after sustaining the shot. Balveer Singh fled away from the crime scene after opening the shot. On an alarm being raised by me, persons from the village had gathered. Rajendra of the village had made a call to police at number 100. He had dictated the complaint of the incident at my home to Rajendra. Rajendra had read over the contents of the complaint to me. He had put my thumb impression over it and lodged an FIR by visiting the police station. This witness has proved the written complaint being ext. ka-1 by way of his evidence. The Sub-Inspector had reached the crime scene in the night itself and sent the dead body for post-mortem in sealed condition after preparing the panchayatnama. The Sub-Inspector had recorded my statement at the crime scene in the village. He had shown the crime scene to the Sub-Inspector.

20. PW-6 constable Amar Singh has in his statement on oath has stated that on 18.11.2015, he was on duty at Police station Dado. On that day at around 22:20 hours, he had registered case crime no. 261 of 2015 u/s 302 IPC against the accused Balveer Singh on the written complaint filed by the complainant Itwari Singh, chik

whereof was prepared by me on the computer.

21. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant as far as death of deceased is concerned and we conclude that it was homicidal death caused by appellant.

22. The question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

23. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	KNOWLEDGE (4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

24. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

25. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1

and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

26. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280,** the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

*15.1 Similarly, in the case of **Maniben (supra)**, the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the

appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

27. In latest decision **in Khokan@ Khokhan Vishwas Vs. State of Chattisgarh, 2021 LawSuit (SC) 80** on which this court relies wherein the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and sentenced under Section 304 of IPC. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat,**

(2021) 3 SCC 12 which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

28. The factual scenario as it emerges would go to show that the incident occurred when the accused came to the place of incident 100 rupees were demanded which he had taken from the deceased and there was a quarrel between the deceased and accused. At about 9:00 p.m. Balbeer fired at the deceased and this occurred insper of the moment. The evidence goes to show that it was not a premeditated cold blooded murder. However, PW-1 did not see the deceased shooting at the deceased. PW-2, has turned hostile. Similar is the case with PW-3. The gun was recovered at the instance of the accused from a place which was known only to him.

29. As narrated herein above the decision of commission of offence under Section 302 IPC cannot be concurred by us in view of the As narrated herein above as on overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors (supra)** and we are fortified in our view by the judgment of Apex Court in the case of B.N. Kavatakar and Another (supra) and therefore, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC and not under Section 302 of IPC or Section 304 Part -II of IPC.

30. In ***Mohd. Giasuddin Vs. State of AP***, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

31. 'Proper Sentence' was explained in ***Deo Narain Mandal vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the

court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

32. In ***Ravada Sasikala vs. State of A.P***. AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh***, [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh***, [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

33. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

34. Since the learned counsel for the appellant has later not pressed the appeal on merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is required to be partly allowed.

35. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts

and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

36. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principles laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) of IPC.

Punishment:

37. The accused is in jail since 14.1.2016. The Apex Court in such cases has converted the conviction under Section 302 of I.P.C. to under Section 304 Part I of I.P.C. which will come to the aid of the accused-appellant.

38. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, appeal is partly allowed. The judgment in ***Chherturam @ Chainu (supra)*** will enure for the benefit of the accused and the judgment of ***Stalin Vs. State represented by the Inspector of Police (supra)***, we punish the accused-appellant for eight years rigorous imprisonment and fine of Rs.10000/- in default of fine to undergo one year rigorous imprisonment.

39. Appellant-accused is in jail since 14.1.2016 till date. On completion of eight years of incarceration with remission is over for all the offences and if fine is not deposited, the default sentence would start after the period of eight years. The accused-appellant shall be released on completion of said period, if not required in any other case. The accused-appellant would be entitled to all remissions. The judgment and order impugned in this appeal shall stand modified accordingly.

40. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

(2022) 12 ILRA 147
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Jail Appeal No. 2998 of 2010

Vikram ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Rajesh Kumar Singh, A.C.

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 376 & 511-Challenge to-Conviction- Accused made an attempt to commit rape on 5 year girl and on hearing the hue and cry raised by her daughter (victim), as her mother (informant) reached there and the accused ran away arranging his clothes- It is the settled proposition of law that conviction can be based on the testimony of prosecutrix/victim alone without any corroboration, if the testimony of the prosecutrix/victim inspires confidence- Her evidence would be more reliable than that of an injured witness. In the present case, the evidence given by the

prosecutrix/victim does inspire confidence and the conviction could have been based on the statement of the prosecutrix/ victim alone. However, there is a categoric and strong corroboration available in the present case, in the form of statements of PW-1 (complainant) –Moreso, A child witness is competent to testify u/s 118, Evidence Act. Tutoring cannot be a ground to reject his evidence. A child of tender age can be allowed to testify if it has intellectual capacity to understand questions and give rational answers thereto Hence, t**he present case would fall under Section 376 read with Section 511 IPC and it would not fall under Section 354 IPC. (Para**

B. It is trite law that the prosecutrix is not an accomplice. The evidence of victim of sexual assault, if inspires confidence, conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration. Her evidence is more reliable than that of injured witness. In a case of sexual assault corroboration as a condition for judicial reliance is not a requirement of law but a guidance of prudence. Examining the testimony of prosecutrix in the background, as stated above, and in the facts and circumstances of this case, we are of the clear view, that the testimony of prosecutrix inspires confidence, on the basis of which alone conviction can be safely sustained. Moreover, in the instant case we find that the statements of the prosecutrix are well corroborated by medical and other contemporaneous documents. It is also well established principle of law that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

The appeal is dismissed. (E-6)

List of cases cited:

1. Dalip singh & ors.Vs St. of Punj. (1953) AIR SC 364

2. Vadivelu Thevar Vs St. of Madras

3. Masalti & ors. Vs St. of U.P. (p. 209-210 para 14)

4. Chaitu Lal Vs St. of U.K. (2019) 20 SCC 272

5. Kamalanantha & ors.Vs St. of T.N. (2005) 5 SCC 194

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

1. The accused appellant who was tried for the offence under Section 376 read with Section 511 IPC, by Additional Sessions Judge, Shahjahanpur in Sessions Trial No.917/2007, has filed the present jail appeal before this Court being aggrieved by the judgment and order dated 10-02-2010 passed by the said Court whereby the accused-appellant has been convicted for the offence punishable under Section 376 read with Section 511 IPC and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- and in default of payment of fine further rigorous imprisonment for one years.

2. The prosecution case in brief is that, on 06.03.2005, when minor daughter of the informant, aged 5 years was playing at the gate of her home, accused appellant-Vikram came and enticed her away, thereafter made an attempt to commit rape on her and on hearing the hue and cry raised by her daughter (victim), as her mother (informant) reached there and the accused ran away arranging his clothes. Thereafter, First Information Report was lodged by the informant (P.W.-1) on 07.03.2005 at about 15:15 hours bearing Case Crime No.62 of 2005 at Police Station-Khutar, District-Shahjahanpur, under Section 354 IPC.

3. The Investigating Officer (P.W.-6), on registration of crime vide first information

report (Ext. Ka-3) started with investigation.He recorded the statements of the witnesses and inspected the place of occurrence and prepared the site plan (Ext. Ka-5). The Investigation Officer (P.W.-6) on conclusion of the investigation submitted the charge-sheet (Ext. Ka-6) against the accused appellant for the offence under Section 376/511 IPC and since the case was exclusively triable by the court of Sessions Judge, it was committed to court of sesssions judge and later on transferred to the court of Additional Sessions Judge, Shahjahanpur in Sessions Trial No.917/2007 as stated above. The Additional Sessions Judge, Shahjahanpur on 10-02-2010 framed the charge against the accused appellant to the effect that accused-appellant on 06-03-2005 at some time in village Hitaura within the circle of P.S. Khatar district Shahjanhanpur attempted to rape on the victim aged 5 years, and in such attempt did certain act towards the commission of said offence thereby committed an offence punishable under Section 376 read with Section 511 IPC. Accused appellant pleaded not guilty and prayed for trial.

4. Prosecution in support of its case examined as many as six witnesses i.e. Smt. Laung Shri, mother of victim (P.W.-1), victim (P.W.-2), Ram Prasad, father of victim (P.W.-3), Dr. Manju Sachan (P.W.-4), Chhote Lal, H.C.P.-47 (P.W.-5) and Suresh Pal Sharma, S.I. (P.W.-6).

5. In documentary evidence, prosecution produced and proved the Tahrir Report as Ext.Ka-1, injury report as **Ext.Ka-2**, chick FIR as Ext.Ka-3, copy of G.D. as Ext.Ka-4, site plan as Ext.Ka-5 and charge-sheet as Ext.Ka-6.

6. On the closure of prosecution evidence, all the incriminating material was put to the accused. He made his statement under Section 313 of Code of Criminal Procedure and denied the allegation of the offence under Section 376 read with Section 511 IPC and the incident as alleged by prosecution. He submitted that he has been falsely implicated by the prosecution and he is not involved in committing the aforesaid offence.

7. P.W. 1, Smt Laung Shri who is mother of the victim in her testimony stated that occurrence took place three years and three months ago from today at 10-11 A.M. my daughter victim was playing at the gate of her home. My neighbour Vikram came there enticed away my daughter victim aged 5 year and laid her on cot and having made her naked, sat over her, then my daughter raised alarm, then I rushed from the home and reached the place of occurrence, right then vikram ran away arranging his clothes, in northern direction. When my husband came over I got the report scribed by him, having dictated the same. Both went to the police station alongwith their daughter and report was lodged. She proved the report as Ext.Ka-1.

8. P.W. 2, after preliminary interrogation to ascertain her capacity to understanding and ability to depose, the 9 year old victim has stated in her testimony that the incident took place three years from today at noon. At the time of incident I was playing at the gate of my home. Identifying the the accused she stated that this Vikram enticed her away to shop then he laid me on cot and lowered my panty and made me naked. The accused took my panty off with the intention to rape me. He came over me and lay on me and committed dirty deed on me. The accused entered his urine pipe into my place of urine. I raised alarm then my mother and

other villagers came over there, right then, accused ran away, leaving me. Vikram's, the accused present in court, urine pipe entered a little into my place of urine. I was examined at Government hospital. To court she stated that Vikram belongs to my neighbourhood, since before the incident he used to come to my home and I know him very well.

9. P.W. 3, Ram Prasad, who is father of the victim in his testimony he stated that at the time of incident he was away at Aligarh for earning, his wife telephonically informed him about the incident that Vikram has forcefully raped his daughter aged 5 year. On receiving information, he came home and his wife told him that the accused Vikram forcefully taken away his daughter and forcefully raped her. On her dictation he scribed the report, went to police station and lodged the report. Thereafter took her daughter to hospital and got her medically examined.

10. PW-4, Dr Manju Sachan is a Medical Officer, who proved in her testimony medical report as **Ext.Ka-2** and stated that she had conducted the medical examination of the victim and had given report mentioning therein that there is no sign of injury on thighs and vagina. The hymen of victim is intact and is normal in nature, due to which the finger test cann't be conducted and the sample was also not taken. The condition of the victim's private part is also normal.

11. PW-5, H.C. Chotey Lal, who proved, in his testimony, chick FIR and copy of G.D. as **Ext.Ka-3&4.** He stated that he was on his duty at the concerned police station on 07.03.2005, informant, who is the mother of the victim, filed a written complaint against the appellant alleging therein that appellant has tried to sexual assault upon her daughter, aged about 5 years, on the basis of which, he lodged the FIR. At the time of lodging of the FIR, informant along with victim came and her husband was also present there.

12. PW-6, I.O. S.K. Sharma, who proved, in his testimony, site plan and charge-sheet as **Ext.Ka-5 &6**. On 07.03.2005, in his statement, he stated that after lodging of the FIR, he reached at the spot and recorded the statements of the victim as well as her parents, thereafter, on 08.03.2005 after investigating the case thoroughlly, submitted the chargesheet under Sections 354, 376 & 511 IPC.

13. The learned trial Court after hearing the parties' counsel and considered and analysed the evidence on record found the case of prosecution proved beyond all reasionable doubts against the appellant and has convicted the accused-appellant as indicated in para-1 of the judgment. Aggrieved, the accused has preferred this appeal from jail.

14. I have heard learned amicus curaie for the accused-appellant, learned AGA for the State and perused the original record of the trial Court.

15. Learned counsel for the appellant submits that the unexplained delay in the F.I.R. shows that it was lodged as an afterthought without showing the time and place of occurence. He further submits that both the parties had some quarrel as there was some dispute between the mother of the victim and her sister-in-law (Jethani) and only to mount pressure upon the accused false and frivolous FIR has been lodged out of enmity. He further submitted that the prosecution version is highly

improbable. The prosecution did not produce any independent witness in support of its case and the witnesses relied upon by the court below are all of the same family and are interested witnessees. He further submits that because the appellant did not have opportunity to cross examine the prosecutrix, therefore, her uncorroborated statement can not be read in evidence. He further submits that the proved facts and circumstances available on record of the case, make out a case of preparation only against the accused and he has been illegally convicted for the offence punishable under Section 376 read with Section 511 IPC. Drawing attention to the contents of the FIR as also the statement of the victim, learned counsel for the appellant has contended that taking off panty of victim from her body would only mean that the accused was making preparation to forcibly ravish the minor daughter of the informant. From perusal of the memo of appeal, it has also been averred that if at all the facts appearing in the case are taken to be true, then also the offence would not travel beyond section 354 IPC, so the appellant had been illegally convicted and sentenced u/s 376/511 IPC.

16. Per contra learned AGA has defended the impugned judgment and order and has submitted that the learned trial court has rightly convicted the appellant. He further submitted that in our tradition bound country a rural girl of tender age would not tarnish or damage her own reputation and image merely because her family members had any dispute with or animosity against the accused by volunteering to falsely claim that she had been raped and defiled. According to him, the evidence not only shows the intention to commit the rape, an attempt was also made to do it and successful in completion thereof. The contention of the AGA is that the evidence of victim P.W.-2 is cogent, consistent and trustworthy, appellant missed opportunity to cross examine her for no fault of her own. Since her testimony has been duly corroborated by the testimony of P.W.1 and P.W.3. So far as offence of attempt to rape is concerned, that is well established by the testimony of P.W.-2.

17. I have given my thoughtful consideration to submissions made and the entire evidence on record.

18. In view of the rival contentions first I would like to discuss as to whether the prosecution witnesses of fact were rightly believed or not by the trial court. It is worthwhile to mention that all the prosecution witnesses of fact are related to each other but that alone cannot be a sufficient ground to discard their testimony out rightly.

19. In **Dalip singh and Ors v. The State of Punjab (AIR 1953 SC 364)** it has been laid down as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is

often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

20. The above decision has since been followed in **Guli Chandtate of Rajasthan** in which **Vadivelu Thevar v. Sate of Madras** also relied upon. The Apex Court observed that we are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. state of Rajasthan. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.

21. Again in **Masalti and Ors. v. State of U.P. Apex Court observed : (p. 209-210 para 14):**

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

22. Thus In view of the above legal position it is now settled that inter-se relationship of the witnesses cannot be a ground to discard them but while assessing their evidence the Court must be at guard. The prosecution in the present case examined P.W.1 Smt Laung Shri, mother of the victim, P.W.2 the prosecutrix and P.W.3 Ram Prasad father of the victim.

23. P.W.1 Smt Laung Shri is the mather of the prosecutrix while P.W.3 is her father. In this way all are related to each other and as per the above discussion their evidence requires close scrutiny.

24. P.W.1, Smt. Laung Shri, who proved in her testimony, Tahrir as **Ext.Ka-1**, is mother of the victim, she stated that occurrence took place three years and three month ago. At 10-11 a.m. when her daughter (victim), aged about 5 year, was playing at the gate of her home, accused-appellant (Vikram) came there, enticed her daughter away and, thereafter, laid (victim) on the cot and disrobbing her, sat upon the victim. When she (victim) raised alarm to escape herself, then her mother, (P.W-1) rushed towards the place of occurrence and after seeing her (P.W-1), accused-appellant arranging his clothes ran away from the spot in northern side. When her husband (P.W-3) return back to his home, she described the said incident and, thereafter, both went to the police station alongwith their minor daughter (P.W.-2) and lodged the FIR.

25. This witness was tried to be belied on the ground that he has come to depose

against the appellant on account of enmity. Regarding the enmity it was pointed out that at the time of occurrence, Mohan Lal was the pradhan of the village and she was not on talking terms with the pradhan but accused was on talking terms with the pradhan. Thus the enmity pleaded by the appellant has not been proved. Moreover, the above enmity could not prompt the witness to sacrifice the chastity of her daughter. There could be several other ways to take revenge on account of the above enmity, if it was there, and she in normal circumstances would not take revenge through her daughter. Thus the ground of enmity, as suggested by the appellant, is not convincing and it cannot be held that the applicant has been falsely implicated on account of any such enmity.

26. The statement of the witness has also been tried to be belied on the ground that there is contradiction in her statement and FIR about the time of occurrence and the site plan about the place of occurrence. This witness has stated that time of the occurrence is 11 A.M. and accused enticed away and laid on the cot. In site plan, place of occurrence is shown as the house of the accused. From the statement of the witness the prosecution story regarding the time, place and manner of occurrence is fully proved and there is nothing on record to disbelieve this witness. She was rightly believed by the trial court.

27. P.W. 3, Ram Prasad, who is a father of the victim, stated that at the time of incident, he went Aligarh for earning his livelihood. His wife telephonically informed him about the said incident that accused-appellant has forcefully raped his daughter. On receiving such information, he came back to his home, and scribed report at her dictation, thereafter, he along with his wife and daughter went to the police station and lodged the FIR. Thereafter, they took her daughter to the hospital to get her medically examined.The accused was given opportunity to cross examine but he failed to availed the same. He is also a reliable witness and was rightly believed by the trial court

28. P.W.-2, herself is a victim, after preliminary interrogation to ascertain her capacity of understanding and ability, 9 year old victim after identifying the accused, has stated that the incident took place three years ago at noon. At the time of the incident, when she was playing at the gate of her house, accused-appellant came there and enticing her away and taken to the shop, thereafter, he (accused) laid her on the cot disrobbing her entered his urine pipe a little into her place of urine. Thereafter, she raised alarm to escape herself then her mother (P.W.1) and other villagers came over there and after seeing them accused ran away from the spot. She was examined at Government hospital. To court she stated that Vikram belongs to her neighbourhood,since before the incident he used to come to her home and she knows him very well. As counsel for the accused remained absent, accused also refuse to cross examine, his opportunity was closed, coss examination - Nil .

29. A child witness is competent to testify u/s 118, Evidence Act. Tutoring cannot be a ground to reject his evidence. A child of tender age can be allowed to testify if it has intellectual capacity to understand questions and give rational answers thereto. Trial Judge may resort to any examination of a child witness to test his capacity and intelligence. If on a careful scrutiny, the testimony of a child witness is found truthful, there can be no obstacle in the way

of accepting the same and recording conviction of the accused on the basis of his testimony.

30. As the witness was tested before being examined and court found the witness is average intellegent and capable to understand the questions and answer, ADGC (Crl) was permitted to examine and the witness was examined and after examination-in-chief, to court she stated that Vikram belongs to her neighbourhood, since before the incident he used to come to her home and she knows him very well. An opportunity was given to the accused to cross-examine witness but he failed to avail the same, moreover, the said order was not challenged in revision, so the same attained finality. At this stage it can not be allowed that her testimony is not admissile in evidence as she has not been cross-examined in the face of the circumstances that no animus against the witness can be attributed to falsely implicate the accused. The testimony of this witness is cogent, consistent and trusworthy. She is not a tutored witness. She is a reliable witness and has rightly been believed by the trial court.

31. The question that falls for consideration of this court is, as to whether the offence committed by the appellant would come within the scope of Section 376 read with Section 511 IPC or not.

31. Since the main thrust of learned counsel for both the parties is on the ingredients of Section 511 IPC IPC, it would be appropriate to reproduce Section 511 IPC IPC for ready reference and the same reads as under :-

"Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment-Whoever attempts to commit an offence punishable by this Code with [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both."

32. Considering the abovesaid peculiar fact situations of the present case, with a view to arrive at a conclusion, so as to answer the question posed above, there are three different and relevant stages, which are to be analysed from the point of view of this Court. The first stage was whether there was any mens rea which is sine qua non for commission of any offence. In the present case, the above noted first stage of mens rea came to be covered by the appellant, once he went near the house of the victim knowing fully well that the prosecutrix was playing all alone. The second stage was the preparation. The accused-appellant covered the second stage also by laying her in the cot and, thereafter, lowering the panty of the victim and making her naked. The third and crucial stage was an attempt to commit the rape. It is to be seen at this stage, whether the appellant was determined for committing the offence or not. The relevant words from Section 511 IPC, quoted above, would come handy at this stage and the same read as under :-

"and in such attempt does any act towards the commission of the offence".

33. An attempt to commit an offence is an act, or a series of acts, which leads

inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act alone in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

34. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

35. Applying the principle of harmonious interpretation, even one action taken at the hands of accused towards the commission of offence would amount to an attempt because the words are: "does any act". In the present case, the appellant did not only do one act, but more than five acts, which show his strong determination for commission of the offence. These acts were (i) knowing fully well that the prosecutrix/victim was playing all alone; (ii) laying her in the cot and, thereafter, lowering the panty of the victim and making her naked: (iii) came over her; (iv) laying down himself on the prosecutrix/victim; (v) resistance shown by the prosecutrix by screaming loudly and act of not desisting by the appellant. All these actions of the appellant, put together and considered, keeping in view the attending circumstances of the present case, go to establish the strong determination of the appellant in attempting to commit the offence of rape. The accused/Appellant has not shown any reluctance that he is going to stop from committing the aforesaid offence, therefore, had there been no interference, in form of raising alarm by the victim and reaching of mother of victim at the place of occurence , the accused/appellant would have been succeeded in executing his criminal design, the conduct of the accused in the present case is indicative of his definite intention to commit said offence.

36. The above said view taken by this Court finds support from the judgment of the Hon'ble Supreme Court in **Chaitu Lal versus State of Uttarakhand, (2019) 20 SCC 272.** The relevant observations made in para 10 of the judgment, read as under:

"Herein, although the complainantvictim and her daughter were pleading with the accused to let the complainantvictim go, the accused-appellant did not show any reluctance that he was going to stop from committing the aforesaid offence. Therefore, had there been no intervention, the accusedappellant

would have succeeded in executing his criminal design. The conduct of the accused in the present case is indicative of his definite intention to commit the said offence."

37. Thus, drawing thin line distinction between the commission of offence under Section 376 IPC read with Section 511 IPC i.e. attempt to commit rape and offence under Section 354 IPC i.e. offence of outraging the modesty of a woman, this Court is of the considered opinion that the present case falls under Section 376 IPC read with Section 511 IPC and not under Section 354 IPC. In this view of the matter, the question posed, hereinbefore, is answered, accordingly.

38. It is the settled proposition of law that conviction can be based on the testimony of prosecutrix/victim alone without any corroboration, if the testimony of the prosecutrix/victim inspires confidence. I say so because the prosecutrix/victim is not an accomplice, but victim. Her evidence would be more reliable than that of an injured witness. In the present case, the evidence given by the prosecutrix/victim does inspire confidence and the conviction could have been based on the statement of the prosecutrix/victim alone. However, there is a categoric and strong corroboration available in the present case, in the form of statements of other PWs, particularly PW-1, Smt. Laung Shri (complainant).

39. The above said view taken by this Court finds support from the judgment of the Hon'ble Supreme Court in **Kamalanantha and others versus State of Tamil Nadu, (2005) 5 SCC 194.** The relevant observations made in para 34 of the judgment, read as under:

"It is trite law that the prosecutrix is not an accomplice. The evidence of victim of sexual assault, if inspires confidence, conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration. Her evidence is more reliable than that of injured witness. In a case of sexual assault corroboration as a condition for judicial reliance is not a requirement of law but a guidance of prudence. Examining the testimony of prosecutrix in the background, as stated above, and in the facts and circumstances of this case, we are of the clear view, that the testimony of prosecutrix inspires confidence, on the basis of which alone conviction can be safely sustained. Moreover, in the instant case we find that the statements of the prosecutrix are well corroborated by medical and other contemporaneous documents. It is also well established principle of law that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.(See State of Punjab v. Gurmit singh)."

40. So far as delay in lodging of the FIR is concerned, there is sufficient explanation in the FIR itself as at the time of the incident, father of the victim i.e. husband of the complainant was out of station and as soon as the said incident came to his knowledge, he came there and lodged the instant FIR, therefore, this cannot be said that the same has been done as an afterthought. At the time of the incident, prosecutorix was of her tender age and no one will put his/her girl's honour at stake considering her future. As per statement of P.W.-1 (mother of the victim), after seeing her, accused ran away

arranging his clothes from the spot also supports the ingredients of Section 6 of the Evidence Act. The testimony of the victim (P.W.-2) to the extent that the accused had sexual intercourse with her cannot be said to have proved offence under Section 376 IPC since her medical examination does not support prosecution version that she was subjected to sexual intercourse at the time of incident as alleged. The trial Court which has considered the entire evidence on record in this connection and the findings arrived at by the trial Court appears to be well reasoned. Minor contradictions pointed out by the defence are not material and does not make the testimony of these witnesses unbelievable to that extent. I, therefore, find myself in full agreement with the reasons given by the trial Court that the accused attempted to commit rape on the victim (P.W. 2), and the conviction of the accused for the said offence under Section 376 read with Section 511 IPC deserves to be maintained and does not call for any interference in this appeal.

41. Therefore, keeping in view the fact situation and evidence discussed in the forgoing part of the judgment, I unhesitatingly hold that the present case would fall under Section 376 read with Section 511 IPC and it would not fall under Section 354 IPC. Accordingly, the instant Jail Appeal deserves to be dismissed and is **dismissed.**

42. Since the appellant has already served out the entire sentence awarded to him including the default clause of non-payment of fine, he need not surrender, if he is not wanted in any other case crime.

43. A copy of this order be sent to jail and another copy be sent to the court concerned along with the original record forthwith.

44. Sri Rajesh Kumar Singh Advocate, who has very efficiently assisted this Court in the hearing of the appeal as Amicus Curiae, shall be paid Rs.11,000/- as fee within 15 days from the date of this order.

45. There will be no order as to costs.

(2022) 12 ILRA 157
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 3171 of 2010

Sarjeet & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Faneesh Mishra, Sri Chandra Kesh Misra, Sri D.S. Misra, Sri Deepak Kumar Pandey, Dr. C.P. Upadhyay, Sri Govind Saran Hajela, Sri Pradeep Kumar Bhardwaj, Ms. Renu Singh, Sri T. Islam, Sri Saroj Kumar Tiwari, Sri Yogesh Srivastava

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 147, 148, 302, & 120-B - Challenge to-Conviction- P.W.1 in his examination-in-chief admitted the factum of previous enmity between the parties-the prosecution has produced as many as five witnesses as eye-witness of the occurrence including P.W.1, but

except him, others have been declared hostile- P.W.1 is the sole eye-witness of the case and he, being the father of the deceased is highly interested witness, who has inimical terms with the accused-persons-In the present case, the ocular evidence finds corroboration by medical evidence and the prosecution has successfully proved its case beyond reasonable doubt- testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of the testimony of such related witness.(Para 38 to 81)

B. Evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base the conviction upon his testimony if corroborated by other reliable evidence. (Para 21 to 33)

C. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution's case. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses.(Para 37 to 40)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Keshavlal Vs St. of M.P. (2002) 3 SCC 254

2. Gopal Singh Vs St. of U.K. (2013) 7 SCC 545 (para12 & 13)

3. Syed Ibrahim Vs St. of A.P. (2006) AIR SC 2908

4. St. of Karn. Vs J. Jailalittha (2017) 6 SCC 263

5. Tomaso Bruno & anr. Vs St. of U.P.(2015) 7 SCC 178

6. Chennadi Jalapathi Reddy Vs Baddam Pratapa Reddy (2019) 14 SCC 220

7. Muniappan Vs St. of T.N. (2011) 72 ACC 988

8. Deepak Verma Vs St. of H.P.(2011) 10 SCC 129

9. Bikau Pandey Vs St. of Bih. (2003) 12 SCC 616

10. Darya Singh Vs St. of Punj. (1965) AIR SC 328

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

12. Anil Rai Vs St. of Bih (2001) 7 SCC 318

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

14. Shyam Babu Vs St. of U.P. (2012) AIR SC 3311

15. Shyamal Ghosh Vs St. of WB (2012) AIR SC 3539

16. Dayal Singh Vs St. of U.K. (2012) SC 3046

17. Amit Vs St. of U.P. (2012) AIR SC 1433

18. St. of Har.Vs Shakuntala & ors.(2012) 77 ACC 942 SC

19. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 537

20. Surinder Kumar Vs St. of Punj. (2020) 2 SCC 563

21. Rajesh Yadav & anr. Vs St. of U.P. (2022) 119 ACC 978

22. Gura Singh Vs St. of Raj. (2001) 2 SCC 205

23. St. of U.P. Vs Ramesh Prasad Misra & anr. (1996) AIR SC 2766

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

25. Lakhmanbhai Chandabhai Vs St. of Guj. (1999) 8 SCC 624

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

1. This Criminal Appeal has been preferred by appellants - Sarjeet and Devendar against the judgment and order dated 1.5.2010 passed by Additional District and Sessions Judge, Fast Track-I Court No.9, District Gautam Budh Nagar in Sessions Trial No.291 of 2002 (State Vs. Hari Singh and Others) arising out of Case Crime No.42 of 2002 under Sections 147, 148, 302, 120-B IPC, Police Station Dankaur, District Gautam Budh Nagar, convicting and sentencing both the appellants for the offence under Section 147 IPC to undergo six months imprisonment with fine of Rs.500/- each, for the offence under Section 148 IPC to undergo one year imprisonment with fine of Rs.1000/- each and for the offence under Section 302 IPC to undergo imprisonment for life with fine of Rs.10,000/- each with default sentence.

Brief Facts of the case -

2. Prosecution story, in nutshell, as unfolded in written report (Ex.Ka.-1), is as follows:

On 21.3.2002 at about 7.00 a.m. the complainant Nepal Singh alongwith Ramesh, Gajraj and Pawan was sitting in his Gher, when his son Bijendra was sent to Milak to collect money. After Bijrendra left, the complainant saw that accused Sarjeet and Devendar alongwith 5-6 young aged unknown fellows armed with country made pistols and knives were going towards Milak. Apprehending that the accused may not indulge in fight with his son Bijendra, the complainant alongwith Ramesh and others went towards Milak and saw that near Johar Bijendra was caught hold by accused Devendar, Sarjeet and their 5-6 associates who were beating him. The accused Devendar and Sarjeet armed with knives assaulted his son Bijendra on his face and cut his neck. When the complainant raised alarm, hearing his shrieks, Prithvi, Satti and Malkhey alongwith other people reached at the place of occurrence, then the accused persons fled away towards the village Milak. It is further stated in the report that 5-6 years back, accused Devendar's brother Harveer had fallen in a well and died, for which the accused Devendar and his family members had a suspicion over the informant party. A land dispute was also pending between the informant and accused Sarjeet's father Hari Singh. Due to aforesaid reasons, Hari Singh, Jasram, Sarjeet, Devendar called other miscreants on 20.3.2002 at their house and after hatching conspiracy committed murder of the son of the complainant. With the help of villagers, the complaint took his son to Government Hospital in injured condition where the doctors declared him dead.

3. On the basis of written report (Ex.Ka.-1), on 21.03.2002 at 9:05 hours, Chik First Information Report at Crime No.42 of 2002 under Sections 148, 302, 120-B IPC was

4. The investigation started. During the course of examination, both the accused were arrested and murder weapon knives were recovered at the pointing out of the accused-persons. The Investigating Officer recorded the statement of all the witnesses of fact and also the formal witnesses.

5. The inquest of deceased Bijendra was conducted and autopsy of the body was performed by Dr. Yashwant Singh P.W.17 who found the following ante-mortem injuries over the body of the deceased :

(i) Incised wound 7 cm. x 3.5 cm. x great vessel deep & muscle deep on left side neck (left sub mandibula region). On examination - trachea cut, muscles cut, internal carotid artery and internal jugular vein cut and esophagus cut.

(ii) Multiple incised wounds in an area of 12 cm. x 10 cm. of left side face & chest of sizes varying from 1 cm. x 0.5 cm. x sub cut deep to 2.5 cm. x 1 cm. x muscle deep.

(iii) Incised wound 1 cm. x 0.5 cm. x sub cutaneous deep right side chest 8 cm. medial to right nipple at 4'O clock position.

(iv) Incised wound 1 cm. x 0.5 cm. x sub cutaneous deep right side abdomen 6 cm. outer to umbilical at 9'O clock position.

It was found by the doctor that the death was caused due to shock and haemorrhage as a result of ante-mortem injuries.

6. After completing all the formalities, the Investigating Officer submitted charge-sheet against five accused-persons.

7. The appellants / accused appeared before the Court and the matter, being exclusively triable by the Sessions, was committed to the Court of Sessions.

8. Accused Hari Singh, Devendar, Inder, Sarjeet and Jasram were charged under Sections 147, 148, 302/149, 120-B IPC and charges under Section 25/4 Arms Act were also framed separately against accused Devendar and Sarjeet.

9. The accused-persons denied all the charges and claimed to be tried.

Evidence adduced by the Prosecution -

10. The prosecution, to bring home the charge against the accused persons, has relied upon the oral as well as documentary evidence.

11. As per oral evidence, a total of 17 witnesses have been produced by the prosecution, who are as under.

1.	Nepal Singh	P.W.1, the informant / eyewitness
2.	Gajraj Singh	P.W.2, eyewitness
3.	H.C. Rampal Singh	P.W.3, scribe of F.I.R. and G.D.
4.	Prithi Singh	P.W.4, eye-witness / witness of inquest
5.	Constable Jai Prakash Sharma	P.W.5, witness of recovery of murder weapon
6.	Santi @ Santo	P.W.6, witness of fact
7.	Ram Mehar	P.W.7, witness of fact
8.	Constable Nekpal	P.W.8, scribe of F.I.R. and G.D. under Section 25/4 Arms Act
9.	Ram Singh	P.W.9, witness of fact
10.	Dhiri Singh @ Dheeraj Singh	P.W.10, witness of recovery of murder weapon

11.	Amarpal	P.W.11, witness of recovery of murder weapon
12.	Constable Shaukendra Singh	P.W.12, witness of memo of recovery of murder weapon
13.	Malkhey	P.W.13, witness of fact
14.	S.I. Binda Singh Chandel	P.W.14, second Investigating Officer
15.	S.I. Rakesh Babu Yadav	P.W.15, first Investigating Officer
16.	S.I. Om Prakash Singh	P.W.16, third Investigating Officer
17.	Dr. Yashwant Singh	P.W.17 (Performed Autopsy)

12. The Investigating Officer of the matter under Section 25 Arms Act C.P. Balbeer Singh has not been examined and P.W.16 has deposed for him as secondary witness.

13. To support the oral evidence, the following documentary evidence was produced by the prosecution, which is as under.

1.	Written Report	Ex.Ka.-1
2.	Memo of supurdagi of cycle	Ex.Ka.-2
3.	Chik F.I.R.	Ex.Ka.-3
4.	G.D.	Ex.Ka.-4
5.	Inquest Report	Ex.Ka.-5
6.	Memo of Fard of blood-stained and plain soil, blood-stained knife and bicycle	Ex.Ka.-6
7.	Chik F.I.R. and G.D. under Section 25 Arms Act	Ex.Ka.- 7 & 8 respectively
8.	Recovery memo of murder weapon knife	Ex.Ka.-9
9.	Site plan of the place of recovery	Ex.Ka.-10
10.	Charge-sheet	Ex.Ka.-11
11.	Site plan of the place of occurrence	Ex.Ka.-12
12.	Papers relating to postmortem, photo nash, challan nash, letter to C.M.O. and letter to R.I.	Ex.Ka.13, 14, 15, 16, 17 respectively
13.	Charge-sheet against accused Inder	Ex.Ka.-18
14.	Charge-sheet- 2 Sets under Section 25/4 Arms Act	Ex.Ka.-19 & 20 respectively
15.	Autopsy Report	Ex.Ka.-21

Statement under Section 313 Cr.P.C. -

14. The incriminating circumstances and evidence available on record against the accused-persons were put to them in their statements under Section 313 Cr.P.C. wherein the plea of false implication has been taken and the truthfulness and genuineness of the entire oral and documentary evidence produced by the prosecution was denied. However, no defence evidence has been adduced by the accused-persons / appellants.

15. Having heard both the sides and after analyzing the evidence on record the learned trial court found that the prosecution has succeeded to prove its case beyond reasonable doubt and recorded conviction of the accused persons and sentenced them as mentioned here-in-above.

Submissions made by the learned counsel for Appellants -

16. It has been submitted by the learned counsel for the appellants that the witnesses of fact, except P.W.1, have been declared hostile by the prosecution and do not support its case at all. P.W.1 is said to be the sole eye-witness of the case and his statement is also shaky and does not inspire confidence. It has also been submitted that

the testimony of P.W.1 is full of contradictions and unnatural statements. It has further been submitted that public witnesses of the alleged recovery of the murder weapons at the pointing out of the accused-persons are also not reliable and have been declared hostile which resulted into the acquittal of accused persons of the charges under Arms Act. It has further been submitted that the informant had a grudge with the accused-persons / appellants for some land dispute and in order to grab that land, he has falsely implicated the appellants in this case. On the aforesaid grounds, it has been prayed that the accused-persons / appellants are liable to be acquitted as the prosecution miserably failed to prove its case.

Submissions made on behalf of the State -

17. Per contra, the learned A.G.A. vehemently opposing the submissions made by the learned counsel for the appellants, has contended that the prosecution has successfully proved its case beyond reasonable doubt. The evidence of P.W.1 is trustworthy and reliable and as per the established legal principles, the conviction can always be successfully recorded on the basis of the evidence of sole eye-witness. The recovery of murder weapon - knives at the pointing out of the appellants has been proved by the cogent evidence. It is a case of cold-blooded murder of a young chap and all the relevant evidence to record the conviction of the appellants is available on record. The false implication theory does not find any basis in the light of the evidence on record. On these grounds, the dismissal of the present criminal appeal has been prayed for.

Analysis - Ocular Evidence -

18. We have heard the submissions made by the learned counsel for the appellants and learned A.G.A. We have to travel through the entire prosecution evidence so as to reach at the right conclusion whether impugned judgment is liable to be sustained or not and before we go through the evidence, we have patiently noted the submissions made by the learned counsel for the appellants while assailing the impugned judgment as well as by the learned A.G.A.

19. At the very outset, it is to be borne in mind that present is the case which is based on eye-witness account. P.W.1 Nepal Singh, P.W.2 Gajraj Singh, P.W.4 Prithi Singh, P.W.6 Santi @ Santo and P.W.13 Malkhey have been produced by the prosecution as eye-witnesses of the occurrence.

20 P.W.1, who is the father of the deceased and also the informant of the case, has proved the prosecution case in his deposition and without any hesitation he has categorically stated that on the fateful day his son Bijendra was caught by the accused-persons - Devendar, Sarjeet and six other unknown persons. Accused Devendar and Sarjeet gave several blows over the face and neck of the deceased. The unknown accused-persons had desi pistols with them. He had seen the occurrence and witnesses Chaman, Ramesh and Gajraj were also present with him. On their shrieks, other persons of the village also came there and the accused-persons fled away. The deceased in injured condition was taken to the hospital, but was declared dead by the doctor. This witness has also proved the written report Ex.Ka.-1 and the memo of supurdgi of cycle on which the deceased was going as Ex.Ka.-2. No material contradiction is found in the entire

testimony of P.W.1 despite a lengthy cross-examination by the defence. His presence over the place of occurrence is natural and probable because at the time of the occurrence, he was sitting along with other persons in his Gher and had sent his son Bijendra to the village Milkey to receive some money. This witness also clearly states that the accused-persons had previous enmity and grudge with him and when his son went by his cycle and he saw the accused-persons nearby, he had a suspicion for some mishappening, so he chased them and became the witness of the fatal incident.

Evidence of Hostile Witnesses - Evidentiary value

21. The learned counsel for the appellants has contended that the witnesses Chaman and Ramesh, who are said to accompany the informant at the time of the occurrence, have not been produced by the prosecution and the third witness Gajraj, who has been examined as P.W.2, is a hostile witness and does not support the prosecution version at all and categorically states that he has seen nothing. The statement of P.W.4 Prithi Singh, P.W.6 Santi @ Santo and P.W.13 Malkhey has also been assailed by the learned counsel for the appellants by arraying them in the category of total hostile witness. He has contended that in no material terms, these witnesses support the deposition of P.W.1 and their testimony proves the appellants innocent.

22. A perusal of the statement of P.W.2, P.W.4, P.W.6 and P.W.13 shows that they have nowhere stated to see the accused-persons attacking over the deceased and thereby causing his murder. This makes us to travel through the relevant laws and legal position in respect of the evidence of a hostile witness and to scrutinize the statement of the aforesaid witnesses in the light of the relevant legal position.

23. Hon'ble Apex Court in **Koli Lakhmanbhai Chandabhai vs. State of Gujarat [1999 (8) SCC 624],** has held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base the conviction upon his testimony if corroborated by other reliable evidence.

24. In **Ramesh Harijan vs. State of U.P. [2012 (5) SCC 777]**, it has been reiterated that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

25. In **State of U.P. vs. Ramesh Prasad Misra and another, AIR 1996 SC 2766,** the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.

26. In **Gura Singh vs. State of Rajasthan (2001) 2 SCC 205,** the Hon'ble Supreme Court held like this - "It is a

misconceived notion that merely because the witnesses have been declared hostile their entire evidence is excluded or rendered unworthy of consideration. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness". (Para 11)

".....In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy." (Paras 12 and 11)

27. In the light of the aforesaid settled legal position, the law on the subject can be summarized to the effect that the testimony of hostile witness cannot be thrown away just on the basis of the fact that he has not supported the prosecution case and was cross-examined by the prosecutor. The testimony of hostile witness can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of such witness should be scrutinized meticulously and very cautiously.

28. P.W.2, in his cross-examination, has stated that when the villagers came to know about the injuries of Bijendra at about 9:30 A.M., he along with other villagers Prithi, Hari Singh etc. reached the spot and took Bijendra to Dankaur from the place of occurrence. He has also admitted that Harveer, the brother of accused Devendar had died after falling into a Well 5 - 6 years before the occurrence. This statement affirms the time and place of occurrence and also the history of enmity between the parties, as stated by P.W.1.

29. Likewise, P.W.4 Prithi Singh has also stated that he had seen the accused-persons from hundred steps behind, who were running away. He was behind his brother Nepal and Malkhey was also with him. He had not seen the faces of the assailants, but had seen them from the back when they were fleeing away from the spot. They took Bijendra to Government Hospital, Dankaur where he was declared dead. This witness also states that the crime was committed on 21.3.2002 when he was having a conversation with Malkhey and Santi at his house. He also proves his signature over the inquest report Ex.Ka.-5 and the seizure memo of blood-stained and plain soil, one pair of sleeper, one blood-stained knife and cycle as Ex.Ka.-6. The aforesaid deposition of P.W.4 also corroborates the date and place of occurrence and fact regarding other incriminating materials taken into custody by the police.

30. Likewise P.W.6, though declared hostile, proves the time and other material aspect of the matter when he says that he had reached the spot following Prithi where Bijendra was lying dead in the lap of Nepal.

31. P.W.13 Malkhey in the same fashion states that when on noise he alongwith Prithi and Santi reached the spot, he saw Bijendra lying in the lap of Nepal in the injured condition. He had seen the assailants from behind.

32. The aforesaid depositions of P.W.2, P.W.4, P.W.6 and P.W.13 can be taken into account so far as they relate to the date, time and place of occurrence. It is true that they have not seen the faces of the assailants, but in material particulars their evidence supports the prosecution case. P.W.1 has clearly seen the assailants committing the crime. The learned trial court has taken into account the aforesaid legal position and has well appreciated and scrutinized the evidence of the hostile witnesses. We also find that up to some extent, but in significant manner, the prosecution version in this case is affirmed by the statements of hostile witnesses also. The ocular evidence of P.W.1 is also found cogent and reliable.

33. The legal theory, as denoted here-in-above, operating upon the appreciation of evidence of a hostile witness has been reproduced by the Hon'ble Supreme Court recently in **Rajesh Yadav & Another vs. State of U.P. (2022) 119 ACC 978** which can also be taken note of.

Other Witnesses of Fact -

34. The deposition of P.W.7 and P.W.9 has also been assailed by the learned counsel for the appellants and argument has been advanced that they are the witnesses, who are said to be the eye-witness of the fact that the accused-persons were planning for the murder of the deceased at the house of Hari Singh but both of them have denied even to hear or see such incident of planning and they have also been declared hostile.

35. Learned A.G.A. for the State fairly admits that there is nothing in the statement of P.W.7 and P.W.9, which goes to help the prosecution in any way.

36. We are of the considered opinion that even if the depositions of P.W.7 and P.W.9 are completely washed off, it brings no harm to the prosecution case because the reliable and cogent occular evidence is available on record in the form of deposition of P.W.1.

Related / Interested witness - Evidentiary value -

37. The learned counsel for the appellants has forcefully submitted that P.W.1 is the sole eye-witness of the case and he, being the father of the deceased is highly interested witness, who has inimical terms with the accused-persons and in this way, his evidence should not be relied upon to convict the accused-persons for such a grave offence like murder. His deposition is always under the cloud of suspicion and is not acceptable.

38. As has been discussed here-in-above, the prosecution has produced as many as five witnesses as eye-witness of the occurrence including P.W.1, but except him, others have been declared hostile. The prosecution story is very natural in this way that on the fateful day the informant had sent his son to receive some money from the other village when he was sitting in his Gher along with other persons, but as soon as he saw the accused-persons moving near his Gher, who had a previous enmity with him, he had a suspicion for some mishappening and he went behind them and became the witness of the unfortunate incident. In these circumstances, how he can be said to be an unnatural witness and what makes his presence on the spot improbable. His evidence cannot be brushed aside only because of the fact that he is the father of the deceased.

39. Hence, we do not find ourselves in agreement with the aforesaid plea taken

by the learned counsel for the appellant. The legal position in respect of a relative witness has been made clear in a catena of decisions by the Hon'ble Apex Court and by this Court also. It is well settled that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is relative or family member of the victim of the offence. In such a case the Court has to adopt a careful approach in analysing the evidence of such a witness and if after careful scrutiny, the testimony of the related witness is otherwise found credible the accused can be convicted on the basis of testimony of such related witness. Recently, in **Surinder Kumar Vs. State of Punjab (2020) 2 SCC 563** Hon'ble Supreme Court has reiterated that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

40. The Hon'ble Apex Court in **Bhagwan JagannathMarkad Vs. State of Maharastra (2016) 10 SCC 537** has held that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case Court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of the testimony of such related witness.

41. The same view has been taken in **Dhari & Others Vs. State of U.P., AIR 2013 SC 308, Shyam Babu Vs. State of U.P., AIR 2012 SC 3311, Shyamal Ghosh Vs. State of WB, AIR 2012 SC 3539, Dayal Singh Vs. State of Uttaranchal, AIR 2012 SC 3046, Amit Vs. State of U.P., AIR 2012 SC 1433 and State of Haryana Vs. Shakuntala & Others, 2012 (77) ACC 942 (SC)** and so on.

Motive -

42. In this sequence, it has also been vehemently argued that the motive assigned behind the crime has not been properly proved. It has also been argued that if there was an enmity between the parties the accused undoubtedly have been falsely implicated due to enmity.

43. From the careful scrutiny of the deposition of P.W.1, we find that in his examination-in-chief he has admitted the factum of previous enmity between the parties. He has been cross examined at length on this point wherein he has clarified that the parties have some land disputes and civil litigation is also pending between them. P.W.1 has fairly admitted that prior to this occurrence, Harveer, the brother of accused Devendar died by falling into a Well and he himself was suspected in his murder by the accused-persons, but if this story is taken as a cause for enmity between the parties, the informant had no reason to falsely implicate the accused-persons in this case, rather it was a strong reason for the appellants / accused-persons to commit the crime against the informant. In their statement under Section 313 Cr.P.C., the accused persons have admitted the factum of enmity between the parties.

44. In the aforesaid context, another plea has been raised by the appellants that since the parties are on inimical terms, as per statement of P.W.1 and also as per the version of F.I.R. itself, a possibility of false implication of the accused-persons cannot be thrown out completely.

45. In **Anil Rai Vs. State of Bihar (2001) 7 SCC 318** it has been held that enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of the accused persons.

46. In **Dalip Singh vs. State of Punjab, AIR 1953 SC 364** it was observed that -

"Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth".

47. The Hon'ble Supreme Court in **Darya Singh Vs. State of Punjab, AIR 1965 SC 328** held that evidence of an eye-witness, who is a near relative of the victim should be closely scrutinized, but no corroboration is necessary for acceptance of his evidence.

48. The trial Court has also discussed the various aspects of motive and enmity existing between the parties in the present case particularly in the light of the evidence of P.W.1. Reliance has been placed upon **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** wherein it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance.

49. There are catena of decisions on the point that in a case based upon the eye witness account, the motive loses its significance. In **Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129** It has been held as under:

"...Proof of motive is not a sine qua non before a person can be held guilty of commission of crime. Motive being a matter of mind, is more often than not difficult to establish through evidence."

Reliable Ocular Evidence -

50. In fact, P.W.1 has been cross-examined at length by the defence. His statement, which started in the year 2003 before the trial court, was concluded finally in 2005, as it appears from the perusal of the record, but despite the lengthy and thorough cross-examination conducted into a long span of time, his entire evidence is found cogent, trustworthy and innocent. The trial court has rightly relied upon his statement, no material contradiction is found wherein. The contradictions and discrepancies found in his deposition are minor in nature and are not such as to hit at the very root of the prosecution case and are as such, ignorable. He is the eye-witness of the crime of murder and the unfortunate father of the young deceased.

51. The Hon'ble Supreme Court in **Rajesh Yadav & another (supra)** has placed reliance upon the decision in C. Muniappan vs. State of Tamil Nadu, 2011 (72) ACC 988 wherein it was held that it is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution's case. As the mental abilities of a human being cannot be expected to be attuned to absorb all the

details of the incident, minor discrepancies are bound to occur in the statements of witnesses.

Medical Evidence -

52. In order to establish the guilt of the accused and to corroborate its story, the prosecution, apart from the eye-witness account, mainly relied on expert opinion of Dr. Yashwant Singh (P.W.17), who performed the autopsy of the body of the deceased and has proved the autopsy report (Ex.Ka.-21). From the perusal of the autopsy report, as also affirmed by P.W.17, we find that several incised wounds have been found on the face, neck, chest and abdomen of the deceased. He also found that the trachea muscles, internal carotid artery, internal jugular vein and esophagus were cut. The autopsy was performed on 22.03.2002 at 11:00 A.M. and according to the opinion of P.W.17, the deceased was died one day before the postmortem. The prosecution story also says that the murder was committed on 21.03.2002, one day before the postmortem. The learned counsel for the appellants has vehemently argued that P.W.17 in his cross-examination has categorically stated that the injuries over the person of the deceased are not probably to be inflicted by knife rather it might have been inflicted by some sharp-edged and heavy instrument e.g. spade, axe, tabal etc. He has made it a point that in such circumstances, the prosecution case is not corroborated with the medical evidence. The learned A.G.A., on the other hand, has contended that the offence of murder has been seen by the eye-witness P.W.1 in this case and he has categorically deposed that the murder was caused by use of knife.

53. The rival contentions of both the sides take us to go through the law relating to the evidentiary value of an expert particularly when it is contrary in some aspects to that of the occular version.

54. In **Chennadi Jalapathi Reddy Versus Baddam Pratapa Reddy, (2019) 14 SCC 220** it was held that the Court must be cautious while evaluating expert evidence, which is a weak type of evidence and not substantive in nature. It may not be safe to solely rely upon such evidence and the Court may seek independent and reliable corroboration in the facts of a given case, as a general rule of prudence. Generally, mere expert evidence as to a fact is not regarded as conclusive proof of it.

55. Likewise in **Tomaso Bruno and Another Versus State of U.P., (2015) 7 SCC 178** it was held that Courts give due regard to expert testimony but are not bound by it. Report when read in conjunction with other evidence on record, renders it unacceptable. It was reiterated in **State of Karnataka Versus J. Jailalittha (2017) 6 SCC 263** that an expert is not a witness of fact and his evidence is really of an advisory character and his duty is to furnish court with scientific test criteria to test accuracy of conclusions. Based on such expert opinion and appreciating facts of each case, court must give its independent judgment. Court should not subjugate its own judgment to that of expert or delegate its authority to third party but ought to access evidence of expert like any other evidence.

56. The legal position which emerges out from the study of several verdicts given by the Hon'ble Supreme Court is that expert evidence is only advisory in nature and the Court is never bound by the evidence of the experts.

57. Section 45 of the Evidence Act though provides the relevancy of the expert

evidence or opinion, it nowhere discloses the evidentiary value of it.

58. In fact, the hazard in accepting the opinion of an expert is not because an expert may not be reliable as a witness, but because human judgment is fallible.

59. We should keep into mind that occular evidence is cogent and credible. Medical evidence to the contrary cannot corrode the evidentiary value of the former.

60. In the present case also, as discussed above, the evidence of P.W.1 is cogent, reliable and trustworthy and free of any kind of embellishment and that is why against the occular version of P.W.1, the opinion given by the Doctor (P.W.17) cannot be given weightage to so far as the instrument used in the crime is concerned. Hence, the prosecution case is supported with medical evidence also in the aforesaid fashion.

61. At this juncture, we cannot overlook the inquest report (Ex.Ka.-5) wherein the Panchas have also opined that the death seems to be caused due to the injuries inflicted by knives upon the body of the deceased and this report also favours the prosecution case.

Place of occurrence -

62. Finger has also also been raised by the learned counsel for the appellants towards the place of occurrence in this case. It has been argued that the place of occurrence is not established and at this juncture, the prosecution case fails. Reliance has been placed upon the decision of the Hon'ble Supreme Court in **Syed Ibrahim Versus State of Andhra Pradesh, A.I.R. 2006 SC 2908** wherein it was held in clear terms that when the place of occurrence itself has not been established it would not be proper to accept the prosecution version.

63. In the light of the arguments advanced by the learned counsel for the appellants, it is desirable to have a glance upon the topography of the place of occurrence, which was performed by the investigating officer - P.W.15, who has deposed before the Court that on the pointing out of the informant, he had inspected the spot and recovered one bicycle, two sleepers and one blood-stained knife from there and had also taken the blood-stained and plain soil from the spot. A recovery memo was also prepared at the crime scene, which was Ex.Ka.-6 and the site plan was also prepared which was Ex.Ka.-12. P.W.1, the informant, in his testimony has stated that the incident occurred outside the village near Johar. He had seen the bicycle and one knife lying on spot. He has also stated in his cross-examination that the occurrence took place in the east of Johar. Ex.Ka.12, the site plan prepared by the investigating officer reflects the same topography. It is shown therein that the occurrence has been committed at place "X', which is in the east of the Johar. The place from where the witnesses saw the occurrence of murder, the place of recovery of knife, bicycle and sleepers, the direction of the deceased coming to the spot, the way where the accused-persons ran away after the occurrence, all these relevant places have been specifically shown in the site plan Ex.Ka.-12.

64. On scrutiny of the testimony of P.W.1 and P.W.15 on the point of place of occurrence, we do not find anything to

suggest that these witnesses were prevaricating. Hence, the prosecution case is innocent and firm so far as the place of occurrence is concerned.

F.I.R. / Written Report -

65. The F.I.R. and the written report of the case are the next submissions to hammer by the appellants. It is argued that the F.I.R. is ante-timed and afterthought. It has been lodged after due consultation and so is the case of written report Ex.Ka.-1, which is not the result of free will of the informant P.W.1. This contention was vehemently opposed by the learned A.G.A. This plea draws our attention to the F.I.R. of the case Ex.Ka.-3 and G.D. Ex.Ka.-4. It has been mentioned in Ex.Ka.-3 that the incident occurred on 21.3.2002 at 7:30 A.M. and the F.I.R. has been lodged on the same day at 9:05 A.M. The place of occurrence situates at a distance of 3 kilometers from the police station. The deceased was first taken to the hospital in injured condition where he was declared dead and then F.I.R. was lodged. In these circumstances since the F.I.R. has been lodged one and a half hours after the occurrence, it is not belated and is well within time. The prompt F.I.R. rules out any possibility to make any concocted or fanciful story. P.W.1, the informant has categorically stated that the report of the case was written by Chaman on his dictation and it was read over to him after being written and then he put his thumb impression over it. This written report has been proved as Ex.Ka.-1 by P.W.1 and in the light of the specific evidence of P.W.1 on this aspect, there was no need to examine the scribe of the written report - Chaman, as has been objected to by the learned counsel for the appellants. The registration of the F.I.R. (Ex.Ka.-3) on the basis of the written report given by the informant Nepal Singh and also the registration of G.D. (Ex.Ka.-4) has been proved by P.W.3 H.C. Ram Pal Singh and no adversity is found in the deposition of P.W.3. On the basis of the above evidence, we do not find any force in the contention of the learned counsel for the appellants so far as the veracity and genuineness of F.I.R. and written report is concerned and we find ourselves in disagreement with the arguments advanced on behalf of the appellants in this behalf.

Recovery of Murder Weapons -

66. The learned counsel for the appellants further submits that the alleged recovery of murder weapons has not been proved in the manner prescribed by the law and the witnesses thereof are also not reliable. It has been contended that P.W.10 and P.W.11 are the public witnesses of the alleged recovery, but they are hostile witnesses and do not support the prosecution version and recovery of knives in any manner. It has been submitted that the recovery has been proved only by the witnesses, who are the police personnel. Their evidence in respect of the alleged recovery is not trustworthy. Recovery has been made from an open place, which was accessible to any person.

67. With reference to the contentions aforesaid, the depositions of P.W.10 and P.W.11 were scrutinized by us. They have categorically denied the fact that accused Devendar and Sarjeet had made any recovery of knives to the police before them.

68. The law relating to hostile witness has been discussed here-in-above and it is settled position of law that up to that extent,

the deposition of a hostile witness can be relied upon to which it supports the prosecution version. The evidence of P.W.10 and P.W.11 is a proof of the fact that they had made their signatures over the memo of recovery before the police.

69. P.W.12 Constable Shaukendra Singh has proved the fact of recovery of murder weapons - knives by both the accused-persons separately and a memo of recovery was prepared and the witnesses also made their signature over it. The recovery was made from bushes near milk pullia. He has identified his signature over Ex.Ka.-9 and also identified the two knives before the Court. However, he has made a significant statement that the place of recovery was an open place accessible to anyone.

70. P.W.5 Constable Jai Prakash Sharma is also a witness of recovery of murder weapons and in his examination-in-chief, he has identified both the knives and proved it as Material Exhibit-1 & 2, but he has also admitted that both the knives were lying on the ground in the bushes and the bushes were in an open place.

71. In the same manner, P.W.14, the second investigating officer of the case, has also proved the fact of recovery of murder weapons and the site plan of place of recovery, which he has proved as Ex.Ka.-10, but in his cross-examination, he states that the place of recovery of knives was an open place, which was at a distance of 25 steps from the kacchi patri where transportation go on continuously.

72. P.W.15, the first investigating officer of the case, has deposed that the accused-persons were taken on police custody remand and two murder weapons (knives) were recovered on their pointing out by the police.

73. P.W.16 is the investigating officer of the case registered under Section 25/4 Arms Act and he has proved the charge-sheets Ex.Ka.-19 & Ex.Ka.-20 submitted to the Court.

74. We have taken notice of the fact that the trial court has acquitted the present appellants under Section 25/4 Arms Act and has relied upon the fact that the independent witnesses of recovery have turned hostile and the evidence available in this regard is that of police personnel only. The learned trial judge taking cognizance of the fact that the independent public witnesses have become hostile, did not rely upon the evidence of the police personnel.

75. The F.S.L. Report has also been considered by the learned trial court and it has been opined that it also does not support the prosecution case. We have also made a perusal of the F.S.L. Report. The blood-stains have been found disintegrated over both the knives and as such it was not capable to ascertain its origin. On the basis of aforesaid observations, the learned trial court acquitted both the accused persons from the charge under Section 25/4 Arms Act.

76. We have also taken notice of the fact that the said recovery cannot be termed as recovery under Section 27 of Evidence Act due to the reason that there is no memo of disclosure statement on the part of the accused persons. This fact finds significance because the concealed place was accessible and ordinarily visible to anyone and it cannot be said that it was the accused-persons only who could reach the place of recovery or could see the articles.

77. It is also a point to be noted that the public witnesses of recovery are mere chance witnesses and their presence at the place of recovery is not natural and probable as they are not the resident of that locality. Hence, the trial court rightly acquitted the accused persons from the charge under Section 25/4 Arms Act. However, it is also to be borne in mind that acquittal of the appellants under Section 25/4 Arms Act has not been challenged by the prosecution. We have also considered this issue that if the recovery of so called murder weapon is not proved, whether it affects the prosecution case adversely. We have found earlier that the occurrence has been proved by the reliable ocular evidence supported with the medical evidence. We can take note of the view of Hon'ble Apex Court held in **Gopal Singh Versus State of Uttrakhand, (2013) 7 SCC 545 (paragraphs 12 & 13)** wherein the weapons of assault were not recovered, and the doctor's evidence was available to prove that the victim has sustained gunshot injuries and knife injuries, the Hon'ble Apex Court held that non-recovery of the said weapons was not fatal to the prosecution case, as the injuries sustained by the victim itself prove the nature of the weapon used.

78. However, the F.S.L. Report shows that human blood was found over the clothings of the deceased but it could not be ascertained that blood found on clothings belonged to that of the deceased. Whether this ambiguity affects the prosecution case adversely, the question finds its answer in negative in view of the proposition laid down in **Keshavlal Versus State of Madhya Pradesh, (2002) 3 SCC 254.**

79. From the testimonies of P.W.14, P.W.15 and P.W.16, the investigating officers of the case, we find no material lacuna or omission in the investigation of the case. It is also significant that all the incriminating evidence and circumstances have been put before the appellants in their statement under Section 313 Cr.P.C. Though they have denied the evidence and incriminating circumstances arising against them, no defence evidence has been adduced by them.

80. The upshot of the discussion is that the prosecution version based on trustworthy evidence inspires our confidence for the reasons aforesaid. The learned trial court has made a proper analysis and scrutiny of the evidence on record and has passed the reasoned order of conviction and we find no perversity as such in the same.

81. In such view of the matter, we are of the considered view that the learned trial court has taken a correct and legal view in convicting and sentencing the convicts / appellants, which does not require any interference by this Court by taking a different view. In the present case, the ocular evidence finds corroboration by medical evidence and the prosecution has successfully proved its case beyond reasonable doubt. After properly appreciating the evidence on record the learned Trial Court has drawn a conclusion which, in our view, is just and proper. The sentence imposed is also appropriate and the present Criminal Appeal is liable to be dismissed.

82. The Criminal Appeal is hereby dismissed. Conviction and sentence imposed upon the accused appellants Sarjeet and Devendar vide judgment and order dated 1.5.2010 for the offences under Sections 147, 148, 302 IPC is upheld.

Accused appellants are in jail. They shall serve out the sentence imposed upon them by the Trial Court.

83. Copy of this judgment alongwith lower court record be sent forthwith to the Court concerned for compliance.

(2022) 12 ILRA 173
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE MAYANK KUMAR JAIN, J.

Criminal Appeal No. 3333 of 1984

Smt. Vidya Devi & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri A.B.L. Gour, Sri Pradeep Kumar Mishra

Counsel for the Respondent:
D.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 302 / 34 & 201 - Challenge to-Conviction-Circumstantial evidence-the appellant with the other co-accused committed the murder of her daughter-in-law -The motive of the incident is also proved by the prosecution with the evidence of PW-1 and PW2 -The evidence of PW3 connects the chain of events as he saw appellant with other co-accused carrying the dead body of the deceased in a gunny bag which was later thrown into the nearby well by them to cause the disappearance of the evidence-The dead body of deceased was recovered on the pointing out of the appellant -deceased was recovered from the well which was later identified by PW1 the informant/father of the deceased-PW 4 has proved the statement of Accused appellant by his evidence as Ex. Ka- 5 therefore, the recovery of the dead body of the deceased on the pointing out of the appellant is admissible under Section 27 of the Evidence Act-The medical evidence is quite consistent with the prosecution case and there is no material available on record to disbelieve the medical evidence adduced by Doctor.-Moreover, the appellant and the other co-accused did not offer any cogent explanation that they have not committed the murder of deceased -The appellant failed to discharge her burden as cast upon her u/s 106 of the Evidence Act, 1872-All this evidence indicates that appellant along with the other co-accused is the author of the crime and she committed the murder of her daughter-in-law -The prosecution has succeeded to bring home the charge against the appellant u/s 302/34 and 201 IPC beyond a reasonable doubt. The trial court has rightly convicted and sentenced the appellant.(Para 1 to 45)

B. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.(Para 43)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Md. Younus Ali Tarafdar Vs St. of W.B. (2020) AIR SC 1057 AIR Online 2020 SC Page-238

2. Sudru Vs St. of Chht. (2019) 8 SCC 333

3. Sangam Lal Vs St. of U.P. (2002) 44 ACC 288

4. Ganpat Singh Vs St. of M.P. (2018) 2 SCC (Crl) 159

5. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116 (SCC p. 185 para 153-154) : (AIR 1984 SC 1622, at p. 1655-56, paras 152-153):

6. Pattu Rajan V. St. of T.N. (2019) 4 SCC 771

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. This criminal appeal has been preferred by the appellants against the judgment and order of sentence dated 29.11.1984 passed by the 6th Additional Sessions Judge, Etah arising out of Case Crime No. 134 of 1983, registered as Sessions Trial No. 824 of 1984 (State Vs. Vidya Devi and others), whereby the learned Additional Session Judge had convicted the appellants Smt. Vidya Devi, Netrapal, and Ram Kripal under Sections 302 / 34 I.P.C. and 201 I.P.C and had sentenced them to undergo life imprisonment under Section 302/34 I.P.C. and rigorous imprisonment of 3 years along with a fine of Rs. 2,000/- each under Section 201 I.P.C. In case of default in the payment of the fine, they were sentenced to undergo additional rigorous imprisonment for six months.

2. Two appellants namely Netrapal and Ram Kripal died during the pendency of this appeal and the appeal qua them stood abated vide order dated 10.07.2018 passed by this Court. The only surviving appellant is Smt. Vidya Devi.

3. Brief facts of the case are that Shiv Raj Singh, father of the deceased Asha Devi, submitted a written reportt to Station House Officer, Sidhpura, District Etah stating therein that the marriage of his daughter Asha Devi was performed with the accused Ram Kripal s/o Netrapal around 3 ½ years ago. *"Gauna Ceremony"* was performed one year after the marriage post when she started to live with her in-laws. After some time, the accused-appellants Vidya Devi (mother-in-law), Netrapal (father-in-law) and her husband Ram Kripal started to blame his daughter for being of unsound mind, that she did not perform any household work and that she also stole bread. He held "*Panchayat*" in the village of accused-appellants two to three times but later he brought her daughter back with him. On the occasion of Holi, Netra Pal, father-in-law of his daughter, took Asha Devi back with him after giving an undertaking that she would not be subjected to cruelty or ill-treatment anymore in the near future. The Complainant continued to enquire about the wellness of his daughter. Sometime later, the accused-appellants Vidya Devi and Netrapal asked the Complainant to marry his second daughter with their son Ram Kripal failing which they would not keep her daughter Asha Devi with them. The Complainant refused to concede to the demand and asked them to send back Asha Devi to him, but they refused.

4. Two days before the date of the written report, the accused-appellants Ram Kripal, Netrapal, Vidya Devi and Deo Singh had beaten his daughter and dislodged her from their house. Harvansh Singh, Shiv Lal, Ram Lal Singh, Suraj Pal Singh, Udaiveer Singh and others witnessed the incident and rescued Asha Devi. They had sent her back to her in-laws after making her and her in-laws understand.

5. One day before the date of lodging the first information report, at around 11.00 am one Shiv Lal, a resident of Dhanakar came to him and informed him that Ram Kripal, Netrapal and Vidya Devi have

caused the disappearance of his daughter during the preceding night. He along with Sukhram Singh, Allauddin, Bhikey Ali, Hari Shankar Tiwari, Sultan, Raj Kumar and others went to the residence of his daughter at around 5:00 PM. On enquiring about the whereabouts of his daughter, he was told that she was missing and the accused-appellants Ramkripal and Netrapal were absconding. He suspected that these people have killed his daughter and had caused the disappearance of her dead body. He believed that it was done due to the demand for dowry and the second marriage of Ram Kripal.

6. The Complainant had also filed one written report **Ext. Ka-2** dated 04.01.1982 earlier with the Superintendent of Police Etah mentioning the dowry demand. He had then stated that his daughter Asha Kumari was married to Ram Kripal S/o Netrapal, resident of Dhanakar, Police Station Sidhpura, District Bulandshahr. During the marriage, he had given ornaments made of gold and silver, clothes worth Rs. 2,000/- and other articles worth Rs. 5,000/- to her daughter. But after her marriage, her husband, mother-in-law and father-in-law had been regularly demanding for motorcycle from his daughter, which was beyond his capacity. Asha Devi's husband and her in-laws had been harassing her and threatening to kill her. Ram Kripal also threatened to kill his daughter to perform a second marriage.

7. The written report **Ext. Ka-3** was entered in the Police station concerned at rapat No. 11. (Ext.-Ka 4). Based on this written report, case crime No. 134/82 was registered. The investigation was entrusted to S.I. Tota Ram (PW. 4). He recorded the statements of the complainant and other witnesses. He rushed to village Dhanakar. He recorded the statement of the appellant Vidya Devi. She told him that she along with her son and husband had committed the murder of Asha Devi. They had put her dead body in a gunny bag and after tying it, along with a piece of stone, threw it into a nearby well. On the pointing of the Appellant Vidya Devi, a gunny bag was pulled out from the well. A dead body of a female was recovered from this bag which the Complainant identified as of his daughter, Asha Devi.

8. The inquest report (Ext. Ka-7) was prepared. After the preparation of relevant documents, the dead body was sent for post-mortem. The post-mortem was conducted and a report (Ext. Ka-14) was prepared by the Doctor. During the investigation, the investigation officer executed certain relevant documents, collected the evidence and after the conclusion of the investigation, a charge sheet (Ext. Ka-13) came to be filed u/s 302/201 against the appellants Smt. Vidya Devi, Netrapal and Ram Kripal along with Deo Singh, Rakshpal and Rajpal under Section 302/201 of IPC.

9. The learned trial court framed charges against the appellant/accused Ram Kripal, Netra Pal, Smt. Vidya Devi under Section 302 I.P.C. read with Section 34 I.P.C. and charges under Section 201 I.P.C. against the accused Netrapal, Ram Kripal, Vidya Devi, Deo Singh, Rakshpal and Rajpal. The accused did not plead guilty and therefore they came to be tried by the learned Trial Court for the aforesaid offences.

10. To bring home the charge against the accused, the prosecution examined three witnesses of fact, namely, PW-1 Shiv Raj Singh, (complainant), PW-2 Sukh Ram,

PW-3 Udaivir Singh and two formal witnesses namely, PW-4 S. I. Tota Ram (Investigating officer) and PW-5 Dr. S. R. Gupta, Medical Officer. (who conducted the post-mortem)

11. After close of the prosecution evidence, the statement under Section 313 Cr.P.C. of the accused-appellant Vidya Devi was recorded, in which she had admitted that the deceased was married to her son Ram Kripal. She denied all the allegations made against her. She stated that she had never demanded any dowry from Asha Devi. She had never beaten or harassed Asha Devi. The Complainant was never asked to marry his second daughter with her son Ram Kripal. No "*Panchayat*" took place in their village. She along with her husband and son did not kill Asha Devi. They did not throw the dead body of Asha Devi into the nearby well after putting it inside a gunny bag. She did not give any statement to the Investigating Officer and the body of the deceased Asha Devi was not recovered on her pointing out. The witnesses, deposed falsely against her, being the relatives of the complainant and due to enmity.

12. No evidence in her defense was produced by the appellant before the trial court.

13. Hearing both the sides and after appreciating the evidence, facts and circumstances of the case, the Learned Trial Court recorded conviction and passed the sentence against the appellant as aforesaid. Accused Deo Singh, Rakshpal and Rajpal were acquitted by the trial Court.

14. Being aggrieved by the impugned judgement and the order, the accused-appellant has preferred the present criminal appeal.

15. We have heard Sri Pradeep Kumar Mishra, learned Amicus Curiae for the appellant and Sri Sunil Kumar Tripathi, Sri Alok Kumar Tripathi, Sri Om Prakash and Sri M. P. Singh Gaur, learned Additional Government Advocates for the State and perused the record placed before us. We have also re-appreciated the entire evidence on record.

16. On the basis of the evidence available on record, it has to be determined as to whether the accused-appellant had committed the murder of Asha Devi and with the intention to cause the disappearance of the evidence, threw away her dead body into the nearby well.

17. Learned counsel for the appellant vehemently argued that Vidya Devi, the surviving appellant, has falsely been implicated in the present case. Admittedly, she is the mother-in-law of the deceased Asha Devi. There is no direct evidence at all thus, the case of the prosecution rests on circumstantial evidence. There is no eyewitness account of the alleged incident since none has seen the appellant committing the murder of Asha Devi. The alleged statement of the appellant made before the police is not admissible in the eye of the law since the appellant Vidya Devi had not been arrayed as an accused and had not been taken into custody till the time of making the alleged statement about the fact that she along with other co-accused had thrown the dead body of the deceased Asha Devi into the nearby well of their house. Therefore, the information relating to the discovery of the dead body of the deceased Asha Devi cannot be considered to be the information as provided under Section 27 of the Evidence Act. To make his submission good learned counsel for the appellant vehemently

argued that the information relating to the discovery of the dead body is admissible under Section 27 of the Evidence Act only if the accused is in the custody of a police officer while making such statement leading to any recovery. In fact, the appellant did not give any statement about the manner of commission of the crime and further the dead body of the deceased was not recovered on her pointing out. It has further been submitted that the mental condition of deceased Asha Devi was not sound and she had committed suicide on account of her disease. It has also been submitted that no proposal was ever made before the complainant Shiv Raj Singh to marry his second daughter with Ram Kripal, the son of the appellant since he was already married to the deceased Asha Devi. It has further been submitted that the deceased Asha Devi was never treated with any kind of cruelty or harassment. No motive has been assigned to the appellant to commit the crime. The judgement passed by the trial court is bad in law, and therefore, the appeal is liable to be allowed.

18. Per contra learned Additional Government Advocate argued that the marriage of the deceased Asha Devi with the son of the appellant is admitted. The relations between deceased Asha Devi and the appellant were not cordial. The prosecution has proved the motive and circumstances by cogent evidence which resulted in the conviction of the appellant by the learned trial court. To fulfill their demand for dowry, the appellant along with other co-accused used to harass the deceased Asha Devi and made false allegations against her that she was a lady of unsound mind, she did not perform household work, and she used to steal bread. The appellants often used to beat her and for no reason, dislodged her from their house. To mount pressure upon the complainant and Asha Devi, the present appellant along with the other accused Netrapal (since died) and Ram Kripal (since died) asked the complainant to perform the marriage of his second daughter with Ram Kripal, their son, while the accused Ram Kripal was already married to the deceased Asha Devi. It has further been submitted that the appellant Vidya Devi along with the other co-accused Netrapal and Ram Kripal killed Asha Devi, put her dead body in a gunny bag and threw it inside the well. It is also submitted that during the investigation, the appellant disclosed the true facts before the Investigating Officer and on her pointing out, the dead body of the deceased Asha Devi was recovered from the well which was kept in a gunny bag with a piece of stone. The dead body was identified by the complainant to be of his daughter. The learned trial Court after appreciating the documentary as well as the oral evidence available on record rightly convicted and sentenced the appellant.

19. Making the above submissions, learned A.G.A. prayed to dismiss the appeal.

20. As per the prosecution story, Asha Devi, daughter of the complainant was married to Ram Kripal. Her husband and in-laws used to blame her and harass her for dowry. The complainant did not accept the proposal to get his second daughter married to Ram Kripal, so the husband and in-laws of his daughter killed her on 23.08.1983 and caused the disappearance of her dead body. After receiving the written report filed by the complainant, police reached the house of the appellant along with him and other persons including PW-2 Sukhram. During the interrogation

with the present appellant Vidya Devi, the manner of commission of the crime was narrated by her that on the preceding night, Ram Kripal (her son) and Netrapal (her husband) held the hands and feet of Asha Devi and strangulated her to death and thereafter, threw her dead body in the well with the assistance of the other accused. Upon her pointing out the dead body of Asha Devi was recovered from the well.

21. In view of the aforementioned facts, it is required to be noted that the case of the prosecution rests on circumstantial evidence. There is no direct evidence that can suggest that the appellant had committed the murder of Asha Devi.

22. In **Md. Younus Ali Tarafdar v. State of West Bengal A.I.R. 2020 Supreme Court 1057: A.I.R. Online 2020 SC Page-238** the Hon'ble Supreme Court laid out the factors to be considered while adjudicating the case of circumstantial evidence observed that:-

" There is no direct evidence regarding the involvement of the Appellant in the crime. The case of the prosecution is on basis of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence as laid down by this Court are :

Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hyopothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

23. In **Pattu Rajan V. State of Tamil Nadu (2019) 4 SCC 771**, the Apex Court observed the nature of evidence in the case of circumstantial evidence and held that:-

"30. Before we undertake a consideration of the evidence supporting such circumstances, we would like to note that the law relating to circumstantial evidence is well settled. The Judge while deciding matters resting on circumstantial evidence should always tread cautiously so as to not allow conjectures or suspicion, however strong, to take the place of proof. If the alleged circumstances are conclusively proved before the Court by leading cogent and reliable evidence, the Court need look any further before affirming the guilt of the accused. Moreover, human agency may be faulty in expressing the picturisation of the actual incident, but circumstances cannot fail or be ignored. As aptly put in this oft-quoted phrase:" Men may lie, but circumstances do not".

31. As mentioned supra, the circumstances relied upon by the prosecution should be of a conclusive

nature and they should be such as to exclude every other hyopothesis except the one to be proved by the prosecution regarding the guilt of the accused. There must be a chain of evidence proving the circumstances so complete so as to not leave any reasonable ground for a conclusion of innocence of the accused. Although it is not necessary for this Court to refer to decisions concerning this legal proposition, we prefer to quote the following observations made in **Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116 (SCC p. 185 para 153-154) : (AIR 1984 SC 1622, at p. 1655-56, paras 152-153):**

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobde V. State of Maharashtra 1973 Cri L.J 1783 where the following observations were made:

Certainly, it is a primary principle that accused must be and not merely may be guilty before a Court can convict and the mental distance between "may be and "must be" is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

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

154. These five golden principles, is we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

24. The Hon'ble Supreme Court concerning the cases based on circumstantial evidence in **Ganpat Singh Vs. State of Madhya Pradesh (2018) 2 Supreme Court Cases (Criminal) 159**, held that:-

"There are no eyewitnesses to the crime. In a case which rests on circumstantial evidence, the law postulates a twofold requirement. First, every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt. Second, all the circumstances must be consistent only with the guilt of the accused. The principle has been consistently formulated thus:

"The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the

conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence."

25. PW1 Shiv Raj Singh is the informant and father of the deceased Asha Devi, who had stated in his evidence that he performed the marriage of his daughter with accused Ram Kripal and after *"Gauna Ceremony"* his daughter started to live at her in-laws' house. Accused Netra Pal, father-in-law, Ram Kripal, her husband and Vidya Devi, her mother-in-law began to blame her that she was of unsound mind and she used to steal bread. He organized *Panchayat* and brought back his daughter along with him. After some time the accused Netrapal assured him that her daughter Asha Devi would not be subjected to any ill-treatment. With this belief, Asha Devi was sent back with him. After some time, the accused Netrapal and Vidya Devi asked the informant to marry his second daughter with their son Ram Kripal but he did not concede. After 15 to 20 days, he was informed that his daughter was missing. He reached the house of his daughter but she was not found there. The accused persons were also not there. He came to know that his daughter had been killed by her in-laws. He submitted a report to the police station concerned and also accompanied the police to the village of the accused-appellant Vidya Devi. Accused Vidya Devi told that on the fateful night at around midnight, she held Asha Devi's feet, her husband Netrapal held the ears and her son Ram Kripal strangulated Asha Devi to death. To cause the disappearance of the dead body, Ram Kripal and Netrapal called Rakshpal, Ram Pal and Dev Singh. All these people including Vidya Devi, the appellant, put the dead body of Asha Devi in a gunny bag and tied it with a rope of plastic. Ram Kripal carried the gunny bag over his head and threw it into the well near Pursara. Netrapal carried a piece of stone which was also kept inside the bag. The accused Vidya Devi led the investigating officer along with the informant and other persons and pointed toward the well from where the gunny bag was pulled out containing a dead body of a female which was identified by the complainant as of his daughter. Recovery memo Ext Ka-1 was prepared which bore his thumb impression. This witness has also identified the rope of the plastic and the piece of stone which was found with the dead body. He also stated that the accused were making the demand for a motorcycle from his daughter. He has also proved the written report as Ext. Ka 2.

26. PW2 Sukh Ram in his testimony had stated that he was present in the village along with Bhikari, Allaudin, Shiv Raj Singh and others when Shiv Lal resident of village Dhanakar came and informed that Asha Devi was beaten up by her in-laws and was dislodged from her house. On 20.08.1983 at around midnight, Asha Devi was killed by her in-laws. He along with Shiv Raj Singh and other persons reached the house of Asha Devi and found her missing. Accused Ram Kripal and Netrapal were also not there. Accused Vidya Devi was present there and she told that she along with her husband Netrapal and son Ram Kripal had committed the murder of Asha Devi and had thrown her dead body into a nearby well. PW2 is the witness of the recovery of the dead body and also the witness of the recovery memo.

27. PW 3 Udaivir Singh is the witness of two facts. He is the witness of ill-treatment by the accused of deceased Asha

Devi and more importantly, he is the witness of the incident that when he went to ease himself at around 4:00 am, he saw the accused Netrapal, Ram Kripal and Vidya Devi and others heading towards the drainage. Accused Ram Kripal was carrying a gunny bag over his head.

28. PW 4- S. I., Tota Ram is the Investigating Officer of this case, he has executed all the relevant documents during the course of the investigation which are proved by him before the trial court. On the basis of the statement made by the accused Vidya Devi, he recovered the dead body of the deceased Asha Devi from the place pointed out by accused Vidya Devi and prepared the recovery memo Ext. Ka-1. He proved the statement of accused appellant Vidya Devi as Ext. 5 after filing its copy at the time of his deposition. He prepared the site plan of the place of recovery of the dead body Ext. Ka-6 and also the site plan of the place of occurrence as Ext. Ka-12. Apart from these, inquest report Ext. Ka-7, Challan dead body Ext Ka-8, Photo of the dead body Ext. Ka-9, Letter to R.I. and C.M.O. Ext. Ka 10 and Ext. Ka-11 respectively, were also prepared. The dead body was sent for post-mortem by him. After recording the evidence of witnesses and concluding the investigation, he filed the charge sheet against the accused persons being Ext. Ka-13. This witness had proved the gunny bag, piece of stone, and piece of rope as the material exhibits.

29. PW 5, Dr. R. S. Gupta has stated that on 24.08.1983, he conducted the post-mortem of the deceased Asha Devi and prepared his report which is proved as Ex. Ka14. He found the following injuries;-

"No superficial external injury seen on her body but hematoma was present in the neck muscles on both sides. Corua of Hyoid bones and thyroid cartilage was found fractured on both the sides. Trachea larynx pharynx are grossly congested. "

According to him, the death of Asha Devi had taken place 3-5 days before the date of post-mortem. In his opinion the cause of death was asphyxia.

30. The present case of the prosecution consisted on the following circumstances:-

(i) Motive available to the appellant

(ii) Causing the disappearance of the evidence by the appellant.

(iii) Recovery of the dead body of deceased Asha Devi on the pointing of appellant Vidya Devi.

(iv) Consistency of medical evidence.

31. It requires to adjudicate as to whether the circumstances form a complete chain of events that would indicate that the appellant Vidya Devi along with other co-accused committed the murder of deceased Asha Devi and caused the disappearance of her body.

(i) Motive available to the appellant

32. The motive behind the murder of Asha Devi is stated by PW1 Shiv Raj Singh in his testimony, that the appellant along with her husband and her son used to harass his daughter and blame her for being of unsound mind and that she used to steal bread. He organised a "*Panchayat*' in the village to resolve the dispute failing which he brought back his daughter with him. After some time, on receiving assurance from the in-laws of his daughter that she

would not be subjected to harassment in the future, he sent his daughter with her father-in-law Netrapal. He also stated that the appellant and her husband had asked him to marry his second daughter with their son Ram Kripal failing which they would not keep Asha Devi with them. This demand was turned down by him. The statement of PW1 Shiv Raj Singh is corroborated by PW3 Udaiveer Singh. The testimonies of PW1 Shiv Raj Singh and PW3 Udaiveer Singh with regard to strained relations between the deceased Asha Devi and her in-laws and regular harassment made by the appellant are trustworthy and have no material contradictions. Therefore, it is established that the appellants were not happy with the deceased Asha Devi and they had wanted to re-marry their son. Therefore, had the motive to eliminate Asha Devi.

(ii) Causing the disappearance of the evidence by the appellant

33. PW 3 Udaiveer had stated in his evidence that at around 4:00 a.m., he went to ease himself. He saw from a distance of 10 yards that the accused/ appellant Netrapal, Ram Kripal and Vidya Devi along with other persons were heading towards the drainage. Ram Kripal was holding a gunny bag over his head. In his cross-examination, he stated that the Investigating Officer recorded his statement three days after the aforesaid incident.

34. The evidence of PW3 Udaiveer forms an important chain of event which indicates that in the early morning, at around 4 am, after the fateful night, the appellant Vidya Devi along with other accused was seen by him when they were heading towards the drainage and the son of the appellant Ram Kripal was holding a gunny bag over his head. The dead body of the deceased Asha Devi was recovered from the same well. Therefore, the aforesaid evidence forms a chain of the continuing process towards the recovery of the dead body of the deceased Asha Devi. It thus indicates that after committing the murder of Asha Devi, the appellant Vidya Devi and other co-accused threw the body in a nearby well. All the appellants were seen by PW3 Udaiveer Singh when they were heading to cause the disappearance of the dead body. Therefore, the evidence of PW3 is important evidence under the circumstances of this case.

(iii) **Recovery of the dead body of deceased Asha Devi on the pointing of appellant Vidya Devi:-**

35. PW-1 Shiv Raj Singh stated in his evidence that after receiving the information from Ravi Lal about the missing whereabouts of his daughter the accused Ram Kripal and Netrapal being absconding, he submitted a written report to the police station. He along with other persons accompanied the police party and reached village Dhanakar. Accused Vidya Devi was present there and on interrogation, she disclosed that on the night of the 20th at around midnight, she along with her husband and her son had committed the murder of Asha Devi. The dead body of Asha Devi was kept in a gunny bag which was carried by Ram Kripal over his head and thrown into the well. She also stated that she can get the body recovered from the well. Based on this statement, the informant, with other persons, reached the site of the well and found a gunny bag inside it which was carried out and the dead body of his daughter was recovered. Recovery memo Ex. Ka1 was prepared which bore his thumb impression. PW2 Sukhram Singh

also corroborated the evidence of PW1 Shiv Raj as he had also accompanied Shiv Raj Singh to Village Dhanakar and the dead body was also recovered in his presence on the pointing of the accused-appellant Vidya Devi.

36. PW4 S.I. Tota Ram, the Investigating Officer has proved the recovery memo of the dead body of the deceased Asha Devi. This witness has also proved the recovery of the gunny bag, the piece of stone and the piece of rope as material exhibits.

37. It is also pertinent to narrate here the inquest report (Ex Ka 7) which discloses that the body of deceased Asha Devi was recovered in the presence of the informant and other witnesses by the investigating officer on 23.08.1983. When the investigating officer reached the site of the well, he was shown by the villagers that a gunny bag was floating on the surface of the water. The bag was pulled out and it was opened. A dead body of a female along with a piece of stone was recovered. The body had been tied with a plastic rope which was identified by the informant as that of his daughter Asha Devi. These facts also corroborate the fact that the accused-appellant had caused the disappearance of the evidence.

38. Learned Counsel for appellant Shri Pradeep Kumar Mishra strongly urged that the appellant Vidya Devi was not in the custody of the Investigating Officer and had not been arrayed as an accused, therefore, the information relating to the discovery of the dead body of the deceased Asha Devi is not admissible under Section 27 of the Evidence Act. He further submitted that the information leading to the discovery is admissible only if the person accused of an offence is in the custody of a police officer and not otherwise.

39. In **Sangam Lal Vs. State of U.P. 2002 (44) ACC 288,** the Hon'ble Division Bench of this Court has observed that:-

"The question which requires consideration here is what is the meaning of the word "custody" and whether a person can be said to be in custody only after he has been formally arrested by the police officer. The dictionary meaning of the word "custody" is--the act or duty of carrying and preserving; protection. In Guardian and Wards Act, the word "custody" refers not only to actual but also to constructive or legal custody. In Maharani v. Emperor,1 this question was considered and it was held as follows:

"the word "custody' in Section 26 or 27, Evidence Act, does not mean ??? custody, but includes such state of affairs in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction."

In Chotey v.State of U.P.2 the Court after referring to the aforesaid decision observed that there is distinction between an accused being "under arrest" and an accused being in "custody". In Re. Rant Chandran, AIR 1960 Madras 191, it was ruled that the interpretation of the word "custody" in various decisions has proceeded in so far as of suggest that "police custody" in terms of Section 27 might well include surveillance, interrogation before arrest etc. Where a person submits himself to the custody of a police officer with the consciousness that temporarily at least he is in such custody, or such control, whether formally authorised in some manner or otherwise.

This question has been considered threadbare in the Constitution Bench decision of the Apex Court in State of U.P. v.Deoman Upadhaya,3 wherein para 12 of the reports, it was held as under:

"(12) There is nothing in the Evidence Act which precludes proof of information given by a person not in custody which relates to the facts thereby discovered; it is by virtue of the ban imposed by Section 162 of the Cr. P.C., that a statement made to a police officer in the course of the investigation of an offence under Ch. 14 by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody, submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of Section 27 of the Indian Evidence Act:.....A person who has committed an offence, but who is not in custody, normally would not without surrendering himself to the police give information voluntarily to a police officer investigating the commission of that offence leading to the discovery of material evidence supporting a charge against him for the commission of the offence....."

17. The law is, therefore, well settled that in order to attract Section 27 of the Evidence Act, it is not necessary that the accused should have been under arrest and it is enough if he has come into the hands of a police officer or is under some sort of surveillance or restriction. A person giving information to the police officer may be deemed to have submitted himself to the custody of the police officer within the meaning of Section 27 of the Evidence Act."

40. In view of the observation made by the Hon'ble Division Bench of this Court in the aforesaid case, we are also of the view that since the appellant Vidya Devi was interrogated by the investigating officer and consequently she stated the manner of commission of the crime by her along with the other family members and that on her pointing out, the dead body of the deceased was recovered from the well which was later identified by PW1 the informant/fat her of the deceased. PW 4 S. I. Tota Ram has proved the statement of Accused appellant Vidya Devi by his evidence as Ex. Ka- 5,therefore, the recovery of the dead body of the deceased Asha Devi on the pointing out of the appellant Vidya Devi is admissible under Section 27 of the Evidence Act.

(iv) Consistency of Medical Evidence

41. The medical evidence is in consonance with the oral evidence of the

witnesses. PW5 Dr. R. S. Gupta stated in his evidence that he conducted the post-mortem of the body of the deceased Asha Devi on 24.08.1983. He found that no superficial external injuries were seen on her body but hematoma was present in the neck muscles on both sides. Corua of Hyoid bones and thyroid cartilage was found fractured on both the sides. Trachea larynx pharynx were grossly congested. In his opinion, the cause of death was asphyxia as a result of A.M.I. Further, he stated that the duration of death was 3 to 5 days before. Given the facts and circumstances of the case, the medical report corroborates the case of the prosecution and the ante mortem injuries found on the body of the deceased Asha Devi prove that the death was caused due to asphyxia as a result of strangulation.

42. It is admitted fact that deceased Asha Devi was with her in-laws when at the time of her death. Since the death of Asha Devi occurred in the house of appellant Vidya Devi, therefore, a burden lies upon the appellant to explain the circumstances under which deceased Asha Devi died.

43. In **Sudru v. State of Chhattisgarh, (2019) 8 SCC 333,** the Hon'ble Apex Court observed that :-

"In this view of the matter, after the prosecution has established the aforesaid fact, the burden would shift upon the appellant under Section 106 of the Evidence Act. Once the prosecution proves, that it is the deceased and the appellant, who were alone in that room and on the next day morning the dead body of the deceased was found, the onus shifts on the appellant to explain, as to what has happened in that night and as to how the death of the deceased has occurred.

9. In this respect reference can be made to the following observation of this Court in Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] : (SCC p. 694, para 21)

"21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete."

44. On the basis of the above discussion, we conclude that all the circumstances clearly indicate that the appellant with the other co-accused committed the murder of her daughter-in-law Asha Devi. The motive of the incident is also proved by the prosecution with the evidence of PW-1 Shiv Raj Singh and PW2 Sukh Ram. The evidence of PW3 Udaiveer connects the chain of events as he saw appellant Vidya Devi with other co-accused carrying the dead body of the deceased Asha Devi in a gunny bag which was later thrown into the nearby well by them to cause the disappearance of the evidence. The dead body of Asha Devi was recovered on the pointing out of the appellant Vidya Devi. The medical evidence is quite consistent with the prosecution case and there is no material available on record to disbelieve the medical evidence adduced by Dr. R. S. Gupta. Moreover, the appellant Vidya Devi and the other co-accused did

not offer any cogent explanation that they have not committed the murder of deceased Asha Devi. The appellant failed to discharge her burden as cast upon her u/s 106 of the Evidence Act, 1872. All this evidence indicates that appellant Vidya Devi along with the other co-accused is the author of the crime and she committed the murder of her daughter-in-law Asha Devi. The prosecution has succeeded to bring home the charge against the appellant u/s 302/34 and 201 IPC beyond a reasonable doubt. The trial court has rightly convicted and sentenced the appellant Vidya Devi. Therefore, the impugned judgment and order of the trial court do not require any interference and are liable to be affirmed.

ORDER

45. The criminal appeal is accordingly dismissed.

46. The Appellant is on bail. Her personal bonds and surety bonds are cancelled. She be taken into custody forthwith and be sent to jail to serve out the remaining part of the sentence.

47. Let the certified copy of this order be transmitted to the trial court for compliance.

48. The lower Court record be also transmitted to the court concerned.

(2022) 12 ILRA 186
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 4147 of 2016

Badam Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Apul Misra, Sri Akhilesh Singh, Sri Satya Pal Singh

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 302 - Challenge to-Conviction-deceased had died in her matrimonial home within seven years of marriage- the cause of death was found to be ante mortem hanging- PW-1, PW-2 and PW-3 stated without any hesitation that the deceased died in her matrimonial home-The evidence of PW-7, PW-8 and PW-9 also corroborates this fact that on information of the incident when police reached the matrimonial home of the deceased the dead body of the deceased was found at the place -the witnesses of fact, PW-2, PW-3, PW-4 and PW-5 are hostile witnesses and do not support the prosecution case-no cogent evidence adduced by the prosecution to prove entire chain of circumstances which may compel court to arrive at conclusion that accused only had committed alleged crime- ingredients of Section 304-B are not attracted as there was no quarrel or demand of dowry soon before her death-Therefore on the aforesaid circumstances, the trial court found that it was a case of murder punishable under Section 302 IPC based on circumstantial evidence-Prosecution had miserably failed to prove entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else- Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of accused- the prosecution has not been able to establish the guilt of the accused appellant under

Section 302 IPC beyond reasonable doubt.(Para 1 to 46)

B. It is well settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused.(Para 37)

The appeal is allowed. (E-6)

List of Cases cited:

1. Suchand Pal Vs Phani Pal (2004) SCC (Cri) 220

2. Shivaji Chintappa Patil Vs St. Of Mah. (2021) 5 SC 626

3. Balaji Gunthu Dhule Vs St. of Mah. (2012) 11 SCC 685

4. Nagendra Shah Vs St. of Bih. (2021) 10 SCC 725

5. Satye Singh & anr. Vs St. of U.K. (2022) 5 SCC 438

6. St. of Raj. Vs Kashi Ram (2006) 12 SCC 254

7. Ranjit Kumar Haldar Vs St. of Sikkim (2019) 7 SCC 684

8. Uniworth Textiles Ltd. Vs CCE (2013) 9 SCC 753

9. Dharam Deo Yadav Vs St. of U.P. (2014) 5 SCC 509

10. Ashok Debbarma Vs St. of Tripura (2014) 4 SCC 747

11. Raja Vs St. of Haryana (2015) 11 SCC 43

12. St. of U.P. Vs Ravindra Prakash Mittal (Dr) (1992) 3 SCC 300

13. Kamesh Panjiyar Vs St. of Bih. (2005) 2 SCC 388

14. Kashmir Kaur Vs St. of Punj. (2012) 13 SCC 627

15. Baljinder Kaur Vs St. of Punj. (2015) 2 SCC 629

16. Kans Raj Vs St. of Punj. (2000) 5 SCC 207

17. Rajbir Vs St. of Har. (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568

18. Jasvinder Saini & ors.Vs St. (Govt of NCT of Delhi) (2013) 7 SCC 256

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

1. The accused-appellant **Badam Singh** was convicted under Section 302 of IPC and sentenced for life imprisonment with fine of Rs.50,000/- with the stipulation of default clause vide judgment and order dated 28.7.2016 passed by the Sessions Judge, Budaun in Sessions Trial No. 666 of 2015 (State Vs. Badam Singh) arising out of Case Crime No.361 of 2015, Police Station- Zarif Nagar, District- Budaun. Feeling aggrieved with the same, accused appellant has preferred this appeal.

2. The brief facts culled out from the record are that on the basis of a written report submitted by the complainant at Police Station- Zarifnagar, District- Budaun, a Case Crime No.0361 of 2015 was registered in which averments were made that Ram Bholi, daughter of the complainant, was married to Badam Singh son of Chhote Lal (accused-appellant) as per hindu rites and rituals. After few days of the marriage, a demand of motorcycle and buffalo was raised as additional dowry.

The said demand was told to the informant by her daughter. When the informant inquired about the said demand of additional dowry from the in-laws of her daughter, they stated that if the informant fails to give the Motorcycle & Buffalo, he would get his daughter back. On 6.7.2015, Badam Singh, Devendra and Chhatrapal sons of Chhote Lal, Rupa wife of Chhote Lal and Km. Santosh all the accused persons strangled her to death. This information was given telephonically to the informant by Ompal son of Balister, resident of Dariyapur, police station Mujriya, who lodged the F.I.R..

3. In pursuance of the aforesaid first information report, Investigating Officer, Umesh Kumar Yadav, Circle Officer, Sahaswan, Budaun, took up the investigation and visited the spot. Site-plan was prepared and inquest report was also prepared. The body of the deceased was sent for post mortem. Concerned doctor performed the autopsy and prepared the post mortem report. I.O. recorded the statements of witnesses. After completing the investigation, I.O. submitted charge sheet against accused appellant. The matter being triable by Court of Sessions was committed to the Court of Sessions for trial.

4. The learned trial court framed charges against the accused under Section 304-B, 498-A IPC and ¾ Dowry Prohibition Act. Alternative charge under Sections 302 IPC was also framed. The accused-person pleaded not guilty and wanted to be tried. The prosecution so as to bring home the charges, examined the following witnesses:-

1.	Sonpal	PW-1-informant (father of the deceased)
2.	Amrita	PW-2 (mother of the deceased)
3.	Sunita	PW-3 (sister-in-law of the deceased (bhabhi)
4.	Tajpal Singh	PW-4 (brother of the deceased)
5.	Gayatri	PW-5 (sister of the deceased)
6.	Dr. Rajesh Kumar Verma	PW-6 (who performed the autopsy on the body of the deceased)
7.	Nanak Singh	PW-7 (who conducted inquest
8.	Head constable Rajpal Singh	PW-8 (scribe of F.I.R.)
9.	Umesh Kumar Yadav	PW-9 (Investigating Officer)

5. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1.	Written report	Ext. Ka-1
2.	Post mortem report	Ext. Ka-
3.	Inquest report	Ext. Ka-
4.	Photo lash	Ext. Ka-
5.	Specimen seal	Ext. Ka-
6.	Challan lash	Ext. Ka-
7.	Challan lash	Ext. Ka-
8.	First Information Report	Ext. Ka-
9.	Copy of G.D.	Ext. Ka-
10.	Site plan	Ext. Ka-
11.	Charge sheet	Ext. Ka-

6. After completion of prosecution evidence, incriminating circumstances emanating from the prosecution evidence were put to the accused. In his statement recorded under Section 313 CrPC, he

denied his involvement in the incident and pleaded false implication on account of enmity.

7. Heard Shri Akhilesh Singh assisted by Shri Satya Pal Singh, learned counsel for the appellant and Shri Patanjali Mishra, learned AGA for the State and perused the record.

8. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. It is further submitted that all the witnesses of fact have turned hostile and on the basis of analysis of their evidence, no guilt against the accused appellant is established and proved. It is further submitted that to prove a case under Section 302 IPC, the burden lies upon the prosecution. In the present matter, the case was based on circumstantial evidence and no circumstance was proved by the prosecution to connect the accused appellant with the alleged offence of murder. The learned trial court has wrongly recorded the conviction on the basis of provisions of Section 106 Evidence Act, which under law, was not permissible in the circumstances of present case. Motive of crime is not proved. The findings recorded by the trial court in the impugned judgment are illegal and perverse warranting interference by this Court.

9. Learned AGA for the State vehemently opposed the submissions made on behalf of the appellant and submitted that the death of the deceased had taken place in her matrimonial home and injuries were also found on her body, which are mentioned as ante mortem injuries in post mortem report. It means that due to injuries sustained by her, she died. It is also submitted that testimony of hostile witnesses can also be relied upon to the extent it supports the prosecution case. Learned trial court has rightly convicted the appellant under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

10. At the very outset, it is found that the appellant has been acquitted under Sections 304-B, 498-A IPC and ¾ D.P. Act but has been convicted under Section 302 IPC. The learned trial court has mentioned certain circumstances indicating the guilt of the appellant and has come to the conclusion that since no explanation of these circumstances has been offered by the appellant, his conviction can be recorded under Section 302 IPC. The trial court has found that it was a case based on circumstantial evidence and there was no eye witness account.

11. Charge against the accused was framed on 10.12.2015 under Sections 304-B, 498-A IPC and 3/4 D.P. Act and in alternative under Section 302 IPC.

12. In ***Rajbir vs. State of Haryana, (2010) 15 SCC 116,*** the Hon'ble Supreme Court directed to ordinarily add Section 302 IPC to the charge of Section 304-B IPC so that death sentences can be imposed in such heinous and barbaric crime against women. However, subsequently the direction issued in the case of ***Rajbir case*** (supra) was explained by the Hon'ble Apex Court in ***Jasvinder Saini and others vs. State (Government of NCT of Delhi), (2013) 7 Supreme Court Cases 256.*** It was held that mechanical addition of charge under Section 302 IPC when evidence prima facie did not support the case of murder was unsustainable. It was further held that :

"15. It is common ground that a charge under Section 304-B IPC is not a

substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in ***Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568]*** *. The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in* ***Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568]*** *, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court."*

It was also held that :

"14. Be that as it may, the common thread running through both the orders is that this Court had in ***Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568]*** *directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court."*

13. We find that during course of investigation, no evidence of Section 302 IPC was collected by the Investigating Officer and that is why charge sheet was filed under Sections 304-B, 498-A IPC and 3/4 D.P. Act and not under Section 302 IPC. However, the additional charge under Section 302 IPC was initially framed and the trial started.

14. On the basis of evidence on record and especially of the prosecution witnesses, who were the family members of the deceased, the trial court gave a categorical finding that no offence under Sections 304-B, 498-A IPC and ¾ D.P. Act is made out.

15. The conditions required to be proved to bring home a charge under Section 304-B IPC are very well settled in a catena of decisions of the Hon'ble Supreme Court as well as of this Court, like : ***Kamesh Panjiyar Vs. State of Bihar, (2005) 2 SCC 388, Kashmir Kaur Vs. State***

of Punjab, (2012) 13 SCC 627 and ***Baljinder Kaur vs. State of Punjab, (2015) 2 SCC 629.*** In ***Kans Raj vs. State of Punjab, (2000) 5 SCC 207***, the ingredients of Section 304-B IPC have been reiterated, which are as under :

(a) Death of a woman occurring otherwise than under normal circumstances;

(b) Death was occurred within 7 years of her marriage;

(c) The deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

(d) Such cruelty or harassment should be for or in connection with the demand of dowry; and

(e) To such cruelty or harassment the deceased should have been subjected to soon before her death.

16. The learned trial court has opined that the factum of the death of the deceased within seven years of her marriage and causing of death otherwise than under normal circumstances are the two ingredients, which are not disputed. So far as the fact of cruelty and harassment of the deceased by her husband or any relative of her husband for, or in connection with any demand for dowry, is concerned, the learned trial court has concluded that none of the witnesses of fact narrated even a single word in respect of the said allegations. It also transpires from a perusal of the statement of witnesses of fact that the element of "soon before' has also not been proved. Hence, it was simply clear before the trial court that the ingredients to bring home a charge under Section 304-B IPC were not fully established. It is desirable to add here that in case the aforesaid ingredients were proved by the prosecution, the Court would have presumed that the accused had caused the dowry death of the deceased. Since the ingredients of the said offence and especially the element of "soon before' were missing, the prosecution was not in a position to take the benefit of presumption clause given under Section 113-B of the Evidence Act and the burden did not shift upon the accused but it remained over the prosecution.

17. The trial court held that the deceased had died in her matrimonial home. In the Autopsy Report marks of injury have been found over the neck of the deceased and the cause of death was found to be ante mortem hanging. Considering the aforesaid grounds, the learned trial court found that it was a case of murder punishable under Section 302 IPC based on circumstantial evidence.

18. What is required in a case based on circumstantial evidence has been discussed and clarified so many times. The law on the subject is well settled.

19. In **State of U.P. v. Ravindra Prakash Mittal (Dr), (1992) 3 SCC 300**, the Hon'ble Apex Court has held:

*"**20.** .....There is a series of decisions of this Court so eloquently and ardently propounding the cardinal principle to be followed in cases in which the evidence is purely of circumstantial nature. We think, it is not necessary to recapitulate all those decisions except stating that the essential ingredients to prove guilt of an accused person by circumstantial evidence are:*

(1) The circumstances from which the conclusion is drawn should be fully proved;

(2) the circumstances should be conclusive in nature;

(3) all the facts so established should be consistent only with the

hypothesis of guilt and inconsistent with innocence;

(4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused."

20. In **Raja v. State of Haryana, (2015) 11 SCC 43,** it was held that the Court is required to evaluate circumstantial evidence to see that chain of events has been established clearly and completely to rule out any reasonable likelihood of innocence of accused; whether chain is complete or not, would depend on facts of each case emanating from evidence and no universal yardstick should be fixed.

21. We find that several circumstances have been discussed by the learned trial court relating to the murder of the deceased.

22. The first circumstance is that the death of the deceased occurred in her matrimonial home. PW-1, PW-2 and PW-3 in their depositions stated without any hesitation that the deceased died in her matrimonial home. The inquest report Ext. ka-3 and the testimonies of PW-7 and PW-9 also indicate the same fact. The site plan Ext. ka-10 is another piece of evidence to ascertain the place of death of the deceased and dead body has been shown lying at letter "B', which is the room of the accused. The main place of occurrence has been shown by letter "A', which is the room of the accused. The evidence of PW-7, PW-8 and PW-9 also corroborates this fact that on information of the incident when police reached the matrimonial home of the deceased the dead body of the deceased was found at the place shown as letter "B'. PW-1, PW-2 and PW-3 have also stated that when they reached the matrimonial house of the deceased, they saw the dead body lying there.

23. The learned counsel for the appellant has submitted that even if it is assumed that death of the deceased was caused in suspicious circumstances, this fact is not to be ignored that in a case rest upon circumstantial evidence the burden of proof always lies upon the prosecution. It has been vehemently argued that the last seen theory has a significant role to bring home the charge against the accused in a case based on circumstantial evidence and in the present case there is no witness to depose that at any point of time, at the time or shortly before the death of the deceased anyone saw the accused appellant with the deceased and that is the major dent in the prosecution case.

24. In the light of the aforesaid submissions, we have thoroughly examined the oral evidence on record. As pointed out earlier, the witnesses of fact, PW-2, PW-3, PW-4 and PW-5 are hostile witnesses and do not support the prosecution case.

25. PW-1, the father of the deceased, no where in his evidence states that at the time of occurrence deceased was seen by anyone in the company of the accused. Even in his cross-examination a denial has been made by him in respect of affidavit given by him to Superintendent of Police, Budaun alleging therein the guilt of the present accused appellant. In the aforesaid circumstances it can be concluded, on the basis of evidence on record, that the last seen theory is not proved against the present accused appellant. We are afraid that only on the basis of this fact that the body of the deceased was found in her matrimonial home, although this fact was also contradicted by the family members of the deceased in their testimonies as they stated that the dead body was found in Jungle, and absconding of the accused, we

are compelled to draw a definite conclusion that it was the accused appellant who was the author of the crime. According to the depositions of the witnesses of fact the accused appellant had informed them regarding the incident. In the absence of definite evidence on the point that at the time of the occurrence the accused was present in his house, it could not be held that the accused has murdered his own wife. It is true that in his statement under Section 313 CrPC the accused has not made any clear averment as to where he was present at the time of occurrence, but since there was no evidence against him to implicate him in the present crime he was not under obligation to disclose his presence at the time of incident. A plea of innocence and false implication on account of enmity has been taken by him in his statement under Section 313 CrPC.

26. The attention of the Court is drawn towards the verdict of Hon'ble Supreme Court in **Ashok Debbarma vs. State of Tripura, (2014) 4 SCC 747** wherein it was held that Section 313 CrPC statements solely by themselves are not enough for conviction, but can be used for corroboration along with other evidence for conviction. In the light of the aforesaid case law, we are unable to find any other evidence to which the statement of accused under Section 313 CrPC corroborates. In **Dharam Deo Yadav vs. State of U.P., (2014) 5 SCC 509,** it has been held that "normally the last seen theory comes into play when the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, as in the present case, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence".

27. So far as the present case is concerned, we have noticed that there is no evidence on record in respect of last seen theory.

28. In fact burden of proving malafides lies on the shoulders the one who is alleging it, as provided under Section 101 of the Evidence Act and also held in **Uniworth Textiles Ltd. Vs. CCE, (2013) 9 SCC 753.**

29. We take notice of the fact that the conviction in the present case has been recorded on the basis of Section 106 of the Evidence Act.

30. In **Ranjit Kumar Haldar vs. State of Sikkim, (2019) 7 SCC 684** it was held that general rule is that burden of proof is on prosecution. However, Section 106 was introduced not to relieve prosecution of their duty, but it is designed to meet situation, in which it would be impossible or difficult for prosecution to establish facts which are especially within the knowledge of accused.

31. Section 106, Evidence Act provides that "when any fact is especially

within the knowledge of any person, the burden of proving that fact is upon him".

32. In **State of Rajasthan vs. Kashi Ram, (2006) 12 SCC 254** it was pronounced that the provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer any explanation as to how and when he parted company with the deceased. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act.

33. In **Satye Singh and another vs. State of Uttarakhand, (2022) 5 SCC 438** it was held that Section 106 Evidence Act is not intended to relieve prosecution from discharging its duty to prove guilt of accused. Prosecution must discharge its primary onus of proof to establish basic facts against the accused in accordance with law only thereafter may Section 106 be invoked to, depending on the facts and circumstances of each case.

34. In **Nagendra Shah vs. State of Bihar, (2021) 10 SCC 725** it was reiterated that "when there is failure on the part of the accused to offer reasonable explanation in discharge of burden placed on him by virtue of Section 106 when case rests on circumstantial evidence, if chain of circumstances, which require to be established by prosecution, is not established the failure of the accused to discharge the burden under Section 106 of the Evidence Act, is not relevant at all, when the chain is not complete, falsity of the defence is no ground to convict the accused." Needless to say that in the instant case the circumstances established by the prosecution do not lead to one and only possible inference regarding guilt of the accused appellant.

35. In the aforesaid circumstances, what survives for our consideration is only the opinion of the medical practitioner who conducted the autopsy and gave a report on the cause of the death. In this factual scenario, as held in ***Balaji Gunthu Dhule vs. State of Maharashtra, (2012) 11 SCC 685,*** only on the basis of post mortem report the appellant could not have been convicted of the offence punishable under Section 302 IPC.

36. In the case in hand we find that no circumstance, except that the body of the deceased was found in the house of the accused and it was an unnatural death, was proved by the prosecution. Learned AGA has also pointed out that some injuries have been found on the body of the deceased.

37. In the backdrop of the aforesaid circumstances, we have to mention at the cost of repetition that no one has seen the accused with the deceased at the time of the occurrence or a little before the occurrence and last seen theory is also not available to the prosecution. In these circumstances, we can safely rely upon **Shivaji Chintappa Patil vs The State Of Maharashtra, (2021) 5 SC 626**, wherein the Hon'ble Apex Court held that it is well settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased.

Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused.

38. We have no hesitation to hold that the circumstances pointed out by the learned trial court, are not sufficient to say that the prosecution has discharged its primary burden of proving its case beyond reasonable doubt. In these circumstances, we are of the view that it was not proper for the trial court to convict the accused appellant with the aid of Section 106 Evidence Act when the prosecution had miserably failed to discharge its primary burden of proof. At the same time we doubt that merely absconding of accused from the place of occurrence is a sufficient proof to prove the guilt of the accused.

39. In **Satye Singh case** (supra) it was reiterated that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence that all the circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else. Further held in the facts and circumstances of the aforesaid matter that circumstances howsoever strong cannot take place of proof and that guilt of accused have to be proved by the prosecution beyond reasonable doubt.

40. Learned AGA has submitted that since the occurrence has taken place in the closed precincts of the house of the deceased where accused and deceased were living together, hence, this is the duty of the accused appellant to explain that under what circumstances death of the deceased was caused. In this reference, we take note of the statement of the doctor PW-6, who in his examination-in-chief has stated that the death of the deceased would have been caused about two days before the post mortem. The autopsy of the deceased was performed on 8.7.2015 at 2.00 p.m.. If we rely upon the statement of the doctor - PW-6, the death of the deceased would have been caused on 6.7.2015 in the afternoon. It was not the night when the appellant's presence in his house could be naturally presumed. Even if we assume that in the house of the appellant the deceased and appellant were the only residents, it does not ecessarily mean that throughout the day and night the accused appellant happened to be present in his house. It is true that the accused appellant had not stated in his statement under Section 313 CrPC that at the time of occurrence he was not present in his house but, as we have discussed earlier, since the prosecution had failed to prove its case prima facie, no liability may be thrown upon the accused appellant to explain the circumstances under Section 106 Evidence Act, particularly, in the absence of evidence of last seen.

41. The cause and manner of death of the deceased is another circumstance where the trial court strongly hits. The learned trial court has discussed that death was not caused by hanging, as stated by the doctor PW-6 rather it was a case of strangulation. He has discussed the various features in respect of death caused by hanging and death caused by strangulation. It has been pointed out that in the inquest report the panchas have also opined that the death of the deceased was caused by strangulation.

The learned trial court has also highlighted this fact that one contusion over the neck of the deceased and one over her back have been found by the panchas while inspecting the injuries of the deceased. The learned trial court has opined that the broken bangle of the deceased shows that she had made protest while she was being strangulated and in the course of her protest probably her bangle was broken and she also got injury over her back. We do not find any cogent reasoning in the finding of the learned trial court in this regard. The doctor - PW-6 has categorically stated that the death was caused due to ante mortem hanging and has also opined that the death was not caused by strangulation. The learned trial court replaced its view over the medical / expert evidence without any cogent reasoning, which was not permissible, especially in a case where no eye witness account exists.

42. In the facts and circumstances of the case and on the basis of aforesaid discussions and relying upon the relevant laws on the subject, we do not concur with the findings of the learned trial court recorded in the impugned judgment and order. The prosecution has failed to prove its case prima facie to be enabled to take shelter of Section 106 Evidence Act and to shift the onus of proof upon the defence. The case rests upon circumstantial evidence and chain of circumstances is not complete. The learned trial court has itself held that there was no demand of dowry or harassment and cruelty to the deceased and in these circumstances we also find that there was a total absence of motive for the accused appellant to kill his own wife. If the relations between the spouse were not strained and there was no cruelty or demand of dowry what provoked the accused appellant for the murder of his wife, is not clear from the perusal of the entire impugned judgment. The theory of last seen is completely missing. The impugned judgment has been passed only on the basis of suspicion, conjectures and surmises. The legal position is well settled and reiterated many times that suspicion howsoever strong cannot take place of proof.

43. Prosecution had miserably failed to prove entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else. Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of accused. Prosecution having failed to prove basic facts as alleged against the accused, burden could not be shifted on accused by pressing into service the provisions contained in section 106 of Evidence Act. There being no cogent evidence adduced by the prosecution to prove entire chain of circumstances which may compel court to arrive at conclusion that accused only had committed alleged crime.

44. In ***Suchand Pal vs. Phani Pal, 2004 SCC (Cri) 220,*** the Hon'ble Supreme Court held that if from the evidence on record and in the facts and circumstances of the case two views are possible, one pointing to the innocence of the accused and other to the guilt of the accused, the view which favours the accused should be preferred.

45. Upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the the present case, we are of the opinion that the conclusion given by the learned trial court in the impugned judgment and order is not in accordance

with law and the evidence available on record. Thus, this Court is of the view that the prosecution has not been able to establish the guilt of the accused appellant under Section 302 IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the Court. Therefore, the Court is inclined to grant benefit of doubt to the accused appellant on the ground of rule of caution.

46. Hence, the impugned judgment and order of conviction and sentence, which has been sought to be assailed, call for and deserves interference. The criminal appeal is liable to be allowed and the same is accordingly **allowed.**

47. The impugned judgement and order dated 28.7.2016 is set aside. The accused appellant is found not guilty for the offence punishable under Section 302 IPC. He is acquitted from the charge. Accused appellant is in jail. He should be released forthwith, if not wanted in any other case.

48. Let a copy of this judgment along with trial court record be sent to the Court concerned, Budaun for compliance.

(2022) 12 ILRA 197
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2022

BEFORE

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

Criminal Appeal No. 5332 of 2011

Rakesh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri B.N. Rai, Sri Adarsh Kumar, Sri Ganesh Mani Tripathi

Counsel for the Respondent:
Govt. Advocate.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 302/34, 498A, 304B IPC - 3/4 D.P. Act, -Challenge to-Conviction-In the absence of proving any fact regarding the demand of additional dowry, motive is not proved-It is also not proved that at the time of occurrence appellant was inside the house as he has taken plea that he had gone to his duty at 9:00 am-In medical evidence also the time of death is not established.- The chain of circumstances is not complete against the appellant- the prosecution has examined three witnesses of fact PW1 , PW2 and PW3, All these witnesses have turned hostile, They have not supported the prosecution version rather have deposed in the testimony that the deceased was not subjected to cruelty in connection with additional dowry. Learned trial court has opined that the ingredients of offence of dowry death are not proved in this case because no witness of fact has supported the prosecution case rather he considered alternative charge of Section 302 IPC on the basis of circumstantial evidence and the provision of Section 106 of Indian Evidence Act-the prosecution could not elicit any evidence which could prove the motive. Hence, the motive fails. As far as the circumstantial evidence is concerned, there is no doubt that conviction can be based on the basis of circumstantial evidence but it should be tested on the touchstone of the law relating to circumstantial evidence. Hence, the burden could not be shifted on the appellant u/s 106 of Indian Evidence Act. Hence, learned trial court has committed a grave error in convicting and sentencing the appellant u/s 302 of IPC on the basis of circumstantial evidence because there was no circumstantial evidence existed against the appellant-prosecution has not

established its case beyond reasonable doubt against the appellant and he is entitled to be given benefit of doubt.(Para 1 to 30)

B. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."(Par 26)

The appeal is allowed. (E-6)

List of Cases cited:

1. Satye Singh Vs St. of U.K .(2022) 0 Supreme (SC) 143

2. Tomaso Bruno & anr. Vs St. of U.P. (2015) 1 Crimes (SC) 105

3. Harjinder Singh @ Bhola Vs St. of Punj. (2004) 5 Supreme 578

4. Ramasankar Kushwaha Vs St. of U.P. (2021) 0 Supreme (All) 935

5. Siddappa Vs St. of Karn. (2022) LawSuit (Kar) 2541

6. Gambhir Vs St. of Mah. (1982) 2 SCC 351

7. Padala Veera Reddy Vs St. of A.P. & ors. (1989) Supp. 2 SCC 706,

8. Hukam Singh Vs St. of Raj. (1977) 2 SCC 99

9. Eradu Vs St. of Hyderabad (1956) AIR SC 316

10. Earabhadrappa Vs St. of Karn. (1983) 2 SCC 330

11. St. of U.P. Vs Sukhbasi(1985) Supp. SCC 79

12. Balwinder Singh Vs St. of Punj. (1987) 1 SCC 16

13. Ashok Kumar Chatterjee Vs St. of M.P (1989) Supp. 1 SCC 560)

14. Shivu & anr.. Vs Regt.Gen. HC of Karn. & anr.. (2007) 4 SCC 713

15. Chenga Reddy & ors. Vs St. of A.P. (1996) 10 SCC 193 para 21

16. Siddappa Vs St. of Karn.(2022) LawSuit (Kar) 2541

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgement and order dated 08.08.2011 passed by Additional Sessions Judge, Court No.16 in Session Trial No.403 of 2009 (State Vs. Rakesh and others), arising out of Case Crime No.04 of 2009, under Section 498A, 304B IPC and 3/4 D.P. Act, Police Station- Colonelganj, District- Kanpur Nagar, whereby the appellants were convicted and sentenced under Section 302/34 IPC for life imprisonment along with fine of Rs.10,000/-.

2. The brief facts of the case as culled out from the record are that first information report was lodged by informant Ram Chandra at Police Station- Colonelganj, District- Kanpur Nagar on 10.01.2009 with the averments that the marriage of his daughter was solemnized with Rakesh on 15.05.2006, in which informant had given dowry as per his financial condition. The husband, his mother Chhidana and father Shivram along with his three sisters were not satisfied with the dowry. After some days of the marriage, they used to torture his daughter for want

of motorcycle and gold chain as additional dowry. His daughter had complained several times to the informant but he could not meet out the aforesaid demand. On 10.01.2009 at about 9:00 am husband and in-laws of his daughter killed her. He got the information at 01:30 pm on telephone and reached to the matrimonial home of his daughter.

3. On the basis of aforesaid report, a Case Crime No.04 of 2009 was registered at police station.

4. Investigation was taken up by I.O., who visited the spot and recovered *Dupatta* from the spot, the dead body of the deceased was sent for post mortem after completing the inquest proceedings. Inquest report was prepared. The post mortem of the dead body was conducted by concerned doctor and post mortem report was prepared. I.O. recorded statements u/s 161 Cr.P.C. Site plan was also prepared. After completion of investigation, a charge sheet was submitted by the I.O. against accused Rakesh, Shivram and Smt. Chhidana u/s 498A, 304B IPC and 3/4 Dowry Prohibition Act. Magistrate took the cognizance and committed it to the Court of Sessions because the case was triable exclusively by Court of Sessions.

5. Learned trial court framed charges against all the accused persons u/s 498A, 304B IPC, alternatively u/s 302 r/w Section 34 IPC and u/s 3/4 Dowry Prohibition Act. Accused persons denied the charges and claimed to be tried.

6. The prosecution so as to bring home the charges, framed against the accused, examined the following witnesses:

1.	Ram Chandra	PW1
2.	Siya Ram	PW2
3.	Smt. Shiv Kali	PW3
4.	Shailendra Tiwari	PW4
5.	Shiv Ratan	PW5
6.	Siya Ram Maurya	PW6
7.	Rajesh Kumar	PW7
8.	R.C. Vidyarthi	PW8

7. Following documentary evidence was filed by prosecution, which was proved by leading evidence:

1.	FIR	Ex.ka8
2.	Written Report	Ex.ka1
3.	Recovery memo of *Dupatta*	Ex.ka13
4.	Recovery memo of Wedding card & Vyabhar Copy	Ex.ka11
5.	P.M. Report	Ex.ka2
6.	Panchayatnama	Ex.ka3
7.	Chalan Lash	Ex.ka4
8.	Charge sheet (Mool)	Ex.ka12
9.	Site plan with index	Ex.ka10

8. After completion of prosecution evidence, the statements of accused u/s 313 of Cr.P.C. were recorded, in which they stated that false evidence has led against them and the deceased had committed suicide for not having the child. No defense witness is examined by the accused persons.

9. The learned trial court after hearing both the parties, convicted the accused persons Rakesh, Shiv Ram and Chhidana for the offence u/s 302 r/w Section 34 IPC and sentenced them for life with fine of Rs.10,000/- each.

10. It is pertinent to mention that when we have heard this appeal, the

accused appellants Shivram and Smt. Chhidana had passed away. So now, we are concerned with the appeal of appellant Rakesh only, who is the husband of the deceased.

11. Heard Shri Ganesh Mani Tripathi, learned counsel for the appellant and Shri N.K. Srivastava, learned AGA appearing on behalf of the State.

12. Learned counsel for the appellants has submitted that this is no evidence case. No prosecution witness has supported the case of prosecution. It is submitted that prosecution has examined three witnesses of fact, namely, PW1 Ram Chandra, PW2 Siya Ram and PW3 Shiv Kali. All the three witnesses have turned hostile and nobody has supported the prosecution version. Even then, the trial court convicted and sentenced the appellant along with deceased appellants. It is further submitted that learned trial court has opined that demand of additional dowry is not proved, hence no presumption can be raised u/s 113B of Indian Evidence Act. Learned trial court was of the view that the case of dowry death is not proved and after holding that finding, learned trial court went further and took the recourse of provision of Section 106 of Indian Evidence Act and convicted the appellant on the basis of circumstantial evidence. At the time of alleged occurrence, the appellant Rakesh was not in the house. He had gone to his duty at 9:00 am on the date of occurrence. There was nobody inside the house when the suicide was committed by the deceased.

13. Learned counsel for the appellant further submitted that prosecution had established the case of dowry death and dowry death is not proved as found by the learned trial Judge. Hence, no motive for committing the alleged murder remains on the record. Smt. Madhuri Devi, who had seen the deceased first time and Jitendra Kumar who had given information to the police station, were not examined during trial. Time of death is not mentioned in inquest report, which was prepared on 10.01.2009.

14. Learned counsel for the appellant submitted that in the morning at 9:00 am on the said date of occurrence, the appellant had gone on his duty and this plea of alibi was not confronted by the prosecution witnesses, namely, PW1, PW2 and PW3. Hence, the burden could not be shifted on the appellant u/s 106 of Indian Evidence Act. Hence, learned trial court has committed a grave error in convicting and sentencing the appellant u/s 302 of IPC on the basis of circumstantial evidence because there was no circumstantial evidence existed against the appellant.

15. Learned counsel for the appellant relied on **Satye Singh Vs. State of Uttrakhand 2022 0 Supreme (SC) 143, Tomaso Bruno and another Vs. State of U.P. 2015 1 Crimes (SC) 105, Harjinder Singh @ Bhola Vs. State of Punjab 2004 (5) Supreme 578, Ramasankar Kushwaha Vs. State of U.P. 2021 0 Supreme (All) 935 and Siddappa Vs. State of Karnataka 2022 LawSuit (Kar) 2541.**

16. Learned AGA opposed the submissions made by learned counsel for the appellants and submitted that although the witnesses of fact have turned hostile in this case and not supported the prosecution case, there was ample evidence against the appellant on the basis of which, he was convicted. It is contended that the death of the deceased had taken place in his

matrimonial home where she used to reside with her husband in-laws. Hence, the burden was on appellant to prove how the death was taken place and according to opinion of doctor, conducting the post mortem, the cause of death was asphyxia due to throttling. Hence, trial court has not committed any mistake and appeal is liable to be dismissed.

17. Prosecution has established this case as a case of dowry death. According to the prosecution story, the marriage of daughter of informant was solemnized with appellant Rakesh and she was tortured for demand of additional dowry. It is also the prosecution case that she was done to death by the appellant Rakesh along with his parents, who have passed away now.

18. To prove its case, the prosecution has examined three witnesses of fact, namely, PW1 Ram Chandra, PW2 Siya Ram and PW3 Smt. Shiv Kali. All these witnesses have turned hostile. They have not supported the prosecution version rather have deposed in the testimony that the deceased was not subjected to cruelty in connection with additional dowry. Learned trial court has opined that the ingredients of offence of dowry death are not proved in this case because no witness of fact has supported the prosecution case. He went further and considered the case under alternative charge of Section 302 IPC on the basis of circumstantial evidence and the provision of Section 106 of Indian Evidence Act.

19. To prove the case under circumstantial evidence, the motive assumes a great importance. The motive of offence is set up by the prosecution as demand of dowry but all the three witnesses PW1 to PW3 have denied this factum in their respective testimony. They have not supported the prosecution version and turned hostile and even in the cross-examination, the prosecution could not elicit any evidence which could prove the motive. Hence, the motive fails. Learned trial court has opined in impugned judgement that when the death of the deceased had taken place, the entire house was not locked from inside and if the deceased would have committed the suicide when she was alone then in that case she should have bolted the room inside because no person wants any sort of interception when he is going to commit suicide. We are of the opinion that this is not the thumb rule. The mindset of the person, going to commit the suicide differs from person to person. If the room was not bolted from inside, it cannot be considered the incriminating circumstances against the appellant. Another circumstance, mentioned by the learned trial court, is that PW3 has admitted that when she reached to the matrimonial home of her daughter, accused were not there. This conduct of accused is also not indicative that they had committed the crime because residents of the house may flee out of fear also.

20. Learned trial court has given finding in the impugned judgement that appellant and deceased were residing in the same house, hence, the burden to prove the innocence was on the appellant in the light of Section 106 Indian Evidence Act. Learned trial court goes forward and applied the theory of last seen evidence in this case by stating that the appellant Rakesh had gone to his duty at 9:00 am and the dead body of the deceased was first seen hanging at 10:30 am. This duration was too short, hence, it was also the factor, pointing to the guilt of the appellant.

21. In our opinion, learned trial court has misread the provisions of Section 106

Indian Evidence Act. For invoking the provision of Section 106 Indian Evidence Act, it cannot be said that the appellant and deceased were residing in the same house but first of all the prosecution will have to prove the fact that at the time of commission of offence, the appellant was inside the house. Prosecution cannot escape from its liability to discharge its burden first.

22. Section 106 of Indian Evidence Act read as under:

106. Burden of proving fact especially within knowledge--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

23. The Karnataka High Court in **Siddappa Vs. State of Karnataka 2022 LawSuit (Kar) 2541** this issue was discussed. It is held in the aforesaid case as under:

*"42. In the case of **Gajanan Dashrath Kharate Vs. State of Maharashtra (supra),** the murder of the father of the appellant was committed secretly inside the house. Pertaining to the facts of that case, in para.13 of the said judgment, the Hon'ble Apex Court was pleased to observe as below:*

"13. As seen from the evidence, appellant Gajanan and his father Dashrath and mother were living together. On 7-4-2002, mother of the appellant-accused had gone to another Village Dahigaon. The prosecution has proved presence of the appellant at his home on the night of 7-4-2002. Therefore, the appellant is duty-bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of the occurrence, when the accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime."

(emphasis supplied)

43. Thus, the initial burden of proving that, as on the date of the alleged incident, the accused was present in the house or was lastly seen with the deceased or that he was lastly in the company of the deceased at the time of the incident would be primarily upon the prosecution.

Thus, it is observed in the above paragraph by the Hon'ble Apex Court that the initial burden to establish the case would undoubtedly be upon the prosecution. It is only when the prosecution discharges the said burden that the accused

was found in the company of the deceased, the burden of proving the facts which are exclusively within the knowledge of the accused would fall upon him.

24. Since the prosecution could not discharge its burden by proving the fact that at the time of alleged occurrence, the appellant was inside the house. Moreover, in this case three accused persons are convicted, namely, Rakesh, Shivram and Smt. Chhidana, if they all were inside the house then also the question arises as to who had committed the crime. Co-accused Shivram and Chhidana have passed away now and as discussed above it is not sufficient for prosecution to prove the fact that the deceased and appellant were residing together in the same house. No benefit can be given to prosecution if it fails to prove the fact that at the time of alleged occurrence, the appellant was inside the house. Hence, Section 106 Indian Evidence Act has no applicability in this case.

25. As far as the circumstantial evidence is concerned, there is no doubt that conviction can be based on the basis of circumstantial evidence but it should be tested on the touchstone of the law relating to circumstantial evidence.

26. The Hon'ble Apex Court in This Court in **C. Chenga Reddy & Ors. vs. State of A.P., (1996) 10 SCC 193, para (21)** held as under :-

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of [pic]evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

27. After referring to a catena of cases based on circumstantial evidence in **Shivu and Anr. vs. Registrar General, High Court of Karnataka & Anr., (2007) 4 SCC 713**, this Court held as under:-

"12. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. ***{See Hukam Singh v. State of Rajasthan, (1977) 2 SCC 99; Eradu v. State of Hyderabad(AIR 1956 SC 316), Earabhadrappa v. State of Karnataka (1983) 2 SCC 330, State of U.P. v. Sukhbasi(1985 (Supp.) SCC 79), Balwinder Singh v. State of Punjab(1987) 1 SCC 16 and Ashok Kumar Chatterjee [pic]v. State of M.P (1989 Supp. (1) SCC 560)*** *The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab, AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the*

accused and bring home the offences beyond any reasonable doubt."

28. In **Padala Veera Reddy v. State of A.P. and Ors., 1989 Supp. (2) SCC 706,** it was laid down that in a case of circumstantial evidence such evidence must satisfy the following test:-

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. ***(See Gambhir v. State of Maharashtra (1982) 2 SCC 351)."***

29. In this case, in the absence of proving any fact regarding the demand of additional dowry, motive is not proved. It is also not proved that at the time of occurrence appellant Rakesh was inside the house as he has taken plea that he had gone to his duty at 9:00 am. In medical evidence also the time of death is not established. The chain of circumstances is not complete against the appellant. We are of the considered view that prosecution has not established its case beyond reasonable doubt against the appellant Rakesh and he is entitled to be given benefit of doubt and appeal is liable to be allowed.

30. Appellant-Rakesh is given benefit of doubt and appeal is **allowed** accordingly.

31. Conviction and sentence of appellant Rakesh u/s 302 r/w Section 34 IPC is hereby set aside and he is acquitted of all the aforesaid charges framed against him. He be set free forthwith if not wanted in any other case.

32. Record and proceedings be sent back to the court below.

(2022) 12 ILRA 204
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 5571 of 2015

Nirmal **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Krishna Nand Yadav, Sri Dinesh Kumar Pandey, Sri Manu Sharma

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860- Sections 302. 307 & 342-Challenge to –Conviction-neither the prosecution nor the defence give narration of any altercation or fight between husband and wife either on the date of the incident or on any date immediately before the incident. The marriage of the appellant with the informant (PW-1) was

admittedly over 7 years old and the appellant had been working for livelihood in a different State since before his marriage and was an occasional visitor to his hometown-no incident triggering the incident is proved by the prosecution to serve as a strong motive for the crime- if the appellant had an intention to finish off his children as well as the informant, having inflicted precision knife blows on two innocent children, he would not have used the blunt side of knife or some other non lethal weapon to inflict injury on PW-1 to enable her to survive and be a witness against him, particularly, when he had a plan to finish them off and take a plea of alibi- the conduct of the appellant in taking the wife to the hospital; arranging for an ambulance to take her to the district hospital; and getting her admitted for treatment is suggestive of the fact that he made all efforts to save his wife - incident occurred in the secrecy of a closed room- The prosecution evidence is silent as to how the appellant managed that secrecy to cause injury to his two sons and his wife-the prosecution story and the evidence fails to inspire our confidence as to uphold the conviction recorded by the trial court-Thus, the appellant is entitled to be given benefit of doubt. (Para 1 to 40)

The appeal is allowed. (E-6)

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is against the judgment and order dated 19.10.2015/ 27.10.2015 passed by the Additional Sessions Judge, Court No.2, Maharajganj in S.T. No.111 of 2013, arising out of Case Crime No.133 of 2013, P.S. Thuthibari, District Maharajganj, whereby the appellant (Nirmal) has been convicted under Sections 302, 307, 342 IPC and sentenced as follows:- Imprisonment for life as well as fine of Rs.25,000/-, coupled with a default sentence of one year, under Section 302 IPC; imprisonment for life as well as fine of Rs.24,000/-, coupled with a default sentence of one year, under Section 307 IPC; and one year R.I. as well as fine of Rs.1,000/-, coupled with a default sentence of two months, under Section 342 IPC. All sentences to run concurrently.

INTRODUCTORY FACTS

2. On 14.03.2013 at 8.30 hours, a written report (Ex. Ka-1) thumb marked by Poonam (PW-1), scribed by Zakir Ahmad (PW-3), was lodged by Virendra (PW-2), father of Poonam, giving rise to Case Crime No.133 of 2013 at P.S. Thuthibari, District Maharajganj of which GD entry, vide report No.12 (Ex. Ka-5), and Chik FIR (Ex. Ka-4) was prepared by Constable Ram Adhar (PW-5). In the written report it was alleged that informant - Poonam (PW-1) was married to the accused - Nirmal (the appellant) seven years ago; out of that marriage, she had two sons, namely, Nilesh (deceased no.1- D-1), aged about 5 and a half years, and Niwas (deceased no. 2- D-2), aged about 3 years; that the accused used to suspect informant's character and allege that those children were not his and therefore the informant should go away with her children or else she as well as her sons would be killed; that this fact was communicated by the informant to her parents but they used to counsel her to have patience; that on 13.03.2013, the accused Nirmal killed his children at about 11.10 am and also inflicted knife blow on informant's neck and left after shutting the door from outside; however, later, in the night people admitted her in the hospital therefore, now she is lodging the report for appropriate action.

3. Upon registration of the case, Bhagwati Singh (the investigating officer - I.O.) (PW-6) visited the spot and carried out inquest of the two deceased, namely D-1 and D-2. The inquest of D-1 was completed by

10.50 hours on 14.03.2013 of which an inquest report (Ex. Ka-9) was prepared. One of the inquest witnesses to the report is Mahendra (PW-8). Similarly, inquest of D-2 was completed by 13.30 hours on 14.03.2013 of which an inquest report (Ex. Ka-15) was prepared by PW-6. On 14.03.2013 itself, the I.O. carried out separate inspection; prepared site plan (Ex. Ka -4); lifted plain earth and blood stained earth from the spot of which a seizure memo (Ex. Ka-6) was prepared and also collected murder weapon (a knife) of which seizure memo (Ex. Ka-5) was prepared.

4. Autopsy was carried out on 15.03.2013. Autopsy report, dated 15.03.2013, of D-1 (Ex. Ka-2) indicates that it was completed by 3 pm. The relevant entries in the autopsy report (Ex. Ka-2) are as follow:-

External Examination:-

Average built body, aged 5 years; rigor mortis passed out in all limbs; abdomen distended; scrotum swollen; skin peeled off at places; blister present at places; eyes bulging, mouth open; blood stained cloth on face present.

Ante Mortem Injuries:-

(i) Incised wound 5.8 cm x 1.5 cm x bone deep on left side neck obliquely placed underlying trachea, oesophagus, carotid vessel on left side cut.

(ii) Contusion traumatic swelling 3.0 cm x 2.5 cm on right side head.

Internal Examination:

Stomach contains pasty material 50 gm. Small intestine empty. Large intestine full with faecal matter and gases.

Opinion:- Death due to shock and haemorrhage as a result of ante-mortem injuries.

Duration since death:- About two days.

5. Autopsy report of D-2 (Ex. Ka-3), dated 15.03.2013, reflects that it was completed by 3.45 pm. The relevant entries in the autopsy report (Ex. Ka-3) are as follows:-

External Examination:-

Average built body, aged 4 years; rigor mortis passed out in all limbs; eyes bulging, mouth half open, blisters at places; abdomen distended; skin peeled off at places.

Ante Mortem Injuries:-

Incised wound 4.8 cm x 1.2 cm x bone deep on front and left side neck obliquely, underlying trachea, oesophagus and carotid vessel on left side cut.

Internal Examination:

Stomach contained pasty material 50 gm. Small intestine empty. Large intestine full wth faecal matter and gases.

Opinion:- Death due to shock and haemorrhage as a result of ante-mortem injuries.

Duration since death:- About two days.

6. After completing the investigation, PW-6 prepared and submitted charge sheet (Ex. Ka-7) against the appellant on 24.04.2013. After taking cognizance on the charge sheet, the matter was committed to the court of session. The court of session

charged the appellant as follows:- for the murder of D-1 and D-2, under Section 302 IPC; for attempting murder of the informant Poonam (PW-1), under Section 307 IPC; and for wrongful confinement of PW-1, under Section 342 IPC. The appellant pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

7. During the course of trial, the prosecution examined as many as 10 witnesses. Their testimony, in brief, is as follows:-

8. **PW-1- Poonam- the informant - the wife of the appellant and the person injured.** She stated that she was married to the appellant about seven years before the incident. Out of that marriage she had two sons, namely, Ram Niwas and Nilesh. Nilesh was aged 5 and a half years, whereas Ram Niwas was aged about 4 years at the time of the incident. She stated that the appellant used to work as a tailor/weaver in Gujarat. During Diwali the appellant had come to the village from Gujarat. She stated that she used to live in village Gadaura where her husband had his house and agricultural holding. Her husband is one amongst four brothers each having separate mess though they had common fields etc. She stated that her husband used to level allegations that she is having a bad character and the two children, namely, Ram Niwas and Nilesh, were not from him. PW-1 stated that the appellant also used to threaten her to take her children and go away or she and her children will be killed. PW-1 stated that she gave information of the aforesaid threat to her father (Virendra - PW-2). Her father came and counseled her and her husband. On several occasions, her father had counseled the appellant but to no effect. On the date of the incident, at about 11 am, while she was in her room hanging clothes and her two children were playing on the wooden cot, her husband (the appellant) came and struck Ram Niwas with a knife, when she intervened, the appellant caught her by her neck with his hand and struck Nilesh on the neck with the knife. Both children started struggling to breathe. Thereafter, she was also inflicted knife blow by her husband. Both her children died and she fell unconscious. Thinking that she is dead, her husband locked the door from outside and ran away. As she had injury on her neck, she could not raise an alarm. In the night her husband came with his brother Sarwan and when they found that the informant was alive, Sarwan advised informant's husband Nirmal to take her to the hospital and make a false report that informant has killed her own children and inflicted injuries on herself. On the above suggestion of Sarwan, Nirmal (the appellant) stated that it would be better that he escapes to Nepal, upon which Sarwan told Nirmal that if he escapes now, he would be trapped, therefore it would be better that she (PW-1) is taken to the hospital. PW-1 stated that thereafter Sarwan and Nirmal took her to the hospital and got her admitted in District Hospital, Maharajganj. After she was admitted, information was given to her father. Her father arrived in the morning. Along with her father, Zakir Ahmad had also come. She narrated the incident to her father by gestures. Zakir scribed the report and read out the report. She approved the report by her gestures and put thumb impression on it. The report was shown to her; she identified it and the same was marked Ex. Ka-1. At this stage, the witness showed to the court the mark of injury on her neck and claimed that she is being threatened by

unknown persons not to give statement against Nirmal otherwise she would be killed. PW-1 added that since then she has been staying with her father and has come to give her statement along with her father. When the photograph of the body of the deceased was shown to her she identified the deceased. She clarified that when the first information report was lodged she was not in a position to speak but she could gesticulate and the report was prepared on the basis of gesticulation. She stated that she remained in the hospital for 6-7 days and thereafter under went treatment for few months and in her treatment about 60-70 thousand rupees of her father were spent.

During cross examination, she admitted that her husband had been working out of station since before her marriage. Sometimes he used to return within six months and sometimes after a year. She stated that her husband is one amongst four brothers. All of them have separate mess. For one or two years or may be three years, after Gauna, there used to be a common mess but since thereafter they all had separate mess. In respect of description of the house where she resided at the time of the incident, PW-1 stated that the house has four rooms; each brother has a room to himself; all rooms, having separate doors, open in a common gallery. The room of Sarwan (one of the brothers of her husband) is in front of the room of the informant. On the day of the incident, Sarwan, Sarwan's wife and Sarwan's mother and father including children were there and Nirmal (accused-appellant) was also there. Nirmal had arrived on the day of Diwali. She stated that so long Nirmal stayed in the village he used to only loiter around. He used to leave the house between 10-11 am, normally after having meals, but where he used to go, she did not know. Sometimes he used to leave even without food. She stated that in her house, food used to be cooked early morning as the elder son used to go to the school. On the day of the incident, food was cooked between 7 and 8 am. Her son after having meal had gone to the school. On the date of the incident, Nirmal had his meals at around 11-30 am. The elder son had had his meals but the younger one did not have his meals, he had only milk. She also had not taken her meals. She could not remember as to when Nirmal left the house but then she stated that he left the house after having meals at around 11 am. She stated that after receiving injury she turned unconscious and she does not know for how long she remained unconscious. She stated that she regained consciousness when Sarwan and Nirmal were trying to stir her up. She was given water to drink and after having water she gained consciousness but then again she became unconscious. She stated that when she was given water she was partially conscious. She could hear the conversation between Sarwan and Nirmal. She could not tell as to when the police had come to record her statement and she also could not tell as to where she regained consciousness. She, however, stated that when her father had arrived in the morning, she had regained consciousness. She could not tell as to how many persons had come to the hospital to visit her. At this stage, PW-1 stated "मैं निर्मल से तंग आ गयी थी। वह मुझे बहुत मारते थे।"

She denied the suggestion that she killed her children and tried to kill herself as she was frustrated. She also denied the suggestion that at the time of the incident Nirmal was not in the house but was away. She also denied the suggestion that no such incident had occurred.

9. **PW-2 - Virendra - father of the informant**. PW-2 stated that her daughter

Poonam was married to the appellant about 7 years ago and out of the marriage D-1 and D-2 were born. PW-2 stated that her daughter used to inform him that her husband Nirmal used to level allegations of bad character on her and used to allege that her children were not his. PW-2 stated that he used to counsel her to have patience. In respect of the incident, PW-2 stated that at about 2 am in the night he received a phone call that his daughter Poonam has been inflicted knife blow on the neck and that Nirmal has killed both his children. He was also told that Poonam has been admitted in the government hospital. He stated that he arrived at the hospital at about 5 am where he was informed by his daughter about the incident. After getting full information about the incident from his daughter, he got the report scribed from Zakir Ahmad and after getting the thumb impression of his daughter, the report was lodged.

During cross examination, PW-2 stated that his daughter's Gauna had been 8-9 years ago. Gauna was in the fifth year after marriage. Since before marriage, his son-in-law Nirmal used to work in Gujarat. He stated that he cannot say whether Nirmal had relations with any lady in Gujarat. He stated that the relations between his daughter and his son-in-law got sour about a year and half before the incident and prior to that, their relations used to be cordial. PW-2 stated that his daughter was anguished by the conduct of her husband and used to remain under severe stress. She used to say that her life is not good and therefore it is better that she dies. He also stated that his daughter on one or two occasions had attempted suicide but she was counseled by him. PW-2 could not tell with certainty as to who informed him in the night about the incident but he reiterated that he arrived at the hospital in the morning at 5 am. He left his own house at 3 am to go to the hospital. He stated that at the hospital Nirmal was seen handcuffed by the police. When he had arrived at the hospital, his daughter was unconscious. She regained consciousness after about half an hour. He had no conversation with Nirmal. Nirmal did not inform him about the incident. He stated that his daughter had told him to lodge report. He reiterated that his daughter remained in the hospital for 6-7 days. He stated that he had lodged the report at the police station at about 10 am. He stated that he did not visit Nirmal's house. He, however, admitted that his daughter used to suspect that her husband Nirmal has kept another woman in Gujarat and therefore he used to assault her. He also admitted that his daughter was frustrated living with Nirmal (the appellant) but he denied the suggestion that his daughter out of frustration that her husband Nirmal has kept another lady, killed her own children and attempted to kill herself. He also denied the suggestion that Nirmal had informed PW-2 about the incident. He denied the suggestion that he has lodged a false report only to save his daughter as she had killed her own children and had attempted suicide. He also denied the suggestion that he is telling lies only to save his daughter.

10. **PW-3 - Zakir Ahmad.** He stated that the report (Ex. Ka-1) was scribed by him on the instructions of Poonam Devi and it was read over to her. He stated that Poonam had put her thumb impression on the report. Immediately thereafter he stated that he had scribed the report at Kotwali and had handed it over at P.S. Thuthibari because Poonam was admitted for treatment at that time.

During cross examination, PW-3 stated that Poonam's father Virendra met him in the government hospital where Poonam was admitted. He again stated that

at the time of writing the report at Kotwali Sadar there were number of persons present. He, however, could not tell as to who they were. He, however, denied the suggestion that he made a false report to give colour to the case.

11. **PW-4 - Navnath Prasad - Autopsy Surgeon.** He proved the autopsy reports of D-1 and D-2 already noticed above. He stated that the ante mortem injuries noticed were sufficient to cause death in ordinary course.

During cross examination, he stated that the injuries noticed were of similar kind and could be from a small sharp edged weapon. He stated that he could not disclose as to what material was found in the stomach as they were fully digested.

12. **PW-5 - Constable Ram Adhar.** He proved the registration of the first information report and preparation of the Chik FIR (Ex. Ka-4) and the GD entry thereof (Ex. Ka-5). He stated that at the time of lodging the report only Virendra (father of PW-1) had come with a written report.

During cross examination, he again reiterated that PW-1's father, namely, Virendra, alone had come to lodge the written report and he had brought a written report with him. He denied the suggestion that the report has been registered according to his thoughts. He also denied the suggestion that information of the incident was given by Nirmal to Poonam's father. He also denied the suggestion that Poonam committed the crime.

13. **PW-6 - Bhagwati Singh - Investigating Officer.** He proved various stages of investigation such as inquest proceeding; visiting the spot; preparing the site plan; lifting the blood stained earth and plain earth; and recording the statements of witnesses. Apart from that, he stated that during spot inspection it appeared to him that the room where the bodies were lying had been locked from inside as the latch of the door had broken and was lying inside the room. He stated that during investigation he had recorded the statement of doctor who had medically examined Poonam and it was found that Poonam was brought to the doctor by Nirmal at about 10.30 pm on 13.03.2013. He also stated that he had arrested Nirmal on 15.03.2013 and after completing the investigation he had prepared charge sheet (Ex. Ka-7) on 24.04.2013. He produced various articles which were recovered during the course of investigation as material exhibits including the knife (the weapon of assault).

During cross examination, PW-6 stated that on 14.03.2013 when he had inspected the spot, informant's father Virendra and other villagers were present. He stated that informant's father had not informed him as to who gave information on telephone about the incident. He stated that when he had visited the spot the room of the informant was found open but on inspection he could sense that the door had to be broke open because the latch of the door had separated from the wooden part and was lying on the floor. He, however, clarified that he had not prepared any seizure memo of either the wooden part of the door or the latch but photographs of that room were taken and plain earth and blood stained earth including weapon of assault were lifted from the spot. He stated that when he had visited the hospital to record the statement of the informant, the accused Nirmal was not present but he could ascertain that Nirmal had

got the informant admitted in the hospital. He stated that he recorded the statement of doctor Jamin Ali during investigation who also confirmed that Nirmal had brought the informant for treatment in the night of 13.3.2013 at 10.30 pm. He also stated that the doctor informed him that at that time the informant was not in a position to speak. The doctor also informed him that Nirmal had called for the ambulance to take her to district hospital at Maharajganj. PW-6 stated that Poonam had not informed him that Nirmal had kept a second wife in Gujarat but she had told him that Nirmal had been working in Gujarat and had come after one year. PW-6 stated that he did not notice any finger prints on the weapon of assault and therefore did not send the weapon to finger print expert though weapon was sent to ascertain the presence of human blood on it. He denied the suggestion that the accused Nirmal was present in the hospital. In respect of information gathered from the doctor with regard to duration of injury found on the body of Poonam, PW-6 stated that according to the information provided by the doctor the injuries were fresh as noticed on 14.03.2013 at 2.05 am. He stated that, during the course of investigation, from the villagers he could gather that the time of the incident was between 6 pm and 9 pm. He denied the suggestion that he got the report scribed and got it lodged under his instructions. He also denied the suggestion that the investigation was completed sitting at home and, on the basis of cursory investigation, charge sheet was submitted.

This witness was recalled by order dated 21.05.2015 to prove the inquest reports; the papers prepared in connection with autopsy; and the photographs of the site. The said documents were exhibited and the photographs were also made material exhibits 11, 12, 13 and 14.

During cross examination, after PW-6 was recalled, PW-6 stated that photographs were taken at the time of inquest which was conducted between 9.30 am and 10.50 am. He stated that in photograph 103 Kha/31 a lit lantern is noticed and in photograph 103 Kha/32 *(note it might be 10Kha/ 32)* the broken latch is noticed.

14. **PW-7- Dr. Ranjan Kumar Mishra.** He is the doctor who examined Poonam on 14.03.2013 at 2.05 am. He proved the medical examination report/injury report of Poonam which was marked as Ex. Ka-8. The injuries mentioned by him in the injury report, proved by him, are noticed below:-

(i) A L.W. size about 0.5 cm x 0.5 cm into muscle deep in neck region just 2 cm above from thyroid cartilage. Bleeding present. Advise: refer to ENT surgeon for expert opinion.

(ii) Multiple abrasions (maximum size 1 cm x 0.2 cm and minimum size about 0.5 cm x 0.2 cm) in neck region just above the thyroid cartilage.

Duration:- fresh. **Opinion:-** Injury no.1 kept under observation. Injury no.2 simple in nature. Injury no.1 caused by blunt object and injury no.2 caused by sharp edges.

PW-7 proved the above injury report (Ex. Ka-8) and stated that he examined the injured, who was brought by her husband, at 2.05 am.

During cross examination, PW-7 admitted that at the time when Poonam was brought for medical examination it was only her husband who was present and there was no police personnel. In respect of injury no.2, PW-7 stated specifically as follows:- "चोट नं. 2 धार दार हथियार से स्क्रेच

था और वह चोट मजरुब अपने हाथ से भी बना सकता है।"

In respect of the duration of injury as fresh, PW-7 stated that "6 घंटे की अंदर की चोट फ्रेश होती है।"

In respect of the nature of injury, PW-7 stated that "चोट नं. 1 साधारण प्रकृति की नहीं थी। चोट नं. 2 साधारण प्रकृति की थी। चोट नं. 1 ब्लन्ट ऑब्जेक्ट से आना सम्भव था।"

PW-7 denied the suggestion that he did not properly examine the injured and prepared the injury report without due examination.

15. **PW-8 - Mahendra- inquest witness.** He proved his signatures on the inquest reports and stated that at the spot there was a knife lying which had dried blood stains on it and the police had recovered the same. He proved the signature on the recovery memo.

During cross examination, he stated that he had arrived at the house of Nirmal between 8-8.30 am. When he had arrived the police was already there. He did not see the body from a close distance. He cannot tell as to who was the other panch witnesses.

16. **PW-9 - Purnavashi.** He stated that on the date of the incident he was vending groundnuts in the village. In the morning he did notice Nirmal moving hurriedly and in a nervous manner. Later, he came to know that Nirmal had killed his two sons and he had been escaping from the spot.

During cross examination, the witness stated that the incident was of night and he cannot exactly tell the time and he had gone to the spot just because there was crowd. He could not tell whether he had disclosed to the I.O. that Nirmal was noticed by him escaping from the spot in a nervous manner.

17. **PW-10 - Anil Kumar.** He is another witness of the inquest report. He proved his signature on the inquest reports.

During cross examination, PW-10 stated that he could not go inside the room where the bodies were, as there was a large crowd. Then he stated that he had seen the body of the children but at that time Nirmal's father and mother were there but Nirmal was not there.

STATEMENT UNDER SECTION 313 CrPC

18. The incriminating circumstances appearing in the prosecution evidence were put to the accused-appellant for recording his statement under Section 313 CrPC. He denied the incriminating circumstances appearing against him and claimed that he has been falsely implicated and that his wife Poonam used to suspect him of having a second wife as a result whereof she used to quarrel with the appellant and threatened the appellant that she would kill both her children and commit suicide and would implicate the accused appellant. The entire incident is an outcome of that. Poonam had killed her own children and she attempted suicide. When the incident occurred, he was not there.

DEFENCE EVIDENCE

19. The defence examined two defence witnesses. Their testimony, in brief, are as follows:-

20. **DW-1 - Nripendra Vikram Singh.** He stated that on 13.03.2013 he was in Nepal with Munna Gupta, Mahendra Chauhan and the accused Nirmal. They all had gone for a pleasure trip. On the date of the incident, they had been in Nepal since 9.30 am till late evening. They returned back at about 10.30 pm. Nirmal returned to his house and next day DW-1 came to know that Nirmal's wife killed her own children and also attempted suicide.

During cross examination by the prosecution, DW-1 stated that he is Ex-District President of Hindu Yuva Vahini. Nirmal used to work out of station and used to come to his home on festivals. On the date of the incident, Nirmal came to him at 9 am and he stayed with him throughout the day and they all went to Nepal from where they returned in the evening at 10.30 pm. He denied the suggestion that he is a politician and to secure his vote bank he has made a false statement.

21. **DW-2 - Munna Ram.** He stated that on 13.03.2013 he had visited Nepal with Nirmal. Between 9.30 am till late evening they were together in Nepal. Next day, he came to know that Nirmal's wife had killed her children and had self inflicted a knife injury.

During cross examination by the prosecution, DW-2 stated that he did not know Nirmal from before. He met Nirmal Singh at Nripendra Singh's house and from there he got acquainted with him. He denied the suggestion that Nirmal and he are of the same political ideology and therefore to support Nirmal Singh he has given a false statement.

TRIAL COURT FINDINGS

22. The trial court accepted the ocular account rendered by PW-1 as reliable and trustworthy, which was corroborated by medical evidence, therefore, convicted and sentenced the appellant as above.

23. We have heard Sri Manu Sharma and Dinesh Kumar Pandey for the appellant; Sri Rajiv Lochan Dwivedi, Brief Holder, and Sri Pankaj Saxena, learned AGA, for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

24. The learned counsel for the appellant submitted that the prosecution has failed to prove the motive for the crime. According to the prosecution, the motive for the crime was appellant's suspicion about his wife having an affair and the children not born out of the wedlock. There is no disclosure in the entire prosecution evidence as to who was that person with whom affair of PW-1 was suspected by the accused-appellant. Interestingly, the appellant used to work away from home and had been working as such since before the Gauna and, after marriage, used to visit his village /hometown once a year or may be once in six months. This had frustrated his wife (PW-1) and this frustration is admitted not only by PW-1 but also by her father (PW-2) therefore, there existed motive for PW-1 to act in the manner suggested by the defence just to falsely implicate the appellant. Otherwise also, from the statement of PW-2 it is clear that the relationship between the husband and wife got sour since last one and half year. The children were aged 5 years and 4 years, respectively, therefore, there was no reason for the appellant to suspect that those children were not his. In these

circumstances, since it is a case of murder of one's own children, there had to be a strong motive proved for the crime, which the prosecution has failed to prove. The conduct of the appellant in getting the informant admitted in the hospital is reflective of the fact that the appellant held no guilty mind. If the appellant had killed his own children and had attempted murder of his own wife there was no occasion for the appellant to get his wife admitted in the hospital and leave her as witness against him. The appellant could have easily finished off his wife and disclosed that she was killed while he was away.

25. He contended that PW-1's testimony is not reliable for the following reasons:-

(a) She was an interested witness because if she had not implicated her own husband, she was alone in the company of her children which would have caused suspicion against her and therefore once she survived she had no option but to falsely implicate her husband for her own survival;

(b) Her statement is to the effect that her children were killed on or about 11 am and that when she intervened she was inflicted injury on the neck on or about the same time whereafter she fell unconscious and her husband left the house. In so far as the death of the children are concerned, they were found dead two days before their autopsy which was conducted on 15.03.2013 at around 3 pm, whereas the injury report of PW-1 would reflect that she was medically examined at 2.05 am on 14.03.2013 and her injuries were found fresh. PW-7, who examined PW-1 and who proved the injury report (Ex. Ka-8), disclosed that the duration of injuries noticed by him were fresh, which means that it could have been caused six hours before. This would mean that the incident occurred sometimes around 3 pm or later and not at 11 am as disclosed by PW-1.

(c) According to PW-1, she was inflicted knife wound on the neck. The injuries found on her neck was a lacerated wound and the other were multiple abrasions which, according to the doctor, could be self inflicted. If the injury had been caused by knife, the wound would not have been lacerated therefore the testimony of PW-1 does not find corroboration in the medical evidence whereas the defence testimony clearly discloses that the appellant had visited Nepal with his friends and throughout the day he was with them and returned in the evening. PW-1 also admits that since day time her husband had been busy roaming here and there and he used to leave the house in the morning to visit various places. All of this would suggest that the appellant was not present in the house but elsewhere when the incident occurred.

26. In addition to above, it was submitted that the investigating officer had noticed that the door of the room wherein bodies were found had to be broke open as the latch of the door was found detached from the wooden part and lying on the floor which means that PW-1 had bolted the door from inside; inflicted injuries on her children and thereafter attempted suicide. It was also contended that the site plan of the house would suggest that there were four rooms opening in a common gallery. These four rooms were of four brothers including the appellant. It is admitted that one brother's family, that is of Sarwan, was living right in front of the room of the appellant therefore, the possibility of infliction of injury by the appellant and thereafter escaping from the spot was not

possible unless and until the door was closed from inside. All of this would clearly suggest that the door was shut from inside; the children were killed by PW-1 and thereafter she attempted a suicide and when the appellant returned after his tour, upon noticing PW-1 in an injured stage, took her to the hospital.

27. The learned counsel for the appellant also submitted that from the statement of PW-2 it is clear that when he had visited the hospital he had noticed the appellant handcuffed by the police meaning thereby that the appellant was arrested even before the first information report was lodged therefore, the statement of the investigating officer that the appellant was arrested on 15th is not acceptable. If the appellant was arrested in the morning itself, there was no occasion for the appellant to lodge a report in respect of the incident, more so, because the incident did not occur when the appellant was present in the house and he must have been perplexed as to what were the circumstances in which the deceased had received injuries and her children were killed. It has been submitted that this is such a case where the court had to be circumspect in accepting the testimony of PW-1 even though she was an injured person and the testimony of PW-1 should have been tested before acceptance. The trial court failed to test the testimony of the prosecution witnesses and accepted the same without analysing it against the weight of probabilities. It has been argued that this is a strange case where the knife i.e. the weapon of assault was not sent for finding out the finger prints on it. The finger prints on the knife would have confirmed whether the appellant had killed or not but surprisingly finger prints were not lifted from the knife. Otherwise also, the nature of the incident noticed would have caused spillage of blood and would have surely stained the clothes of the appellant if he had committed the crime but, interestingly, no blood stained clothes of the appellant were recovered to confirm the presence of the appellant.

28. The learned counsel for the appellant also placed the photographs of the bodies of the deceased. He submitted that material exhibit 11 which is a photograph of the two bodies of the deceased taken at the time of inquest would suggest that the elder of the two sons had a cotton bandage around the neck which is suggestive of the fact that after the injury was caused to the children there was an attempt to stop the blood flow. In the prosecution evidence, there is no statement that this attempt was made by the appellant. According to PW-1, when she had intervened after injuries were inflicted on her son, she was caught hold by the appellant and the appellant thereafter inflicted a knife blow on his other son and thereafter he inflicted knife blow on the neck of PW-1 whereafter PW-1 became unconscious. It was argued that if this statement is accepted where was the occasion of bandage appearing on the neck. This would suggest that after PW-1 had inflicted knife blow, she developed remorse and tried to stop the bleeding. All of this would suggest that it was not the appellant who caused the injury.

29. In a nutshell, the submission of the learned counsel for the appellant is that when the entire prosecution evidence, the conduct of the appellant and the facts and circumstances of the cases are taken as a whole, the prosecution story does not at all inspire confidence and therefore it is a fit case where the appellant is to be extended the benefit of doubt. It is urged that the trial

court has not tested the prosecution evidence against the weight of probabilities and has accepted the statement of PW-1 as gospel truth to record conviction.

SUBMISSIONS ON BEHALF OF THE STATE

30. **Per contra,** on behalf of the State it was submitted that this is a case where the mother of two sons is making an allegation that her sons have been killed by their father. It is very difficult for a mother to kill her own children just to implicate her husband. Howsoever strong frustration she might carry it is difficult to accept that a mother would kill her own child. In so far as the motive for the murder is concerned, firstly, the case is based on ocular evidence. If the ocular evidence is found truthful and reliable, absence of motive is not a ground to disbelieve the prosecution case. Moreover, here the motive for the crime has been disclosed by the prosecution as suspicion of the appellant about his wife's involvement with someone else and the children being not born out of the wedlock. Admittedly, the appellant had been employed in a different State and was an annual/ six monthly visitor. In such circumstances, the possibility of him carrying suspicion with regard to his wife's involvement with someone else cannot be disbelieved. In so far as the conflict between the medical evidence and the ocular account of PW-1 with regard to the timing of the injuries is concerned, the doctor, no doubt, had stated that the injuries found on PW-1 was found fresh when he made the examination at 2.05 am on 14.03.2013 but on what basis those injuries were found fresh has not been brought on record. It could perhaps be that those injuries were found bleeding and therefore considered fresh. But bleeding would depend on the healing capacity of the person. If the person has poor healing capacity or is diabetic, bleeding may continue for a long duration and therefore if the injury is ascertained as fresh only on the basis of bleeding, that by itself would not be a ground to disbelieve the prosecution evidence.

31. It was urged that non recovery of blood stained clothes is an investigational lapse. It is well settled that where the prosecution case is based on an eye witness account and the eye witness account is truthful and reliable, an investigational lapse, by itself, is not a ground to disbelieve the same. In so far as the presence of broken latch in the room is concerned, that is not a ground to hold that the room was locked from inside because no witness has been examined by the defence to state that the room was bolted from inside and it had to be broke open. Admittedly, the I.O. had arrived when the room was already open. If the motive of the appellant was to hoodwink the police and for that very purpose the injured was admitted in the hospital to contrive a story that she killed her own children and thereafter attempted a suicide, as was overheard by PW-1, the accused could have well managed to window dress the scene of crime. In such circumstances, the testimony of investigating officer that he noticed a broken latch of the door lying on the floor is not a clinching circumstance on the basis of which the prosecution story be doubted.

32. In so far as the lacerated wound on the neck is concerned, it was submitted on behalf of the State that a lacerated wound may be caused by use of the blunt side of the knife. It is quite probable that if the blunt side of the knife is used it would cause a lacerated wound. Otherwise also,

there is no other weapon recovered from the spot which may reflect that there was any other weapon used to inflict injury either by PW-1 or by the accused therefore, mere presence of a lacerated wound is not sufficient to doubt the ocular account rendered by PW-1. It has been submitted that plea of alibi raised by the defence is not convincing and not supported by any documentary evidence. It could very well be possible that the appellant after committing the offence had gone to visit Nepal with his friends just to create a false plea of alibi. In such circumstances, the trial court was justified in placing reliance on the testimony of PW-1 and discarding the defence story. It was, therefore, urged that the appeal be dismissed and the judgment and order of the trial court be confirmed.

ANALYSIS

33. Upon noticing the rival submissions and on perusal of the entire evidence on record, what is striking is that neither the prosecution nor the defence give narration of any altercation or fight between husband and wife either on the date of the incident or on any date immediately before the incident. The marriage of the appellant with the informant (PW-1) was admittedly over 7 years old and the appellant had been working for livelihood in a different State since before his marriage and was an occasional visitor to his hometown. The evidence that has come on record would indicate that the appellant used to visit the village once a year or once in every 6 months. The incident is of 14.03.2013 and as per the prosecution evidence the appellant had come to his hometown during Diwali period. This would suggest that the appellant had been there in his hometown for at least 3-4 months or may be more. From the statement of PW-1 made during cross examination on 24.09.2015 it is clear that the appellant had returned home on Diwali day. What had been happening since Diwali upto the date of the incident is not clear from the prosecution evidence. Any particular incident which might have triggered the kind of response either from the appellant or from the informant is not disclosed in the prosecution evidence or even in the evidence led by the defence. It therefore appears to be a case where the relationship between the husband and wife had got strained over a period of time and the frustration in that relationship had been building. To what extent that frustration would lead to such kind of an incident is for anybody to guess. But what is important here is that PW-1 during the course of cross examination had stated in categorical terms as follows:- "मैं निर्मल से तंग आ गयी थी। वह मुझे बहुत मारते थे।" On this statement of PW-1 made during the course of cross examination a suggestion was given to PW-1 that she took the decision to end her life on account of this frustration and therefore she killed her own children and attempted suicide. No doubt, PW-1 refuted the above suggestion but whether it was a case of extreme reaction out of frustration or not we would have to examine on the basis of other evidences on record. Notably, PW-2 in his statement made during the course of cross examination on 06.02.2014 had admitted that the differences between his daughter and his son-in-law had started about one year or so before the incident and prior to that their relations were cordial. After stating as above, PW-2 stated as follows:- "मेरे लडकी मेरे दामाद से काफी तंग व परेशान एवं काफी तनाव में रहती थी। मेरी लड़की मुझसे कहती थी कि अब मेरा जीना ठीक नहीं है मेरा मर जाना ही अच्छा है। मेरी

लड़की उसके दो एक बार पहले मरने की खुद कोशिश की थी लेकिन मैंने उस समझा दिया था।" This statement of PW-2 is clear and categorical of the fact that PW-1 (informant) was in a highly frustrated environment which was not only stressful for her but she had also attempted suicide in the past.

34. Once we have noticed the above position, the question that arises foremost in our mind is that if the appellant had a desire to kill his children and his wife why would he not ensure that she is dead. The injury that we notice on the neck of PW-1 is a lacerated wound, which means that either the sharp side of the knife was not used or enough force was not applied. Interestingly, there are abrasions also around the neck which, according to the opinion of the doctor (PW-7), could be self inflicted by sharp edged weapon. Noticeably, the two children were killed by extreme precision by causing injury on their neck that ruptured underlying trachea, oesophagus and carotid vessel. If that precision is used on two innocent children, what was the reason not to use the same weapon with the same conviction and precision on PW-1 with whom there was much greater animosity. This creates a doubt in our mind and renders the prosecution story and evidence failing to inspire our confidence, leading us to test the prosecution evidence on other parameters as well.

35. Bearing in mind the circumstances analysed above, we would have to test the prosecution evidence coming through PW-1 as one coming through an interested witness more so, because, if she had not implicated her husband fingers might have pointed at her. In such circumstances, all the tests that are applicable to test the testimony of an interested witness would have to be applied to test the testimony of PW-1. When we examine the prosecution evidence threadbare, we notice that the lodging of the first information report at the instance of PW-1 is rendered doubtful. The reason for that is that it has come in the testimony of PW-1 as well as PW-2 that, firstly, PW-1 was unconscious and, secondly, she could not speak and could only gesticulate. According to PW-1 and PW-2, Zakir Ahmad (PW-3) had scribed the first information report on the basis of information provided by PW-1 through gesticulation. After the information was provided the report was scribed and her thumb impression was taken to lodge the report. PW-5 (the Chik maker) stated that it was PW-2 who had come alone to lodge the report. PW-3 Zakir Ahmad i.e. the scribe in his testimony admits that the report was scribed by him but he stated that "प्रदर्श क-1 को मैंने कोतवाली में लिखा था और दिया गया था ठूठीबारी थाना में।" Interestingly, at the time when the report was lodged, PW-1 was admitted in the hospital. If the report was scribed at Kotwali and not at the hospital then a serious doubt arises whether the information contained in the report was the information provided by PW-1 or it was provided by someone else, or whatever written there in the report was on legal advise to save PW-1 from the sticky situation in which she was found. The probability of the information scribed in the report being at the instance of PW-1 is for sure very low. The reason being that from her own statement it appears that she was passing from the stage of consciousness to unconsciousness and from unconsciousness to consciousness and was not in a position to speak and could only gesticulate. In such circumstances, the prosecution story set up in the first information report requires to be thoroughly tested before acceptance. In fact, it would have to be tested on all parameters against the weight of probabilities generated from the surrounding circumstances.

36. When we test the prosecution story against the weight of probabilities generated from the surrounding circumstances, the following features appear in favour of the accused:- (i) no incident triggering the incident is proved by the prosecution to serve as a strong motive for the crime; (ii) if the appellant had an intention to finish off his children as well as the informant, having inflicted precision knife blows on two innocent children, he would not have used the blunt side of knife or some other non lethal weapon to inflict injury on PW-1 to enable her to survive and be a witness against him, particularly, when he had a plan to finish them off and take a plea of alibi; (iii) the conduct of the appellant in taking the wife to the hospital; arranging for an ambulance to take her to the district hospital; and getting her admitted for treatment is suggestive of the fact that he made all efforts to save his wife; (iv) the duration of the injury of PW-1 being found fresh when she was examined at 2.05 am on 14.03.2013 would suggest that those injuries were caused sometimes in the evening of 13.03.2013 which is against the testimony of PW-1, inasmuch as, according to her the injuries were caused early morning at around 11 am. Notably, the investigating officer had also stated that during the course of investigation he came to learn that the incident had occurred in the evening of 13.03.2013; (v) the multiple abrasions found on the neck of PW-1 were simple in nature and they could be self inflicted as is the statement of PW-7 whereas, according to PW-1, she was caught hold by the neck by the accused-appellant and thereafter the accused-appellant caused knife blow on her other son and thereafter he inflicted injuries on her. The abrasions found on the neck were varying in size and were caused by sharp weapon meaning thereby that those abrasions could not be a consequence of holding PW-1 by the neck. Rather, it appears to be a case where multiple attempts were made to inflict injury but those attempts failed perhaps due to lack of courage or may be for any other reason. There is no occasion for the appellant to take those multiple attempts on the neck to cause multiple abrasions without inflicting a blow carrying the desired effect. In such circumstances, this creates a serious doubt in our mind whether the incident occurred in the manner alleged by PW-1.

37. Having noticed the features in the prosecution case that appear in favour of the appellant, we shall now examine whether any adverse inference need be drawn against the appellant for not having lodged a prompt report when he had found his wife in an injured condition lying in the house. In this regard, we may notice that, admittedly, the appellant used to leave his house early morning to visit various places. Notably, the appellant in his statement under Section 313 CrPC had stated that he was not in the house when the incident occurred. The two defence witnesses who were examined have also stated that the appellant was with them from about 9.30 am till late evening as they had visited a village in Nepal. In such circumstances, if the appellant was not aware in what circumstances his wife was lying injured and his two children killed, upon noticing his wife alive, his natural reaction would have been to take her to the hospital for medical attention. He did just the same. Consequently, if there was no prompt first information report on the part of the appellant, the very fact that he took his wife to the hospital and rushed her on an ambulance to the district hospital would suggest that he did whatever best he could. In the meantime, information was also

provided may be not by the appellant but by someone else to the father of PW-1 regarding the incident. Interestingly, the father made a statement that he noticed his son-in-law in the hospital handcuffed by the police. It therefore appears to us that the police had already taken a decision to implicate the appellant thereby giving no opportunity to the appellant to lodge a report.

38. For all the reasons above, the prosecution story does not inspire our confidence. No doubt, it is very difficult for a mother to kill her own children just to implicate her husband but it is equally difficult to accept that a father would kill his own children. No doubt, a story has been developed that the father used to suspect his wife of bearing children from someone else but this story did not go any further than mere allegation and no evidence was led to demonstrate that he suspected his wife having an affair with any particular person or that any time in the past he had seen his wife in the company of any other person. Interestingly, the father of PW-1 had made a statement that the relations between the appellant and his wife got sour since a year and a half before the incident, whereas the two children were aged over 5 years and 4 years, respectively. Therefore, it is difficult for us to believe that the appellant thought the two children not to be his own. In these circumstances, if we find it difficult that a mother would kill her children we find it equally difficult that the father would kill his own children.

39. In addition to above, the place of occurrence also assumes importance. The site plan of the house reflects that it has four rooms which open in a common gallery. There were four brothers including the appellant. Each had one room to himself. From the testimony of PW-1, one of the brothers of the appellant, namely, Sarwan, had his wife, parents i.e. the grand parents of the two deceased, and children there in his room at the time of the incident. It is very difficult to believe that any person would be able to kill his own children in the presence of his other relatives, particularly, the grand parents of the children. This position stands explained by the testimony of the investigating officer who disclosed that from the spot inspection that he carried it appeared that the door had to be broke open as the latch was found lying on the floor detached from the wooden plank. All of this would suggest that the incident occurred in the secrecy of a closed room. The prosecution evidence is silent as to how the appellant managed that secrecy to cause injury to his two sons and his wife. This is also a feature which creates doubt in our mind as regards the reliability and truthfulness of the prosecution evidence.

40. For all the reasons above, the prosecution story and the evidence fails to inspire our confidence as to uphold the conviction recorded by the trial court. We therefore have no hesitation in extending the benefit of doubt to the accused-appellant. The appeal is consequently, **allowed**. The judgment and order of conviction and sentence recorded by the trial court is set aside. The appellant is acquitted of all the charges for which he has been tried and convicted. He is reported to be in jail. He shall be released forthwith from jail, unless wanted in any other case, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

41. Let a copy of this order be certified to the court below along with the record for information and compliance.

(2022) 12 ILRA 221
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

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

First Appeal From Order No. 859 of 2009

Jagdish Prasad ...Appellant
Versus
E.S.I.C. (U.P. Region) Sarvodaya Nagar, Kanpur ...Respondent

Counsel for the Appellant:
Sri Indra Mani Tripathi

Counsel for the Respondent:
Sri Rajesh Tewari

Civil Law - Employees' State Insurance Act, 1948 - An appeal lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law - Appeal is firstly heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not - If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law – In the instant case the appellant-employee sustained employment injury on 31.12.1987 in his right ear - Commissioner gave cogent reasons & held that he had suffered 40% of deafness but rated at 30% for loss for earning capacity - Held - Questions raised are the questions of fact and not of law - Appeal dismissed

Dismissed. (E-5)

List of Cases cited:

1. Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs Smt. Sujatha decided on 2.11.2018

2. E.S.I.C. Vs S. Prasad F.A.F.O. 1070 of 1993 dt 26.10.2017

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

1. Heard Sri Indra Mani Tripathi, learned counsel for the appellant and Sri Rajesh Tewari, learned counsel for the respondents.

2. By way of this appeal under Section 30 of the Employees' State Insurance Act, 1948, the appellant who is an employee has challenged the finding by the Apellate Court in Appeal No. 261 of 1988 awarding loss of earning capacity at 30%.

3. The main bone of contention is that appellant-employee sustained employment injury on 31.12.1987 in his right ear. The respondent had an obligatory duty to provide for the loss but they did not provie for the same. The appellant suffered disablement and was not able to work. The appellant according to him was mentally pressurized and his loss of hearing capacity was 40 dots and loss of earning capacity was same but Commissioner has not properly evaluated the same. It is further submitted that at the time of accident occurred and he was sustained injury he was aged 35 years of age. The award of the E.S.I court is assailed and it is contended that this is an error which is apparent on the face of record. It is further submitted that the appellant was hospitalized for 10 days and the medical board did not hold him to be suffering from any loss, so he moved to Appellate Court.

4. The judgement of the First Appellate Court is sought to be sustained by the counsel for the respondents.

5. The order challenged has been properly scrutinized by the court below. The fact that the Commissioner has given cogent reasons that he had suffered 40% of deafness but therefore, it would be rated at 30% for loss for earning capacity.

6. The appeal under Workmen Compensation Act/Employees State Insurance Act has to be viewed very seriously in view of the judgment in Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC).

7. I am supported in my view by the decision of the Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018** wherein it has been held that the Court has held as under:

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

8. This Court, recently in **F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad) decided on 26.10.2017** has followed the decision in **Golla Rajana (Supra)** and has held as follows:

"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra) in paragraph 8 holds as follows "the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."

9. In view of the above, the appeal fails and is dismissed. The questions of law framed are answered against appellant. In fact the questions raised are the questions of fact and not of law.

10. This Court is thankful to both the learned counsels for ably assisting this Court.

11. Interim relief, if any, shall stand vacated forthwith. The amount be disbursed to the claimant forthwith.

(2022) 12 ILRA 223
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 1177 of 2022
And
First Appeal From Order No. 3233 of 2019

Reliance General Insurance Co. Ltd. NOIDA ...Appellant
Versus
Smt. Pushpa Rani & Ors. ...Respondents

Counsel for the Appellant:
Sri Saurabh Srivastava

Counsel for the Respondents:
Sri Dharmendra Kumar Gupta, Smt. Kiran Gupta

Civil Law - Motor Accident - Motor Vehicles Act, 1988 - Section 166 - Claim petition - Contributory Negligence - Pleadings & Proof - It is settled in law that evidence cannot be read in absence of pleading - Case of the claimants was that deceased was standing on the road when he was hit by the Tempo being driven by its driver rashly and negligently due to which he died - Insurance Company filed written statement only contending interalia that there was no negligence of the driver of the offending Tempo - Tribunal held that the deceased abruptly came infront of the Tempo due to which the accident occurred & apportioned the negligence of the driver of the Tempo to the extent of 60% and that of deceased to the extent of 40% - claimants challenged the award on the ground that finding of the Tribunal that there was contributory negligence of the deceased in the accident is illegal - Held - Neither the insurance company nor the owner of the Tempo stated in the written statement that the deceased had come abruptly infront of the Tempo due to which the accident had occurred - In the absence of any case set up by the owner or the insurance company that deceased came infront of the Tempo abruptly which caused the accident, it was not open to the Tribunal to rely upon the testimony of D.W.1/driver who stated that the accident had occurred as the deceased suddenly came infront of the Tempo - It is settled in law that evidence cannot be read in absence of pleading - Tribunal erred in law in carving out a new case on its own and return a finding that the deceased was also negligent in the accident as he came abruptly before the Tempo - Finding of the Tribunal holding the negligence of the deceased to the extent of 40% is perverse and illegal and is not supported by any evidence on record - said finding accordingly, set aside (24, 25, 27)

Allowed. (E-5)

List of Cases cited:

1 National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 (16) SCC 680.

2. Sarla Verma & ors. Vs Delhi Transport Corporation & ors. 2009 (6) SCC 121

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

1. Heard learned counsel for the appellant-insurance company and learned counsel for the claimants/respondents.

2. Since, these two appeals are arising out of same accident and involve common issues, therefore, both the appeals are being

decided together with this common judgement.

3. For convenience, the facts are being delineated from F.A.F.O. No.1177 of 2022.

4. The F.A.F.O. No.1177 of 2022 has been preferred Reliance General Insurance Company challenging the award dated 28.09.2013. F.A.F.O. No.3233 of 2019 has been preferred by the claimants challenging the award dated 28.09.2013 on the ground that finding of the Tribunal that there was contributory negligence of the deceased in the accident is illegal and compensation awarded by the Tribunal is not adequate.

5. The facts of the case are that one Dr. Rajendra Singh on 07.07.2010 at about 10:00 P.M. was standing near his house waiting for rickshaw when he was hit by Tempo No.U.P.-15-W-9707 driven by its driver rashly and negligently. In the said accident, Dr. Rajendra Singh suffered injuries and lateron died during treatment at Subharti Hospital, Meerut. Further case of the claimants in the claim petition is that the deceased at the time of death was 56 years of age and was working as Senior Consultant (Child Specialist) in P.L. Sharma Hospital, Meerut and was getting salary of Rs.96,000/- per month.

6. The owner of the offending Tempo filed written statement contending interalia that Tempo was driven by one Praveen Kumar, who was having a driving licence to drive the Tempo. He further pleaded that if any compensation is to be paid, the liability of the same is of the insurance company as the Tempo No.U.P.-15-W-9707 is duly insured with the Reliance General Insurance Company Ltd.

7. The Reliance General Insurance Company also filed written statement contending interalia that there was no negligence of the driver of the offending Tempo in the alleged accident and further, the liability of the insurance company is subject to condition that all documents relating to Tempo are in order. On the basis of pleadings between the parties, the Tribunal framed as many as four issues.

8. Challenge has been raised by the insurance company as well as claimants in their respective appeals with regard to finding of Tribunal on issue no.1 in respect of negligence and issue no.4 with regard to quantification of compensation awarded by the Tribunal.

9. On the issue no.1, the Tribunal after considering the evidence on record held that the accident had taken place by the Tempo No.U.P.-15-W-9707. The Tribunal further held that the accident had taken place due to rash and negligent driving of driver of Tempo. However, the Tribunal further proceeded to decide the issue of contributory negligence of the deceased in the accident and held that as the deceased abruptly came infront of the Tempo due to which the accident had occurred, and if the deceased had been careful, the accident would have been avoided. Accordingly, the Tribunal apportioned the negligence of the driver of the Tempo to the extent of 60% and that of deceased to the extent of 40%.

10. On the issue of quantification of compensation, the Tribunal on the basis of salary certificate for the month of June, 2010 held the income of the deceased to be Rs.96,701/- per month, and after deducting the income tax from the salary of the deceased held that compensation shall be

computed by taking the income of the deceased to be Rs.9,45,591/- per annum. The Tribunal, thereafter, deducted 1/3rd from the income of the deceased towards the personal expenses of the deceased and thereafter, by applying the multiplier of 8 computed the compensation. The Tribunal reduced the compensation by 40% for the negligence of the deceased in the accident.

11. Challenging the aforesaid award, learned counsel for the appellant-insurance company has contended that once it has come on record that deceased came abruptly infront of the Tempo, which was the cause of the accident, therefore, it is established that the accident was the result of sole negligence of deceased, and therefore, Tribunal has erred in law in holding the negligence of the driver of the Tempo to the extent of 60%. It is contended that as the claim petition has been instituted under Section 166 of Motor Vehicles Act and it is established on record that the accident had taken place due to sole negligence of the deceased, therefore, claim petition was liable to be dismissed as necessary elements of negligence of driver of offending Tempo for maintainability of claim petition under Section 166 of Motor Vehicles Act is lacking in the instant case since the accident was the result of sole negligence of the deceased.

12. It is further submitted that the compensation awarded by the Tribunal is excessive. In support of the said contention, learned counsel for the appellant-insurance company has placed income tax return of the deceased for the assessment year 2008-09 (financial year 2007-08), assessment year 2009-10 (financial year 2008-09) and Form-16 paper no.57Ga of the paper book issued by the Divisional Additional Director & Superintendent in Chief, P.L. Sharma District Hospital, Meerut.

13. It is further submitted that income of the deceased as shown in the income tax return for the assessment year 2009-10 was Rs.7,36,686/-, for the assessment year 2008-09 Rs.4,84,834/- and income tax return are the best piece of evidence for the purposes of determination of income of the deceased, therefore, Tribunal should have taken the the income shown in the income tax return of the deceased for the purposes of computation of compensation and thus, Tribunal has erred in law in relying upon the salary certificate paper no.25Ga dated 02.07.2010 issued by Divisional Additional Director & Superintendent in Chief, P.L. Sharma District Hospital, Meerut in computing the income of the deceased. It is further contended that the compensation awarded by the Tribunal is excessive and is liable to be reduced.

14. Per contra, learned counsel for the claimants/respondents would contend that in the instant case, Tribunal while deciding the issue no.1 has recorded a categorical finding that the accident had taken place due to rash and negligent driving of driver of Tempo, and once the said finding has been recorded by the Tribunal, there was no occasion for the Tribunal to carve out a new case and hold the contributory negligence of the deceased in the accident. It is submitted that neither the insurance company nor the owner of the Tempo has stated in the written statement that the deceased had come abruptly infront of the Tempo due to which the the accident had occurred. It is further submitted that once there is no case of the insurance company or the owner of the Tempo in the written statement that the deceased abruptly came infront of the Tempo, the Tribunal has erred in law in carving out a new case on its own and return a finding that the deceased was also negligent in the accident as he came

abruptly before the Tempo. In such view of the fact, it is submitted that the finding of the Tribunal holding the negligence of the deceased to the extent of 40% is perverse and illegal and is not supported by any evidence on record.

15. It is further contended that the compensation awarded by the Tribunal is inadequate inasmuch as the Tribunal has rightly taken the income of the deceased shown in the salary certificate of the deceased dated 02.07.2010 issued by Divisional Additional Director & Superintendent in Chief, P.L. Sharma District Hospital, Meerut inasmuch as the said salary certificate was proved by the claimants by producing P.W-4. It is contended that once the salary certificate is proved by the claimants/respondents and no evidence in rebuttal to the salary certificate was filed by the insurance company or the owner of the Tempo, the Tribunal has rightly relied upon the income shown in the salary certificate of the deceased for the purposes of computation of compensation. It is further submitted that in the instant case, the income tax return filed on record has been submitted on the basis of Form-16 issued by the department, but as the deceased was Senior Consultant (Child Specialist), there might have been increase in the salary of the deceased and the actual income could have come on record only after deceased had received salary of the entire financial year i.e. 01.04.2010 to 31.03.2011. It is submitted that Form-16 for the assessment year 2011-12 filed by the appellant-insurance company does not reflect as to what was the actual income of the deceased in the financial year 2010-11.

16. Learned counsel for the claimants further contended that as the deceased was a government employee, therefore, the Tribunal should have awarded 15% towards future prospect in the view of the judgement of Apex Court in the case of ***National Insurance Company Limited Vs. Pranay Sethi and Others 2017 (16) SCC 680.*** It is further contended that the age of the deceased was 56 years, therefore, the Tribunal should have applied the multiplier of 9 in place 8 in view of the judgement of Apex Court in the case of ***Sarla Verma and others Vs. Delhi Transport Corporation and others 2009 (6) SCC 121***, and further should have deducted 1/4th towards personal expenses of the deceased instead of 1/3rd in view of the judgement of Apex Court in the case of ***Sarla Verma (supra)*** as there were four dependants upon the deceased. It is further submitted that the a very meagre amount of Rs.9500/- has been awarded by the Tribunal towards funeral expenses, loss of estate and loss of consortium respectively whereas, claimants/respondents are entitled to Rs.70,000/- towards the aforesaid heads in view of the judgement of Apex Court in the case of ***Pranay Sethi (supra)***. Accordingly, it is submitted that the compensation awarded by the Tribunal needs to be enhanced.

17. I have considered the rival submissions of the parties and perused the record.

18. The case of the claimants in the claim petition was that deceased was standing on the road as he was in search of rickshaw and was hit by the Tempo being driven by its driver rashly and negligently due to which he suffered injuries and died. In order to prove the accident and negligence of the driver of the Tempo in the accident, claimants produced two eye witnesses i.e. P.W.2 and P.W.3.

19. P.W.2 in his testimony has categorically stated that after closing his

mobile shop when he reached near Maliyana over bridge, he saw a man standing who was hit by Tempo No.U.P.-15-W-9707 driven by its driver rashly and negligently. In the cross examination, he stated that he had informed about the accident to the police at the checkpost. He further stated that he heard loud noise and then he saw that a man was lying on the road, and passengers and driver of the Tempo had fled away from the spot of the accident.

20. Similarly, P.W.3 also stated that a man was standing near the shop of Ganga Sharan and when he reached near Disha Mobile Shop, he saw that Tempo No.U.P.-15-W-9707 coming from Baghpat being driven by its driver rashly and negligently hit the man standing near the shop of Ganga Sharan. He further stated that the accident had taken place due to rash and negligent driving of driver of Tempo. He further stated that he had seen the accident.

21. At this stage, it is pertinent to note that the driver of the Tempo had also appeared before the Tribunal as D.W.1 and has admitted the factum of the accident and further stated that a man had come infront of his Tempo due to which, the accident had occurred. He further stated that he was driving the vehicle in control and the accident was the result of sole negligence of the deceased.

22. The Tribunal after appreciating the testimony of P.W.2 and P.W.3 and the testimony of D.W.1 held that the accident by Tempo No.U.P.-15-W-9707 is proved by the claimants. It further held that the accident had occurred due to rash and negligent driving of driver of Tempo.

23. At this point, it also pertinent to note that in the written statement, neither owner nor insurance company has pleaded that the accident had occurred as the deceased came before the Tempo abruptly. The Tribunal after recording a finding of the accident and negligence of the driver of the Tempo, on its own proceeded to decide the issue with respect to contributory negligence of the deceased in the accident, and in deciding the said issue, Tribunal placed reliance upon the testimony of D.W.1 and held that the accident occurred because the deceased suddenly came infront of the Tempo. It further found that if the deceased had been careful and had not come infront of the Tempo suddenly, the accident would have been avoided. It further found that the accident could also have been avoided if driver of the Tempo had control over the Tempo. The Tribunal, accordingly, was of the view that the manner in which the accident had taken place also shows the negligence of the deceased in the accident, and accordingly, it held the negligence of the deceased to the extent of 40%.

24. In the opinion of the Court, the finding of the Tribunal with respect to negligence of the deceased in the accident is perverse inasmuch as in the absence of any case set up by the owner or the insurance company that deceased came infront of the Tempo abruptly which caused the accident, it was not open to the Tribunal to rely upon the testimony of D.W.1 who stated that the accident had occurred as the deceased suddenly came infront of the Tempo.

25. It is settled in law that evidence cannot be read in absence of pleading. Though, learned counsel for the insurance company has placed paragraph 32 of the written statement of the insurance company to contend that insurance company has denied the negligence of the driver of the

Tempo, and therefore, there was sufficient pleading in support of the negligence of the deceased in the accident, therefore, Tribunal has rightly believed the testimony of D.W.1 in holding the negligence of the deceased in the accident. But in the opinion of the Court, the said contention is not sustainable. In this respect, it would be apt to reproduce paragraph 32 of the written statement of the insurance company:-

"32. That without admitting the alleged accident the O.P. No.2 takes up a plea that the accident was not caused because of negligence of the driver of Tempo No. U.P.-15-W-9707 but because of negligence himself."

26. Perusal of paragraph 32 of the written statement of the insurance company does not show that any case has been set up by the insurance company that deceased came infront of the Tempo abruptly which caused the accident, and therefore, there was negligence of the deceased in the accident. Pleading of paragraph 32 of the written statement of the insurance company only suggest that the insurance company has denied the negligence of the driver of the Tempo in the accident.

27. In such view of the fact, this Court finds that the finding of the Tribunal holding the negligence of the deceased to the extent of 40% is illegal and not sustainable in law, and is accordingly, set aside. Consequently, this Court holds that the accident was the outcome of the sole negligence of the driver of the Tempo No.U.P.-15-W-9707.

28. Now, coming to the question of quantification of compensation.

29. Though, the income tax return has been filed by the claimants to establish the income of the deceased, but claimants have also filed salary certificate according to which, the last salary drawn by the deceased was Rs.95,901/-.

30. The argument of learned counsel for the insurance company that Tribunal ought to have taken the income tax return of the deceased of the previous year is not sustainable inasmuch as it is admitted on record that deceased was a government employee and returns of the deceased for the assessment year 2009-10 had been filed on the basis of Form-16 issued by Divisional Additional Director & Superintendent in Chief, P.L. Sharma District Hospital, Meerut.

31. The salary certificate indicating the last drawn salary of the deceased has also been issued by the same authority. The income tax return has been filed by a person for the income earned during the entire financial year. In the instant case, the financial year had begun on 01.04.2010 whereas deceased had died on 07.07.2010 just after four months from the date of beginning of financial year.

32. Though, insurance company has filed Form-16 issued by the department for the assessment year 2011-12, but Form-16 does not give a clear picture as to the salary which the deceased would have received during the entire financial year if he had been alive.

33. The perusal of Form-16 for the assessment year 2011-12 reflects that tax of Rs.8,000/- has been deducted from the salary of the deceased in the months of April, May, June and July, and thereafter, Rs.56,967/- has been deducted from the income of the deceased which had been deposited on 31.07.2010, but it is not clear

from the same as to what was the actual salary received by the deceased per month whereas claimants had filed salary certificate dated 02.07.2010 issued by Divisional Additional Director & Superintendent in Chief, P.L. Sharma District Hospital, Meerut showing the last drawn salary of the deceased Rs.95,901/- which was duly proved by the P.W.4 and no evidence was filed in rebuttal to the same by the insurance company, therefore, in the opinion of the Court, the Tribunal has rightly taken the income shown in the salary certificate dated 02.07.2010 for the purposes of computation of compensation.

34. Thus, this Court is of the view that the submission of learned counsel for the insurance company in the facts of the present case that income tax return should have been taken as the basis for computing the compensation is misconceived and is rejected.

35. Now, so far as the contention of learned counsel for the claimants that claimants are entitled to 15% towards future prospect in view of the judgement of Apex Court in the case of ***Pranay Sethi (supra)*** and further Tribunal should have applied the multiplier of 9 instead of 8 and should have deducted 1/4th instead of 1/3rd towards personal expenses of the deceased has substance. Thus, following the aforesaid judgement of Apex Court in the case of ***Pranay Sethi (supra)***, claimants/respondents are entitled to 15% towards future prospect considering the age of the deceased, and further non-pecuniary damages awarded by the Tribunal is also enhanced from Rs.9500/- to Rs.70,000/-.

38. The submission of learned counsel for the claimants/respondents with regard to wrong application of multiplier and deduction of 1/4th towards personal expenses of the deceased in place of 1/3rd in view of the judgement of Apex Court in the case of ***Sarla Verma (supra)*** has got substance. Thus, it is provided compensation should be computed by applying the multiplier of 9 instead of 8 and further, 1/4th should be deducted towards personal expenses of the deceased instead of 1/3rd from the income of the deceased for the purposes of computation of compensation.

39. It is also provided that enhanced amount of compensation shall carry 6% simple interest from the date of institution of claim petition till its payment.

38. Thus, for the reasons given above, the F.A.F.O. No.1177 of 2022 preferred by the Reliance General Insurance Company lacks merit and is ***dismissed***. The F.A.F.O. No.3233 of 2019 preferred by the claimants is partly ***allowed*** and the award of the Tribunal is modified to the extent indicated above. There shall be no order as to costs.

(2022) 12 ILRA 229
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 2299 of 2015

Reliance General Insurance Co. Ltd. M.G. Road, Agra ...Appellant
Versus
Smt. Kamla Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri S.K. Mehrotra

Counsel for the Respondents:

Sri Shrish Chandra Kesarwani, Sri Pradyumn Kumar

Civil Law - Motor Accident - Motor Vehicles Act, 1988 - Section 2(21) - "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms - Insurance laid challenge against the impugned award on the ground that the driving license was not valid and effective at the time of the accident - appellant insurance company contented that the driving license was valid only for light motor vehicle but the offending was a truck and hence a heavy motor vehicle - Held - appellant-insurance company failed to discharge its burden to establish before the learned Tribunal that the unladen weight of the offending vehicle exceeded 7500 Kgs and that the vehicle was not a "light motor vehicle" as defined in the Motor Vehicles Act, 1988 - Mere fact that the offending vehicle is referenced as a truck is of no avail to the appellant - weight of the vehicle is the sole and decisive factor to determine the category of vehicle under the Motor Vehicles Act, 1988 - Popular name or nomenclature used to describe a vehicle is not relevant in deciding its category as per the Motor Vehicles Act, 1988 - Challenge to the validity of the driving licence cannot be sustained - No infirmity in the finding of the learned Tribunal (Para 12)

B. Civil Law - Motor Accident - Motor Vehicles Act , 1988 - Joinder of necessary party - Insurance laid challenge against the impugned award on another ground that the driver was a necessary party but was not impleaded - Held - owner appeared before the learned Tribunal and contested the matter on merits - Owner admitted to the involvement of the vehicle as well as his driver in the mishap - burden to prove collusion between the owner and the claimant or the driver, was on the insurance company to prove the same - Insurance company failed to discharge its burden - Insurance company did not get the driver summoned as a witness - Aforesaid deficiency does not go to the root - Challenge fails (18,19)

Dismissed. (E-5)

List of Cases cited:

National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 (16) SCC 680.

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri S.K.Mehrotra, learned counsel for the appellant, Shri Shrish Chandra Kesarwani, learned counsel for the claimants-respondents and Shri Pradyumn Kumar, learned counsel for the respondent No.7.

2. This first appeal from order arises out of the award dated 29.05.2015 handed down by the Motor Accident Claims Tribunal/District Judge, Etah in M.A.C.P. No.169/2011 (Smt. Kamla Devi and others v. Jagjeet Singh and another) awarding the compensation of Rs.10,76,000/- with a simple interest at the rate of 9% per-annum from the date of filing of the petition till actual payment.

3. The instant appeal has been filed by the insurance company assailing the award.

4. Briefly the case of the claimants before the learned tribunal was that the deceased died of injuries sustained in an accident which occurred on 26.03.2011 and was caused by the rash and negligent driving of the driver of Truck No. HR-55/J-8295. The claimants were dependent on the deceased. The insurance company resisted the claim by filing a written statement. Both parties adduced evidence in the trial.

5. In the proceedings before the learned Tribunal, the application of the insurance company under Section 170 of the Motor Vehicles Act was allowed. Thus the insurance company was permitted to contest the proceedings on behalf of the owner. The burden of proving the validity or otherwise of the driving licence shifted on the insurance company.

6. The owner had also entered appearance before the Tribunal and had admitted to the ownership of the offending vehicle, and confirmed the identity of the driver of the said vehicle. The claimants had filed the driving licence of the driver of the offending vehicle before the court below. The owner of the vehicle had affirmed the validity of the aforesaid driving license.

7. In the instant appeal three grounds of challenge have been laid against the impugned award by Shri S.K.Mehrotra, learned counsel for the appellant.

8. Firstly, the driving license was not valid and effective at the time of the accident. Secondly, the compensation was granted, inasmuch as, excessive amounts were provided under the conventional heads and interest rate of 9% was not permissible in law. Thirdly, the driver was a necessary party but was not impleaded.

9. The learned Tribunal found against the insurance company and upheld the validity and effectiveness of the driving licence by finding as under:

"Further, it is found the truck in question was being plied by the owner through driver Desh Raj Singh having a driving license which was valid from 14.06.2005 to 13.06.2025. It is also found that said driving license was initially issued only to drive LMV (NT) which was later on endorsed with an entry of driving Transport vehicle from 21.10.2013 to 20.10.2016 though the photocopy made available on record of same D.L. Number paper No.7C1/13 bears an endorsement for transport vehicle w.e.f. 07.09.2006 also, on the basis of which the owner had given appointment to Desh Raj Singh as a driver on the offending vehicle. Owner of the offending truck, Jagjeet Singh as O.P.W.2 has also deposed the fact before the tribunal that he had seen the driving license of driver Desh Raj Singh which was valid for driving a transport vehicle."

10. It is contended on behalf of the appellant insurance company that the driving license was valid only for light motor vehicle but the offending was a truck and hence a heavy motor vehicle.

11. The definition of light motor vehicle provided under Section 2(21) of the Motor Vehicles Act, 1988 is extracted below:-

"Section 2(21). "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed [7,500] kilograms."

12. The appellant-insurance company failed to discharge its burden to establish before the learned Tribunal that the unladen weight of the offending vehicle exceeded 7500 Kgs and that the vehicle was not a "light motor vehicle" as defined in the Motor Vehicles Act, 1988. Even before this Court no evidence in the record was pointed out from the record that the weight of the offending unladen vehicle (truck)

exceeded 7500 Kgs. The mere fact that the offending vehicle is referenced as a truck in the proceedings before the learned tribunal is of no avail to the appellant. The weight of the vehicle is the sole and decisive factor to determine the category of vehicle under the Motor Vehicles Act, 1988. Popular name or nomenclature used to describe a vehicle is not relevant in deciding its category as per the Motor Vehicles Act, 1988.

13. In this wake, the challenge to the validity of the driving licence cannot be sustained. There is no infirmity in the finding of the learned Tribunal.

14. To ensure the uniformity in determination of compensation under conventional heads. The Supreme Court in **National Insurance Company Limited v. Pranay Sethi and others,** reported at **(2017) 16 SCC 680** held as under:

"59.8. Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs.15,000, Rs.40,000 and Rs.15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

15. The petitioners accordingly entitled to Rs.15,000, 40,000/- and 15,000/- towards loss of estate, loss of consortium and funeral expenses respectfully. The impugned award, in so far as it is inconsistent with Pranay Sethi (supra), is set aside.

16. Secondly, there is merit in the contention that the interest rate of 9% is high. The interest payable is reduced to 7%.

17. The award is modified accordingly.

18. The last issue regarding the joinder of the necessary party as driver will now be considered. The owner had appeared before the learned Tribunal and contested the matter on merits. The owner admitted to the involvement of the vehicle as well as his driver in the mishap.

19. The burden to prove collusion between the owner and the claimant or the driver, was on the insurance company to prove the same. The insurance company failed to discharge its burden. The insurance company did not get the driver summoned as a witness. Moreover, in the facts of the case, the aforesaid deficiency does not go to the root. The challenge fails.

20. It is contended that the entire awarded amount has been deposited by the insurance company.

21. The learned Tribunal is directed to calculate the compensation amount consistent with the observations made in this judgment and release the remaining amount in favour of the claimant The excess amount shall be refunded to the insurance company.

22. The matter is remanded to the Tribunal. The Tribunal shall determine the compensation payable to the claimants afresh in the light of the observation made above.

23. The entire exercise shall be completed within a period of three months from the date of receipt of copy of this order.

24. The first appeal is partly allowed to the above extent.

(2022) 12 ILRA 233
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 2995 of 2009

National Insurance Co. Ltd. Division Office, Ghaziabad ...Appellant
Versus
Smt. Mahendri & Anr. ...Respondents

Counsel for the Appellant:
Sri Anupam Shukla, Sri Ankur Mehrotra, Sri Radhey Shyam

Counsel for the Respondents:
Sri Chandrajeet, Sri Rakesh Tripathi, Sri Atul Kumar Sinha

Civil Law - Workmen's Compensation Act 1923 - Section 2(1) (d) (iii) (d) - claim petition on behalf of married sister - Dependant - Married Sister - definition of "Dependant" covers only minor brother or unmarried sister or widowed sister if minor - Married sister is not covered under the definition as defined in Section Section 2 (1) (d) (iii) (d) of the Workmen's Compensation Act - claim petition not maintainable on behalf of the married sister of the deceased - Tribunal committed jurisdictional error in entertaining the claim petition on behalf of the married sister of the deceased - Award set aside (Para 11)

Allowed. (E-5)

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

1. Learned counsel for the respondent is not present even in the revised call.

2. Heard learned counsel for the appellant.

3. The present appeal is directed against the judgement/award dated 06.08.2009 passed by Workmen Compensation Commissioner, Ghaziabad in WCA Case No.07 of 2008, by which the Commissioner has awarded Rs.4,48,000/- as compensation to the claimant/respondent for the death of one Gange.

4. The case of the claimant/ respondent is that she is married sister of the deceased, namely, Gange who was employed as Driver of Tata 709 HR69/4021, who died in an accident on 05.009.2007.

5. In the said case, in para-16 of the written statement, the appellant Insurance Company has stated that the claimant/ respondent being married sister of the deceased is not covered within the meaning of the word "Dependant"as defined in Section 2 (1) (d) (iii) (d) of the Workmen Compensation Act. The Commissioner did not frame any issue despite specific plea raised by the Insurance Company as to the maintainability of the claim petition filed by the claimant/respondent.

6. The appeal was entertained on the following substantial question of law:-

"Whether the claimant-respondent No.1 being married sister of the deceased Gange was covered within the meaning of word "Dependant" as defined in Section 2(1) (d) of the Workmen's Compensation Act, 1923 and was entitled to claim compensation on account of the death of the said Gange?"

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

8. To appreciate the controversy in hand, it would be relevant to reproduce Para-16 of the written statement of the Insurance Company:-

9. The judgement of the Commissioner reveals that he has considered in detail the testimony of PW1 (claimant/respondent) who has categorically stated that she is married, but she was dependant upon the deceased as she is physically disabled and her husband was also not well, due to which he was not able to look after her.

10. It is admitted on record that by the claimant that the claimant/respondent was married sister of the deceased.

11. Now coming to the definition of "Dependant" as defined in Section 2(1) (d) (iii) (d) of the Workmen's Compensation Act 1923, it is evident that definition of "Dependant" covers only minor brother or unmarried sister or widowed sister if minor. Married sister is not covered under the definition as defined in Section Section 2 (1) (d) (iii) (d) of the Workmen's Compensation Act. In such view of the fact, this Court finds substance in the argument of the learned counsel for the appellant that the claim petition was not maintainable on behalf of the married sister of the deceased and the Tribunal has committed jurisdictional error in entertaining the claim petition on behalf of the married sister of the deceased.

12. Thus, for the reasons given above, the impugned judgement/award dated 06.08.2009 passed by Workmen Compensation Commissioner, Ghaziabad is hereby set aside. Accordingly, the appeal stands allowed.

13. Consequently, the Tribunal is directed to refund the entire amount deposited by the Insurance Company under Section 30 of the Employees Workmen's Compensation Act to the Insurance Company within a period of one month from the date of production of a certified copy of this order.

(2022) 12 ILRA 234
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

First Appeal No. 830 of 2022

Ashish Morya ...Appellant
Versus
Smt. Anamika Dhiman ...Respondent

Counsel for the Appellant:
Ms. Mamta Singh, Ms. Vandana Singh

Counsel for the Respondent:
Sri Sumit Daga

A. Civil Law - Civil Procedure Code, 1908 - Order II Rule 2(2), C.P.C. - Where a plaintiff intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so relinquished - Plaintiff/husband earlier filed Suit No.1028 of 2021, u/s 9 of the Act, 1955, in which he moved an application stating that "Saptpadi" was not conducted as per Hindu rites & that he does not want to press the suit and that he shall not reinitiate any proceeding - aforesaid suit, was dismissed - Plaintiff-husband was not entitled to file a fresh

suit on the same set of facts for restitution of conjugal rights u/s 9 of the Act, 1955, inasmuch as cause of action and the relief sought in both the suits were identical and the earlier suit was got dismissed by him as not pressed in the absence of a valid marriage - Second suit filed by the plaintiff husband was barred by the provisions of Order II Rule 2, C.P.C. and, therefore, the suit was rightly dismissed by the court below (Para 9)

B. Civil Law - The Hindu Marriage Act, 1955 - Section 8 - U.P. Hindu Marriage Registration Rules, 1973 - Uttar Pradesh Registration of Marriage Rules, 2017 - Registration of Hindu marriages - Marriage certificate – No statutory provisions enabling the Arya Samaj to issue a marriage certificate - Marriage Certificate issued by Arya Samaj has no statutory force (Para 12)

C. Civil Law - The Hindu Marriage Act, 1955 - Section 9 - Restitution of conjugal right - existence of a valid marriage is precondition to ask for relief of restitution of conjugal rights - It is admitted case of the plaintiff/husband that the rites and ceremonies of Saptapadi had not taken place in the alleged marriage of the plaintiff - In the absence of proof of a valid marriage, the court below has not committed any error of law to dismiss the suit observing that mere getting a marriage certificate from Arya Samaj is not proof of a valid marriage (Para 14)

Dismissed. (E-5)

List of Cases cited:

Seema Vs Ashwini Kumar, (2006) 2 SCC 578 (Paras 4, 9 & 15)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Ms. Vandana Singh, holding brief of Ms. Mamta Singh, learned Counsel for the Plaintiff-appellant and Sri Sumit Daga, learned Counsel for the defendant-respondent.

2. This appeal has been filed praying to set aside the judgment and order dated 09.09.2022 in **Case No.269 of 2022,** (Ashish Maurya versus Smt. Anamika Dhiman), under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as Act, 1955) passed by the Principal Judge, Family Court, Saharanpur whereby the case filed by the plaintiff-appellant under Section 9 of the Act, 1955 has been dismissed.

Facts:-

3. Briefly stated the facts of the present case are that the plaintiff-appellant had earlier filed **Case No.1028 of 2021**, (Ashish Maurya versus Smt. Anamika Dhiman), under Section 9 of the Act, 1955 which was subsequently withdrawn by him stating that he does not want to press the case for the reason that a compromise has been entered and satpadi ceremony was not performed for marriage. Again he filed **Case No.269 of 2022,** (Ashish Maurya versus Smt. Anamika Dhiman), under Section 9 of the Act, 1955 which has been dismissed by the impugned judgment dated 09.09.2022. Aggrieved with this judgement, the plaintiff-appellant filed the present appeal.

4. In her written statement, the defendant-respondent has clearly denied any marriage between her and the plaintiff-appellant. She made several allegation in her written statement and specifically stated the story of marriage is totally false and in fact there was no marriage at all and the

plaintiff-appellant is regularly attempting to black mail her. She has also lodged FIR No.0475 of 2021, dated 04.10.2021, under Sections 384, 328, 506, 376, 427 and 504 IPC, Police Station Sadar Bazar, District Saharanpur in which charge sheet has been filed by the police.

Discussion and Findings:

5. We have carefully considered the submissions of the learned counsels for the parties and perused the appeal.

6. The submissions made by learned counsel for the parties give rise to the following questions:-

(a) Whether the Suit No.269 of 2022 (Ashish Maurya vs. Smt. Anamika Dhiman) filed by the plaintiff-appellant was barred by Order II Rule 2(3) of the Civil Procedure Code?

(b) Whether marriage certificate issued by Arya Samaj is proof of a valid marriage?

(c) Whether the plaintiff is entitled for a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955?

Question No.(a) Whether the Suit No.269 of 2022 (Ashish Maurya vs. Smt. Anamika Dhiman) filed by the plaintiff-appellant was barred by Order II Rule 2(3) of the Civil Procedure Code?

7. We find that the plaintiff has earlier filed a Suit No.1028 of 2021 under Section 9 of the Act, 1955 in which subsequently he moved an application stating as under:

"निवेदन है कि प्रार्थी वाद उक्त में वादी है। श्रीमान जी प्रार्थी का समाज के चन्द मौजिज लोगों ने सुलहनामा करा दिया है। उक्त वाद प्रार्थी वापिस लेना चाहता है। उक्त विवाह के सम्बन्ध में वादी एवं प्रतिवादनी ने आर्य समाज में आवेदन किया था जिसमें वादी एवं प्रतिवादनी को दिनांक 29.06.2021 की शादी का प्रमाण पत्र दे दिया है ***लेकिन हिन्दू रीति रिवाज के अनुसार कोई फेरे वादी व प्रतिवादनी के नहीं हुये थे। वादी अपने वाद में बल देना नहीं चाहता है इसलिये वादी का वाद बल न दिये जाने के कारण निरस्त फरमाया जाना जरुरी है। इस सम्बन्ध में पुनः कोई कार्यवाही नहीं करुंगा।*** *अतः श्रीमान जी से प्रार्थना है कि वाद उपरोक्त वादी द्वारा बल ना दिये जाने के कारण निरस्त करने की कृपा करें।"*

8. Order II Rule 2(2), C.P.C. provides as under:

"Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

9. Undisputedly, the plaintiff-appellant has earlier filed the aforesaid Suit No.1028 of 2021 in which he moved an application stating that "Saptpadi" was not conducted as per Hindu rites and rituals and that he does not want to press the suit and that he shall not reinitiate any proceeding. In the aforesaid suit, the defendant-respondent/ girl has filed a written statement. Thereafter, on the complaint of the plaintiff-appellant, the aforesaid Suit No.1028 of 2021 under Section 9 of the Act, 1955 was dismissed. Thus, the plaintiff-appellant has omitted to sue in respect of conjugal rights , therefore, he was not entitled to file a fresh suit No.269 of 2022 on the same set of facts for restitution of conjugal rights under Section 9 of the Act, 1955, inasmuch as cause of action and the relief sought in both the suits

were identical and the earlier suit was got dismissed by him as not pressed in the absence of a valid marriage. Therefore, we do not find any illegality in the impugned judgment holding that the second suit i.e. Suit No.269 of 2022 filed by the plaintiff-appellant was barred by the provisions of Order II Rule 2, C.P.C. and, therefore, the suit was rightly dismissed by the court below.

Question No.(b) Whether marriage certificate issued by Arya Samaj is proof of a valid marriage?

10. Arya Samaj, a vigorously reforming sect of modern Hinduism, founded in the year 1875 by the great saint and reformer Swami Dayanand Saraswati; is a reformist movement which believes in one God and in the Vedas as the books of true knowledge. The Arya Samaj opposes the caste system based upon birth as unvedic and insist that castes should reflect merit. The Arya Samaj has sought to revitalize Hindu life and instil self-confidence and national pride amongst Hindus with the watch word of Swami Daya Nand "Back to the Vedas".

11. In the case of **Seema vs. Ashwini Kumar, (2006) 2 SCC 578 (Paras 4, 9 and 15),** Hon'ble Supreme Court considered the provisions of Section 8 of the Act, 1955 and compulsory registration of marriages and held as under:

4. It has been pointed out that compulsory registration of marriages would be a step in the right direction for the prevention of child marriages still prevalent in many parts of the country. ***In the Constitution of India, List III (the concurrent list) of the Seventh Schedule provides in Entries 5 and 30 as follows:***

"5. ***Marriage and divorce;*** *infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution* ***subject to their personal law.***

* * *

30. Vital statistics including registration of births and deaths."

9. ***In exercise of powers conferred by Section 8 of the Hindu Act the State of U.P. has framed the U.P. Hindu Marriage Registration Rules, 1973*** *which have been notified in 1973.* ***In the affidavit filed by the State Government it is stated that the marriages are being registered after enactment of the Rules.***

15. As is evident from narration of facts, though most of the States have framed rules regarding registration of marriages, registration of marriage is not compulsory in several States. If the record of marriage is kept, to a large extent, the dispute concerning solemnisation of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non-registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. ***Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage,*** *yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage.* ***That being so, it would be in the interest of the society if marriages are made compulsorily registrable. The***

legislative intent in enacting Section 8 of the Hindu Act is apparent from the use of the expression "for the purpose of facilitating the proof of Hindu marriages".

12. Thus, from the aforequoted judgment of the Hon'ble Supreme Court, it is evident that though the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value. The plaintiff-appellant has neither led any evidence nor filed any certificate of marriage as proof of marriage under Section 8 of the Act, 1955 read with the Uttar Pradesh Hindu Marriage Registration Rules, 1973 or the Uttar Pradesh Registration of Marriage Rules, 2017. Learned counsel for the plaintiff-appellant has also completely failed to place before us any statutory provisions enabling the Arya Samaj to issue a marriage certificate. Thus, we have no difficulty to hold that **Marriage Certificate issued by Arya Samaj has no statutory force.**

13. Section 5 of the Act, 1955 provides for conditions for a Hindu marriage. Section 7 of the Act, 1955 provides for ceremonies of a Hindu marriage that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto and that where such rites and ceremonies include the Saptapadi i.e. the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is taken. Section 11 of the Act, 1955 provides for void marriages. It is admitted case of the plaintiff-appellant that the rites and ceremonies of Saptapadi had not taken place in the alleged marriage of the plaintiff with the defendant on 29.06.2021. It is also relevant to mention here that the defendant respondent has made serious allegation and filed an application under Order VII Rule 11, C.P.C. in the above Suit No.269 of 2022 that the plaintiff-appellant stolen her photographs from whatsapp and facebook and deceitfully got her signature on some papers alluring her for providing employment. The defendant-respondent has also made serious allegation of rape etc. against the plaintiff-appellant and lodged FIR No.475 of 2021 under Sections 384, 328, 506, 376, 427, 504 I.P.C.. P.S. Sadar Bajar in which chargesheet has also been filed by the police. Thus, in the absence of a valid marriage, **marriage certificate of Arya Samaj is not proof of a valid marriage** of the plaintiff-appellant and the defendant-respondent.

Question No.(c) Whether the plaintiff is entitled for a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955?

14. Section 9 of the Act, 1955 provides for restitution of conjugal rights. It provides that when either the husband or the wife has, **without reasonable excuse,** withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, **on being satisfied of the truth of the statements** made in such petition and that **there is no legal ground** why the application should not be granted, may decree restitution of conjugal rights accordingly. The explanation appended to Section 9 of the Act, 1955 provides that where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving

reasonable excuse shall be on the person who has withdrawn from the society. Since in the present set of facts, there is no proof of valid marriage, therefore, the court below has not committed any error of law to dismiss the suit. In our view, **existence of a valid marriage is precondition to ask for relief of restitution of conjugal rights.** In the absence of proof of a valid marriage, under the facts and circumstances of the case; the court below has not committed any error of law to dismiss the suit observing that mere getting a marriage certificate from Arya Samaj is not proof of a valid marriage.

15. For all the reasons aforestated, we find that **the present appeal** has no merit and is, therefore, **dismissed with costs.**

(2022) 12 ILRA 239
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2022

BEFORE

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

Public Interest Litigation (P.I.L.) No. 1816 of 2022

Vision India Welfare Trust, Inderlok, New Delhi ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Kamlesh Kumar Mishra

Counsel for the Respondents:
A.S.G.I., Sri Shashank Shekhar Singh, Sri Vinod Kumar Shukla

A. Public Interest Litigation - Allahabad High Court Rules,1952 - SubRule (3-A) of Rule 1, Chapter XXII of the Rules of Court - Rule 1(3-A) of Chapter XXII of the Rules requires the petitioner to establish its credentials by affidavit - Petitioner seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him *giving his credentials* - In the instant case, in paragraph no. 5 of the petition only this much was pleaded *'that the petitioner is a social trust and is not politically motivated by any political party nor have been financed by any person/ political party to file this PIL'* - Held - contents of the writ petition show no more than a paraphrasing of the contents of Sub-Rule (3-A) of Rule 1 - no facts pleaded vis-à-vis any of the requirements which the Rule postulates to maintain a petition in public interest - Petitioner does not say as to what kind of activities does the petitioner - 'Vision India Welfare Trust' undertakes, what has it done in the past towards charity or the realization of charitable objectives that it may have set for itself - Not a word has been said by the petitioner about any specific activities that it has undertaken in the past - In the absence of that, a bald assertion, would not satisfy the first part of Rule 1(3-A) of Chapter XXII that requires the petitioner to establish its credentials by affidavit. (Para 6, 7, 8, 9)

B. Public Interest Litigation - Allahabad High Court Rules,1952 - SubRule (3-A) of Rule 1, Chapter XXII of the Rules of Court - Rule 1(3-A) require that the petitioner must show *what public cause it seeks to espouse* - Held - There is hardly anything said about it - Petitioner in no way satisfies the two essential parts of SubRule (3-A) of Rule 1 of Chapter XXII of the Rules of Court.

C. Public Interest Litigation - Service Matter - except for a writ of quo warranto, public interest litigation is not maintainable in service matters - Petitioner seeks is to question the appointment of respondent no.6 as an Associate Professor in the Department of Psychology of the University - Held - In substance, the cause of action involved is

one of a pure service matter - Petitioner, which is admittedly a trust, certainly does not have a private cause of action against the sixth respondent's selection as an Associate Professor in the University - It has not been able to establish what kind of a public interest it seeks to espouse - Apart from the principle that that in a service matter, a PIL just does not lie (Para 14)

Dismissed. (E-5)

List of Cases cited:

1. Ashok Kumar Pandey Vs St. of W.B., (2004) 3 SCC 349

2. Hari Bansh Lal Vs Sahodar Prasad Mahto & ors., (2010) 9 SCC 655,

3. Dr. B. Singh Vs U.O.I. & ors., (2004) 3 SCC 363,

4. Dr. Duryodhan Sahu & ors. Vs Jitendra Kumar Mishra & ors., (1998) 7 SCC 273

5. Gurpal Singh Vs St. of Pun. & ors., (2005) 5 SCC 136

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble J.J. Munir, J.)

1. Heard Mr. Kamlesh Kumar Mishra, learned Counsel for the petitioner, learned Counsel appearing for the respondents and perused the material placed on record.

2. The petitioner, Vision India Welfare Trust, a registered charitable trust as it claims, has filed this petition through its Treasurer, Mohd. Ali Ansari, seeking to question the selection of respondent no.6 as an Associate Professor in the Department of Psychology, Algarh Muslim University, Aligarh (for short, 'the University').

3. The petitioner seeks to move this petition in public interest and asks this Court to quash the recommendations of the General Selection Committee held on 25.07.2015 to the post of Associate Professor in the Department of Psychology of the University. A *mandamus* has also been sought to declare the appointment of respondent no.6 void *ab initio* and direct recovery of salary paid to him on account of his appointment on the post of Associate Professor. There is no writ of *quo warranto* that the petitioner seeks.

4. Since the petition is one that claims to be moved in public interest, in our opinion, the petition must pass muster of Sub-Rule (3-A) of Rule 1, Chapter XXII of the Rules of Court. Sub-Rule (3-A) of Rule 1 of Chapter XXII reads :

"(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."

5. Paragraphs Nos. 3 to 6, which are pleadings made to comply with Sub-Rule (3-A) of Rule 1 read:

"3. That at the very outset it is stated that the petitioner has no selfish motive behind filing of this petition and he is filing this petition by way of PIL only in common interest of public at large.

4. That the petitioner will not get any profit/ loss by filing the present petition.

5. That the petitioner is a social trust namely Vision India Welfare Trust and is not politically motivated by any political party nor have been financed by any person/ political party to file this PIL. A photocopy of the trust deed dated 14.11.2008 is being filed herewith and is marked as **Annexure No. 1** to this PIL.

6. That the facts giving arise to the present public interest litigation are startling as without any fear and in collusion with official respondent of the government, the private respondent has been recruited as Associate professor, Department of Psychology of Aligarh Muslim University."

6. Now, it must be observed at the outset that Rule 1 (3-A) of Chapter XXII is no ceremony to be observed by a petitioner, who moves this Court in public interest. A petitioner moving this Court in public interest must substantially comply with the requirements of the Rule. What we find *ex facie* from the averments in Paragraphs Nos. 3 to 6 of the writ petition is that the petitioner has hardly done that. The contents of Paragraph Nos. 3 to 6 of the writ petition show no more than a paraphrasing of the contents of Sub-Rule (3-A) of Rule 1. There is just a reference to the label of contents that a PIL petitioner must satisfy before maintaining his petition. There are no facts pleaded vis-à-vis any of the requirements which the Rule postulates to maintain a petition in public interest. The first of the requirements is the disclosure of the petitioner's credentials. To that end, the petitioner has said nothing more than that, that the petitioner is a charitable trust and is not politically motivated by any political party nor financed by any person or political party to file the present PIL. This, as already said, is no more a hollow orchestration of one part of Rule 1(3-A), that is to say, the part relating to disclosure of credentials.

7. The petitioner does not say by as much as a whisper about itself, or its office bearers, what kind of activities does the Vision India Welfare Trust undertakes, what has it done in the past towards charity or the realization of charitable objectives that it may have set for itself. A copy of the trust deed, that has been enclosed, appears to be either a truncated part of the document or a deed that is so vague that one cannot make out what the objects of the trust are. Nothing more in the trust deed has been said about its objects than that, that it is a non-political, non-religious and charitable trust. But, what kind of charity it proposes to do, the trust deed hardly spells out. If one were to leave aside the trust deed and take the petitioner's assertions on its face value that the petitioner-Trust has some charitable objectives, the petitioner was certainly required to show its activities in the past and what kind of charity it has undertaken. For example, a Trust with a charitable object may pursue philanthropic activities, like taking care of orphans or providing food and clothing to the needy or destitutes or ensuring education of children of economically weaker sections of the society. It can be innumerable things that would all account for charitable objectives.

8. The petitioner would, however, have to state what kind of charity it does in order to establish their credentials. If it is the petitioner's object that they go after corruption in public activities, it would have to be specifically pleaded and from instances shown how the petitioner in the past has worked to chase and weed out corruption in public life. Not a word has been said by the petitioner about any specific activities that it has undertaken in

the past. In the absence of that, a bald assertion of the kind that finds place in Paragraph No. 5, in our opinion, would not satisfy the first part of Rule 1(3-A) of Chapter XXII that requires the petitioner to establish its credentials by affidavit.

9. The next part of Rule 1(3-A) require that the petitioner must show what public cause it seeks to espouse. There is hardly anything said about it either. In our considered opinion, the petitioner in no way satisfies the two essential parts of Sub-Rule (3-A) of Rule 1 of Chapter XXII of the Rules of Court.

10. The other aspect which requires elucidation is that what the petitioner seeks is to question the appointment of respondent no.6 as an Associate Professor in the Department of Psychology of the University. This right is reserved to a person, who is aggrieved by this selection. A reading of the petition leaves an unmistakable impression on our mind that the petitioner wants this Court to enter into the thicket of facts and law about the validity of the sixth respondent's selection and appointment as an Associate Professor in the Department of Psychology of the University. We could be called upon to do this by a candidate for the post who had failed to get selected; not a stranger claiming to espouse some kind of a mysterious public interest, that is hardly spelt out.

11. This Court finds that in substance, the cause of action involved in the present writ petition is one of a pure service matter. This Court cannot ignore the salutary principle that in service matters, a public interest litigation does not lie. In this connection, reference may be made to the decision of the Supreme Court in **Ashok Kumar Pandey v. State of W.B., (2004) 3 SCC 349**. In **Ashok Kumar Pandey** *(supra)*, it was observed by the Supreme Court thus:

"16. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that courts are flooded with a large number of so-called public interest litigations where even a minuscule percentage can legitimately be called public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in a large number of cases, yet unmindful of the real intentions and objectives, courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. *Though in Duryodhan Sahu (Dr) v. Jitendra Kumar Mishra* [(1998) 7 SCC 273 : 1998 SCC (L&S) 1802 : AIR 1999 SC 114] this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Whenever such frivolous pleas are taken to explain possession, the courts should do well not only to dismiss the petitions but also to impose exemplary costs. It would be

desirable for the courts to filter out the frivolous petitions and dismiss them with costs as aforestated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the courts."

(emphasis by Court)

12. In **Hari Bansh Lal v. Sahodar Prasad Mahto and others, (2010) 9 SCC 655,** their Lordships of the Supreme Court, after considering the decisions in **Ashok Kumar Pandey** *(supra),* **Dr. B. Singh v. Union of India and others, (2004) 3 SCC 363, Dr. Duryodhan Sahu and others v. Jitendra Kumar Mishra and others, (1998) 7 SCC 273, and Gurpal Singh v. State of Punjab and others, (2005) 5 SCC 136,** held:

"15. The above principles make it clear that except for a writ of *quo warranto*, public interest litigation is not maintainable in service matters."

13. We have remarked earlier and we do say again that this petition has not at all been framed as one for a writ of *quo warranto* and neither does it seek that relief. It does not conform to the requirements of that writ. It has been styled and filed as a public interest litigation, properly so called, with reliefs sought in the nature of a *certiorari* (though without saying so) and a *mandamus* or directions akin to these writs.

14. The petitioner, which is admittedly a trust, certainly does not have a private cause of action against the sixth respondent's selection as an Associate Professor in the University. It has not been able to establish what kind of a public interest it seeks to espouse. This is quite apart from the principle that we have just noticed that in a service matter, a PIL just does not lie.

15. For all these reasons, we do not find any force in this petition and order it to stand dismissed.

(2022) 12 ILRA 243
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.09.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE RAJEEV SINGH, J.

Application U/S 378(3) No. 69 of 2013

State of U.P. ...Appellant
Versus
Baiju & Ors. ...Respondents

Counsel for the Appellant:
Mrs. Smiti Sahai, Additional Government Advocate

Counsel for the Respondents:

A. Criminal Law - Criminal Procedure Code, 1973 - Section 378 - Appeal Against Acquittal - Scope - while exercising its appellate power, the High Court is empowered to reappreciate, review and reconsider the evidence and this exercise is to be undertaken in order to come to an independent conclusion and unless there are substantial and compelling reasons or very strong reasons to differ from the findings of the trial court, the High Court, as an appellate court in an appeal is not supposed to substitute its findings in case the findings recorded by the trial court are equally plausible. (Para 11)

B. Criminal Law - Criminal Procedure Code, 1973 - Sections 154 & 162 - Second F.I.R. - D.G.P., U.P. circular No.

DG21 of 2016 dated 26.04.2016 - Two F.I.R.s cannot be registered for the same version - Director General of Police, Uttar Pradesh directed to ensure that in future no multiple First Information Reports should be registered for commission of one crime in different offences, except in cross cases (Para 16)

C. Criminal Law - Criminal Procedure Code, 1973 - Section 378 - Appeal Against Acquittal - Informant along with Rakesh Kumar came to police station carrying the injured-Dinesh Kumar Sharma - In F.I.R., allegations were made against three to four unknown persons - Dinesh Kumar Sharma (injured) was in the condition to speak but he did not tell the name of accused - On the next date, informant gave another complaint with a change version by naming the accused/ respondents and assigning their roles - P.W.1 and P.W.2, in their deposition, stated that fire was opened by Salik with close range, but no blackening and tattooing were found - P.W.5, was the witness of recovery memo of country made pistol as well as arrest of the accused persons, but he categorically denied the prosecution case and also stated that no weapon was recovered from him - Trial court properly considered the prosecution evidence and rightly acquitted the accused/respondents (Para 10)

Dismissed. (E-5)

List of Cases cited:

1. Ramesh & ors. Vs St. of Har. reported in (2017) 1 SCC 529

2. Anwar Ali & anr. Vs St. of H.P.h reported in (2020) 10 SCC 166.

(Delivered by Hon'ble Rajesh Bindal, C.J.
&
Hon'ble Rajeev Singh, J.)

1. We have heard Mrs. Smiti Sahai, learned Additional Government Advocate for the State/appellant and have also perused the record available before us.

2. By means of the present application under Section 378(3) Cr.P.C., the State has sought leave to appeal to assail the judgment and order dated 24.05.2012 passed by the learned Additional Sessions Judge, Court No.7, District Sitapur, whereby the learned trial court has acquitted the accused/respondents, namely, Baiju, Salik, Chhailu and Sattan in the instant appeal, for the offence under Sections 302/34 I.P.C. and Section 25 (1 B) of Arms Act.

3. Learned Additional Government Advocate has submitted that as per the prosecution case, on 22.12.2005 at about 6:00 P.M., informant, namely, Nand Kishor was going along with his brother, namely, Dinesh Kumar Sharma by his motorcycle to Gangapurwa (Ladilapur), Sugarcane Centre. At the south of village- Shamipur Godwa, three to four persons armed with *lathi*, *danda* and country made pistol stopped them and started beating with *lathi* and *danda*. Brother of the informant, namely, Dinesh Kumar Sharma, was having licensee rifle No.AB-043636, when he raised objection, then one of the accused person opened fire and brother of the informant received injury at the right side of his chest under the arm. Thereafter, accused persons snatched the rifle and cartridges of the brother of the informant and ran away. Informant saw all the accused persons in the headlight of motorcycle. On the aforesaid complaint, First Information Report as Case Crime No.281 of 2005, under Section 394 I.P.C., Police Station Thangaon, District Sitapur was lodged on 22.12.2005 at 18:50 hours. Inquest was conducted and witness of inquest opined that deceased died due to

firearm injury. On 23.12.2005, spot was inspected by the Investigating Officer and site plan was prepared.

4. On 23.12.2005, another application was given by the informant with the change of his version that in the haste, the name of actual culprit was not given in the first complaint as they were identified. Informant has stated in his new complaint that on 22.12.2005, Will deed was executed by Triveni s/o Ram Awtar in favour of the cousin brother of the informant, namely, Ram Sumiran s/o Ram Prasad Sharma. Ram Sumiran and his family members were living with Triveni and after the death of Triveni, on the basis of successor, his property was mutated in the name of Bhagauti. Therefore, on the basis of Will, mutation case was pending before Tehsil. About three years ago, Baiju s/o Awtar, Sakeel and Chhailu s/o Baiju, purchased the said land from Bhagauti by way of sale deed. Sattan s/o Umrao was assisting Baiju and Dinesh Kumar Sharma (brother of the informant) and also helping Ram Sumiran, as a result, accused/respondents were inimical with him. Accused/respondents were criminal in nature as few years back, they snatched a rifle of Police personnel and the case of said offence is pending. On 22.12.2005, in the evening, when the informant was coming along with his brother, namely, Dinesh Kumar Sharma by his motorcycle-U.P. 34 D2214, as his brother was having licensee refile and informant was also armed with 12 bore licensee gun. Motorcycle was being driven by his brother and he was the pillion rider, when they reached at the link road of Rajapur, then accused persons suddenly came out from *Arhar* field and started abusing and Chhailu, one of the accused, exhorted to kill them. At the same time, Sattan gave *lathi* blow on the head of Dinesh Kumar Sharma (brother of the informant), then he fell down along with informant and Salik opened fire upon Dinesh Kumar Verma, due to which, he received grievous injury. When, the informant tried to escape, then Baiju gave a blow of *lathi*, but he ran away to save his life and also opened fire with his country made pistol. Thereafter, recovery memo was prepared by the Investigating Officer and statement under Section 161 Cr.P.C. was also recorded. On 11.01.2006, accused persons were arrested and on the pointing out of Salik (one of the accused), country made pistol was recovered along with blank cartridges and recovery memo as well as site plan were also prepared.

5. On the basis of recovery of country made pistol on the pointing of Salik during the course of investigation, a fresh First Information Report was lodged as Case Crime No.10 of 2006, under Section 25 (1-B) Arms Act and all the articles including country made pistol were sent to FSL for examination.

6. After investigation, charge-sheet was filed by the Investigating Officer in both the cases against the respondents/accused for the aforesaid offence and cognizance was taken in both the cases by the Magistrate, and thereafter, case was committed to the Court of Session. Charges were framed in both the cases, respondents pleaded not guilty and requested for trial.

7. The prosecution has placed fourteen witnesses, P.W.1-Nand Kishor, P.W.2-Babu, P.W.3-Narayan Singh, P.W.4-Ram Sumiran, P.W.5-Dubar, P.W.6-Lalit Kumar, P.W.7-Brijesh Kumar, P.W.8-Suresh Pal Singh (S.I.), P.W.-9 Dr. Khursheed Alam Sidiqqui, P.W.-10 Manoj Kumar

Singh (SO), P.W.11-Dr. M.K. Prajapati, P.W.12-Pratap Narayan Singh (S.I.), P.W.13- Hari Babu Giri (Head Constable) and P.W.14-Krishna Pal Singh (S.I.) and twenty one documentary evidences, duly proved by the prosecution witnesses.

8. After evidence of the prosecution, statement of the accused person under Section 313 Cr.P.C. was recorded and they denied their participation in the crime and also stated that false recovery has been shown and accused/respondents were implicated on the behest of Ram Sumiran. As the informant is the brother of deceased and accused persons purchased the property of Bhagauti, who is the legal heirs of the property of Triveni and mutation dispute was pending since long in between Ram Sumiran and accused/respondents. Salik, (one of the accused) also stated in his statement recorded under Section 313 Cr.P.C. that he is being the son of Baiju and he was taken into custody and thumb impression was also taken on the blank paper.

9. Learned Additional Government Advocate has submitted P.W.1-Nand Kishor, in his deposition, stated that Salik opened fire on Dinesh Kumar Sharma (deceased) and *lathi* blow was also given to the informant and he supported the prosecution version. The rest of the witnesses, P.W.2-Babu and P.W.4-Ram Sumiran have also supported the prosecution version, but trial Court disbelieved their testimony as the deposition of P.W.1-Nand Kishor, P.W.2-Babu and P.W.5-Dubar are directly corroborating with the antemortem injury of the deceased, therefore, present appeal is filed and leave to appeal is liable to be granted and appeal may be admitted.

10. Considering the argument of learned Additional Government Advocate and impugned judgment, it is evident from the record that on the written complaint of Nand Kishor, which was scribed by Rakesh Kumar s/o Awadh Ram Sharma r/o Sikari, District Sitapur, First Information Report as Case Crime No.281 of 2005, under Section 394 I.P.C, Police Station Thangaon, District Sitapur was registered at G.D. No.30, dated 22.12.2005. In the aforesaid G.D., it is mentioned that informant came to the Police Station along with Rakesh Kumar by his motorcycle carrying the injured-Dinesh Kumar Sharma and in the First Information Report, allegations were made against three to four unknown persons. It is also evident from the aforesaid G.D., in which, it is mentioned that Dinesh Kumar Sharma (injured) was in the condition to speak and he told to the Police Officers that he is having severe pain around the injury at his chest, but he did not tell the name of accused. As P.W.1, in his deposition, stated that on his dictation, a complaint was written by Rakesh Kumar s/o Awadh Ram Sharma r/o Sikari, and thereafter, same was read out by him, then he made signature and given to the concerned Police Station for lodging of the FIR, thereafter, FIR was lodged. He also admitted that on the next date, he had given another complaint with a change version by naming the accused/respondents and assigning their roles. P.W.1 and P.W.2, in their deposition, also stated that fire was opened by Salik with close range, but no blackening and tattooing were found. P.W.5-Dubar, who is the witness of recovery memo of country made pistol as well as arrest of the accused persons, but he categorically denied the prosecution case and also stated that no weapon was recovered from him, therefore, recovery of weapon is suspicious and trial court has rightly considered the prosecution evidence and acquitted the accused/ respondents.

11. As it is well settled by the Hon'ble Supreme Court that while exercising its appellate power, the High Court is empowered to reappreciate, review and reconsider the evidence and this exercise is to be undertaken in order to come to an independent conclusion and unless there are substantial and compelling reasons or very strong reasons to differ from the findings of the trial court, the High Court, as an appellate court in an appeal is not supposed to substitute its findings in case the findings recorded by the trial court are equally plausible. This view was taken by the Hon'ble Supreme Court in the case of ***Ramesh And Others vs. State of Haryana*** reported in ***(2017) 1 SCC 529*** as well as ***Anwar Ali and Another vs. State of Himachal Pradesh*** reported in ***(2020) 10 SCC 166.***

12. Thus, having considered the matter in its totality and in view of the law laid down by the Hon'ble Supreme Court in ***Ramesh's case (supra) and Anwar Ali's case*** (supra), we find that the learned trial court's findings regarding acquittal of accused/respondents herein are based on proper appreciation and analysis of evidences available on record which do not in any manner appear to be improbable or perverse.

13. On the basis of forgoing discussions, we are of the considered view that the application for leave to appeal lacks merit and deserves to be rejected and the same is hereby **rejected.**

14. Since the application for leave to appeal has been rejected, the appeal also does not survive and the same stands **dismissed.**

15. As it is observed in the number of cases that nowadays, Police Officials are lodging multiple First Information Reports for one incident relating to different offences. In the present case, as per the prosecution version, brother of the informant, namely, Dinesh Kumar Sharma was killed with firearm and on the basis of written complaint given by informant, namely, Nand Kishor, First Information Report as Case Crime No.281 of 2005, under Section 394 I.P.C., Police Station Thangaon, District Sitapur was registered on 22.12.2005, and thereafter, investigation was going on and on 11.01.2006, arrest of the accused persons have been shown and recovery of country made pistol was also shown on the pointing out of Salik (accused). On the basis of arrest/recovery memo, second First Information Report as Case Crime No.10 of 2006, under Section 25 (1-B) Arms Act was registered on 11.01.2006. As arrest of the accused and recovery of weapons were the part of investigation of Case Crime No.281 of 2005 (supra), as due to lodging of the second First Information Report for the Arms Act, multiple cases have been registered and separate case diary for investigation of the second case was also prepared and charge-sheet in both the cases were filed before the Court concerned. "Section 220 of Cr.P.C., specifies that in one series of acts more than one offences are committed by the some person, then he may be charged with, and tried at one trial for every such offence."

Earlier, act of the State was deprecated for lodging of the multiple First Information Report for commission of one crime in different offences at the time of deciding the Bail Application No.8741 of 2019 (Surendra @ Fanna vs. State of U.P.), vide order dated 16.10.2019, and thereafter, Director General of Police issued circular. D.G. Circular No.44 of 2019, dated 28.09.2019, in which, a direction was

issued to all the Zonal Additional Director General of Police as well as I.G./D.I.G. to ensure that no second First Information Report should be lodged in relation to commission of offence at one point of time, except in the cross case. Thus, D.G. Circular No.21 of 2016, dated 26.04.2016 and D.G. Circular No.44 of 2019, dated 28.09.2019 are being reproduced as under:-

" Circular No. DG21 of 2016

प्रिय महोदय,

जैसा कि आप अवगत हैं कि कई बार एक ही घटना के सम्बन्ध में पक्षकारों द्वारा एक से अधिक FIR दर्ज करायी जाती है। सामान्यतः यह FIR बतवे बेंम के रूप में दर्ज होती है जिसमें प्रथम FIR के मुल्जिमों द्वारा एक ही घटना के अपने version को दर्शाया जाता है। कभी–कभी एक ही पक्ष के अलग–अलग व्यक्तियों द्वारा भी अलग–अलग FIR दर्ज करायी जाती है जिसमें घटना एक होते हुए भी अन्य तथ्यों में भिन्नता हो सकती है। ऐसा भी पाया गया है कि किसी घटना में प्रथम FIR पुलिस द्वारा दर्ज करने के बाद घटना के सम्बन्ध में पक्षकारों द्वारा अपने अपने हिसाब से उसी घटना के सम्बंध में पुनः FIR दर्ज करायी गयी। इसी प्रकार Multiple FIRs कई बार घटना स्थल से भिन्न थाने पर अथवा धारा 156(3) Cr.P.C. के अन्तर्गत माननीय न्यायालय के माध्यम से भी दर्ज करायी जाती हैं। साामान्यतः इन Multiple FIRs को A.B.C. इत्यादि पर दर्ज किया जाता है परन्तु कई बार अलग अलग अपराध संख्या पर भी दर्ज किया जाता है। ऐसी Multiple FIR' जो कि एक ही घटना से सम्बंधित हैं, की विवेचना में विभाग द्वारा विशेष सावधानी न बरतने से पक्षकार अपने अपने हितों के लिये मा0 न्यायालय की शरण लेते हैं जिससे अनावश्यक परेशानियॉ उत्पन्न होती है। ऐसे समस्त प्रकरण जिनमें एक से अधिक FIR दर्ज की गयी हों, की विवेचना के सम्बंध में निम्न निर्देश दिये जाते हैं जिनका अनुपालन सभी संबंधित द्वारा सुनिश्चित किया जायः–

1. यह परीक्षण कर लिया जाय कि दर्ज हुई प्रश्नगत समस्त प्रथम सूचना रिपोर्ट एक ही घटनाक्रम से सम्बन्धित है अथवा नही?

2. यदि ऐसी सभी FIRs एक ही प्रकरण से संबंधित है, तो इन सभी FIRs की विवेचना एक ही अनुभवी, योग्य एवं दक्ष विवेचक को आवंटित की जाय। यदि संख्या ज्यादा हो तो एक मुख्य विवेचक के नेतृत्व में टीम गठित कर समस्त विवेचनाएं इसी टीम को आवंटित की जाएं।

3. यदि किसी प्रकरण में Cross FIRs दर्ज करायी गयी है तो ऐसी सभी Cross FIRs की विवेचना एक ही विवेचक से करायीं जाए। यदि इनमें से एक FIR में एस0सी0/एस0टी0 एक्ट की धारा लगी है और शेष में एस0सी0/एस0टी0 एक्ट की धारा न लगी हो तो ऐसी समस्त Cross FIRs की विवेचना एक ही पुलिस उपाधीक्षक द्वारा की जाए ताकि विरोधाभास उत्पन्न न हो।

इस सन्दर्भ में माननीय उच्चतम् न्यायालय द्वारा Upkar Singh Vs Ved Prakash & Ors. (2004) 13 SCC 292 में दिये गये निर्णय का उद्धरण आपके मार्गदर्शन हेतु निम्नांकित हैः–

"However, this rule will not apply to a counter claim by the accused in the first complaint or on his behalf alleging a different version of the said incident. Thus in case, there are rival versions in respect of the same episode, the Investigating Agency would take the same on two different FIRs and investigation can be carried under both of them by the same investigating agency and thus, filing an FIR pertaining to a counter claim in respect of the same incident having a different version of events, is permissible."

4- यदि प्रकरण में Multiple FIRs दर्ज है परन्तु Cross FIRs दर्ज नही है, तो बाद में दर्ज समस्त FIRs को 162 सी0आर0पी0सी0 के अन्तर्गत कार्यवाही मानते हुए प्रथम FIR की विवेचना में सम्मिलित किया जाए। ऐसी सभी FIRs के सम्बन्ध में एक ही केस डायरी किता की जाए जिसमें सभी FIR' के तथ्यों का समावेश करके विवेचना की जाए।

इस सन्दर्भ में माननीय उच्चतम् न्यायालय द्वारा ज्ण्ज्।दजवदल टेण "जंजम वि ज्ञमतंसं – क्तेण ;2001द्ध 6 "ब्ब 181 में दिये गये निर्णय का उद्धरण आपके मार्गदर्शन हेतु निम्नांकित हैः–

"This court dealt with a case wherein in respect of the same cognizable offence and same occurrence two FIRs had been lodged and the court held that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. The investigating agency has to proceed only on the information about commission of a cognizable offence which is first entered in the Police Station diary by the Officer Incharge under Section 158 of the Code of Criminal Procedure, 1973 (hereinafter called the Cr.P.C.) and all other subsequent information would be covered by Section 162 Cr.P.C. for the reason that it is the duty of the Investigating Officer not merely to investigate the cognizable offence report in the FIR but also other connected offences found to have committed in the course of the same transaction or the same occurrence and the Investigating Officer has to file one ore more reports under Section 173 Cr.P.C."

5- ,'सी सभी विवेचनाओं के अन्तिम निस्तारण के सम्बंध में यथासंभव एक साथ निर्णय लिया जाय। यह पाया गया है कि कई बार अलग अलग निस्तारण करने से विवेचनाओं में विसंगतियॉ एवं विरोधाभास उत्पन्न होते हैं जबकि घटना एक ही है। यह सुनिश्चित किया जाए कि विवेचना में विसंगति उत्पन्न न हो।

6. यदि ऐसी किसी एक विवेचना में धारा 173(8) दं0प्र0सं0 के अन्तर्गत अग्रिम विवेचना का आदेश किसी भी स्तर से किया जाता है तो यह आदेश सभी विवेचनाओं के लिये स्वतः लागू होगा। ऐसा न करने की स्थिति में विवेचनाओं में आपस में विरोधाभास उत्पन्न होना स्वाभाविक है।

7. यदि किसी कारण से किसी एक विवेचना का स्थानांतरण अपराध शाखा अथवा नये विवेचक अथवा किसी अन्वेषण इकाई को किया जाता है तो उक्त आदेश उक्त प्रकरण से सम्बंधित सभी विवेचनाओं पर स्वतः लागू होगा।

8. पर्यवेक्षण अधिकारी की यह विशेष जिम्मेदारी होगी कि ऐसे सभी प्रकरणों में उपरोक्त निर्देशों का अनुपालन सुनिश्चित करें ताकि अनावश्यक मुकदमेबाजी से बचा जा सके।

भवदीय,
ह0 अपठनीय
26.4.16
(जावीद अहमद)

समस्त जोनल पुलिस महानिरीक्षक/
समस्त परिक्षेत्रीय पुलिस उप महानिरीक्षक/
समस्त वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक,
एवं समस्त विवेचना इकाई प्रभारी,
उत्तर प्रदेश।

DG Circular No. 44 of 2019

प्रिय महोदय,

आप सभी अवगत है कि एक ही समय, स्थान व तिथि पर आपराधिक

घटना के सम्बन्ध में द0प्र0सं0 1973 की धारा 154 के अन्तर्गत एक ही एफ0आई0आर0 पंजीकृत किये जाने का प्राविधान है, जिसके सम्बन्ध में इस मुख्यालय के निर्गत परिपत्र डीजी–21/2016 द्वारा विस्तृत दिशा–निर्देश निर्गत किये गये है, जिसमें एक ही घटना के सम्बन्ध में पक्षकारों द्वारा एक से अधिक एफ0आई0आर0 दर्ज करायी जाती है तब इन multiple एफ0आई0आर0 की विवेचना के सम्बन्ध में पूर्व के परिपत्र में दिशा–निर्देश निर्गत किये गये हैं, जिसमें मा0 सर्वोच्च न्यायालय द्वारा उपकार सिंह बनाम वेद प्रकाश व अन्य (2004) 13 SCC 292 तथा टी0टी0 एन्टोनी बनाम केरल राज्य व अन्य (2001) 6 SCC 181 में पारित निर्णय में दिये गये निर्देशों का उल्लेख किया गया है।

संज्ञान में आया है कि इस मुख्यालय द्वारा पूर्व में निर्गत उक्त परिपत्र में दिये गये दिशा–निर्देशों का कतिपय जनपदों द्वारा अनुपालन नहीं किया जा रहा है। मा0 उच्च न्यायालय इलाहाबाद खण्डपीठ लखनऊ द्वारा जमानत सं0–8741/2019 सुरेन्द्र उर्फ फन्ना बनाम उ0 प्र0 राज्य में पारित आदेश दिनांक 13.09.2019 में एक ही घटना की 02 एफ0आई0आर0 पंजीकृत किये जाने पर सुनवाई के दौरान निम्न निर्देश दिये गये हैः–

The present bail application has been filed on behalf of applicant in Case Crime No. 356 of 2018, under Sections 379, 411 I.P.C., P.S. Tambaur, District Sitapur with the prayer to enlarge him on bail.

Learned counsel for the applicant submitted that on the written complaint of Shatrohan s/o Badri, Village Lauki Majra Kurtahiya, P.S. Tambaur, District Sitapur, the complaint was entered into the General Diary No.27 at 14:12 hours on 08.12.2018

at P.S. Rausa, District Sitapur and it was alleged by the complainant that on 30.11.2018 at about 11:00 p.m. when he went to ease himself outside his house, then he found that his 2 Buffaloes valuation of Rs.50,000/- were missing then search was started alongwith his son and when informant and his son reached at the turning point of Mansab Kha Purwa then they found that one person was going alongwith his buffaloes the informant tried to stop him then the accused person opened fire on him. As the accused person was identified by the son of informant as Surendra Verma @ Fanna (applicant) and thereafter, the son of the informant dialed 100 and the injured was brought to the Health Center, Rausa by the police from where he was referred to Trauma injured was brought to the Health Center, Rausa by the police from where he was referred to Trauma Center, Lucknow and after recovery the complaint was filed on 08.12.2018. On the basis of aforesaid complaint, the Case Crime No. 329 of 2018, under Section 307 I.P.C. was registered on 08.12.2018 at 14:12 hours at P.S. Rausa, District Sitapur.

Learned counsel for the applicant further submitted that the aforesaid complaint was again entered in General Diary by the Station House Officer, P.S. Tambaur, District Sitapur as General Diary No. 34 on 08.12.2018 at 16:21 hours and it was registered as F.I.R. No. 356 of 2018, under Sections 379, 411 I.P.C., P.S. Tambaur, District Sitapur on 08.12.2018 at 16:21 hours.

Learned counsel for the applicant further submitted that two F.I.R.s of the same complaint cannot be registered in different police stations and he further submitted that in F.I.R. No. 329 of 2018, under Section 307 I.P.C., P.S. Rausa, District Sitapur, the applicant has been enlarged on bail by this Court in Bail Application No. 5870 of 2019 vide order dated 14.06.2019 and the photocopy of the aforesaid order provided by the counsel for the applicant is taken on record.

Learned A.G.A. opposed the bail prayer to the applicant but fairly conceded the fact that on the same complaint two F.I.R.s have been lodged, one as F.I.R. No. 329 of 2018 (supra) and second as F.I.R. No. 356 of 2018 (supra).

Further it is found that the D.G.P., U.P. has issued circular No. DG21 of 2016 dated 26.04.2016 on the basis of different reported incidents to the police two F.I.R.s cannot be registered for the same version and it is found that in the present case there is a clear violation of the aforesaid circular.

अतः आप सभी को पुनः निर्देशित किया जाता है कि इस मुख्यालय से निर्गत परिपत्र सं0 21/10 का भली–भॉति अध्ययन कर अपराध गोष्ठियों में चर्चा करते हुए अधीनस्थों को अवगत कराते हुये उसका पूर्णतयाः अनुपालन कराना सुनिश्चित करें। यदि भविष्य में संज्ञान में आता है कि किसी प्रकरण में दिये गये दिशा–निर्देशों का अनुपालन नहीं किया जा रहा है तो सम्बन्धित जिला पुलिस प्रभारी इसके लिये व्यक्तिगत रूप से उत्तरदायी होगें।

भवदीय,
ह0 अपठनीय
(ओ0पी0 सिंह)

समस्त वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी जनपद
उ0 प्र0।

प्रतिलिपि– निम्नलिखित को कृपया सूचनार्थ एवं आवश्यक कार्यवाही हेतु।

1. समस्त जोनल अपर पुलिस महानिदेशक उ0प्र0।

2. समस्त पुलिस महानिरीक्षक/ उपमहानिरीक्षक परिक्षेत्र उ0प्र0।"

16. Director General of Police, Uttar Pradesh is directed to ensure that in future no multiple First Information Reports should be registered for commission of one crime in different offences, except in cross

cases, failing which, the act of the responsible officer would be contemptuous.

(2022) 12 ILRA 251
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ C No. 7917 of 2022

Ziqitza Health Care Ltd. ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sunil Kumar Chaudhary, Kapil Misra

Counsel for the Respondents:
C.S.C.

A. Constitution of India ,1950 – Article 226 – Contractual matter – Judicial review – Scope – Decision making process of Tender Authority, how far can be interfered with – Tata Cellular's case relied upon – Principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations to the exercise of the power of judicial review – Held, tender authority, has been given a certain degree of leverage by the courts, being the best person to understand its requirements – Hence, a mere disagreement with the decision-making process of the tender authority is not a reason for a constitutional court to interfere with the same. (Para 19 and 27)

Writ petition dismissed. (E-1)

List of Cases cited:

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

2. Jagdish Mandal Vs St. of Orissa; (2007) 14 SCC 51

3. Silppi Constructions Contractors Vs U.O.I. & ors.; 2019 SCC OnLine SC 1133

4. National High-Speed Rail Corp. Ltd. Vs Montecarlo Ltd.; 2022 SCC OnLine SC 111

5. Central Coalfields Ltd. & anr. Vs SLL-SML (Joint Venture Consortium) and other; (2016) 8 SCC 622

6. Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corp. Ltd. & anr.; (2016) 16 SCC 818

7. M/S. N.G. Projects Ltd. Vs M/S. Vinod Kumar Jain & ors.; (2022) 6 SCC 127

(Delivered by Hon'ble Om Prakash Shukla, J.)

1. Heard Shri S.C. Mishra, learned Senior Counsel assisted by Shri Sunil Kumar Chaudhary, learned Counsel for the petitioner and Shri Ramesh Kumar Singh, learned Additional Advocate General assisted by Shri Rakesh Vajpayee, learned Additional Chief Standing Counsel for the State.

2. The present writ petition has come to be filed by the petitioner invoking the writ jurisdiction of this Court, thereby seeking two fold prayer; (i) quashing of order dated 07.11.2022 uploaded on the official website of the Department of Animal husbandry on 09.11.2022, whereby the bid submitted by the petitioner has been declared as non-responsive for the reason that the same did not meet the requirement of clause 12(c) of the RFP relating to the aspect of submission of EMD and (ii) challenge to the order dated 09.11.2022 has been also made, whereby the tender summary report was uploaded and the Department of Animal Husbandry has fixed the date of opening of financial bids on 10.11.2022 at 2:30 PM.

3. Since the financial bid of the bidders, who have been found to be qualified in the technical process were going to be considered in the after-noon of the same day, this court, as an interim measure vide its order dated 10.11.2022 had directed that the petitioner's financial bid be also included in the process of consideration, failing which the contract shall not be finalized without leave of this court.

4. The brief facts germane for deciding the present issue raised before this court lies in a narrow compass. The Government of India having envisaged its ambitious scheme relating to livestock health launched the "Livestock Health & Disease Control Scheme". The Operational Guidelines for Livestock Health and Disease Control was issued subsequently, which inter-alia imbibed the need for Establishing and Strengthening of Veterinary Hospitals and Dispensaries (ESVHD) and Mobile Veterinary Units (MVU). The State of Uttar Pradesh keeping in view the operational Guidelines and acting through the office of Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow invited e-tender for hiring of services of support organizations to operationalize the Mobile Veterinary Unit (MVU) at different locations/ department institutions of the state of Uttar Pradesh along with establishment of call center.

5. Although a tender for operation of the aforesaid MVU was floated wherein the entire State was taken as a Unit for bid, however subsequently, a policy decision was taken by the state of Uttar Pradesh for regulating the effective operation of MVU and as such as per the new policy, the State of Uttar Pradesh was divided into five clusters/packages. It was envisaged in the policy that though any bidder can bid for any number of packages, but a successful bidder even if it is L-l in more than one Package will be given only one Package for operation depending upon his preference. Once, the said preference had been exercised, the other Package would go to L-2 bidder upon its choice, provided it agrees to work at the rates of L-1.

6. The policy being at place, the State of Uttar Pradesh through the Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow, notified the Tender. Apparently, the Notice Inviting tender was issued on 02.09.2022 and the pre-bid meeting was slated to be on 09.09.2022 and the Bid due date was 03.10.2022. The Notice inviting Tender contained the time schedule for different stages as well as the important Conditions including the Condition of "Earnest Money Deposit (EMD)". The relevant extract from Notice inviting Tender is as under: -

Date of Issue of Tender Notice	02/09/2022 (5.00PM)
Start date-downloading of online Tender Document	02/09/2022 (5.30PM)
Pre-Bid Meeting	09/09/2022 (From 3.00PM to 6.00 PM)
Uploading of corrigendum	To be decided later.
Online submission date and tune (Bid Due Date)	07/10/2022 (up to 2.00 PM)
Offline submission of documents (Listed in Clause 14)- Last date and Time	On or before date of opening of Technical Bids
Time and Date of Opening of Technical Bids	07/10/2022 (4.00 PM)
Time & Date of Opening of	To be notified after completion of Technical Evaluation and

Financial Bid	approval from authority.
Cost of tender/ tender Fee	Rs. 25,000 (tender cost) + 4,500 (GST) = 29,500/- (Rupees Twenty Nine Thousand Five Hundred Only) (Inclusive tax 18%) through non-refundable Demand draft payable in favour of Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow, payable at Lucknow.
Earnest Money Deposit (EMD)	EMD an amount of Rs. 3336260 (Rupees Thirty-Three Lakhs Thirty-Three Thousand Two Hundred Sixty Only) per Package through Banker's Cheque, Account Payee Demand Draft Bank Guarantee/FDR payable in favour of' Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow, payable at Lucknow.
Performance Security	The selected Bidder must have to submit an irrevocable and unconditional guarantee from a Bank for a sum equivalent to 3% of the contract value in the form of Performance security in terms specified in the LOA. The amount of EMD of selected bidders shall be released without interest.

7. The petitioner participated in the pre-bid meeting held on 09.09.2022 along with ten other entities, who sought explanation to their respective queries. The petitioner also sought explanation & clarification on certain issues and all such clarifications was uploaded on 24.09.2022 on the E-tender portal.

8. That the last date for submission of the tender was extended upto 12/10/2022 by corrigendum dated 06/10/2022 and the Technical Bids were opened on 12/10/2022. The Technical Evaluation Committee in its Meeting held on 07/11/2022 has taken the final decision on the technical bids of the bidders and the decision of the Technical Evaluation Committee was uploaded on 09/11/2022 on E-Tender Portal, simultaneously the document Tender Summary Report was generated, which mentioned that the Financial Bid opening date is scheduled as 10/11/2022 at 2.30 PM.

9. As pleaded in the writ petition, the petitioner had uploaded its tender for all five Packages and had also submitted the hard copy of its Bids as well as hard copy of the EMD well within time. Apparently, the EMD was submitted in the form of Two Term Deposit Receipts issued by State Bank of India, Industrial Finance Branch, Mumbai. One Term Deposit Receipt bears the Fixed Deposit No. 41325333469 for an amount of Rs. 13345040/. The other Term Deposit Receipt bears the Fixed Deposit No. 41325334372 for an amount of Rs.3336260/-.

10. It seems the Technical Evaluation Committee in its decision dated 07/11/2022 found the Petitioner as non-responsive for all five packages because the EMD deposited by it was not in conformity with the terms of that Condition No. 12(c) of the tender as the EMD was not in the Form of Bankers Cheque, Account Payee Demand Draft. Bank Guarantee /FDR drawn and payable in favour of Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow payable at Lucknow.

11. Being aggrieved, the petitioner preferred the present writ petition.

12. This court has extensively heard both the counsels and has given its anxious thoughts to the issue in hand. Shri S.C. Mishra, learned Sr. Counsel for the petitioner has ably taken this court to the various facets of the present issue. Mr.

Mishra has strongly argued that the petitioner fulfills the requirement of clause 12 (c) of the Tender Document, in as much as even the query raised by the Respondent No.1 on 28.10.2022 was duly replied by the Petitioner on 31.10.2022, in which it was clarified that the State Bank of India, Industrial Finance Branch, Mumbai has already written to the Respondent 2 on 21.10.2022 that the fixed deposits are lien marked to Director, Disease Control and Forms, Department of Animal Husbandry, Uttar Pradesh, Lucknow on the request of the Petitioner. Mr. Mishra convincingly argued that the fixed deposit receipt submitted by the Petitioner has been lien marked and only the office of Director, Disease Control and Forms, Department of Animal Husbandly, Uttar Pradesh, Lucknow can encash the fixed deposit by submitting the original in bank and nobody else can encash the same and at the event of return of the fixed deposit to the Petitioner, the written instructions from the department for release of the fixed deposit are required. He further submits that when the fixed deposit is lien marked to any authority, the same should be treated as per Negotiable Instrument Act, 1881 and draws attention of this court to various sections to buttress his argument emphasizing that the fixed deposits submitted by the petitioner along with the bid are fulfilling the requirement of Clause- 12(c) of the tender document.

13. The Ld. Senior Counsel for the petitioner has also agitated and raised the issue of arbitrariness in the order passed by the respondents. According to him, the respondent vide their letter dated 28.10.2022 openly sought clarification from the petitioner relating to the FDR deposited as EMD, which was duly replied by the petitioner on 31.10.2022 and the State Bank of India further left no doubt as to the creation of lien on 3.11.2022. Thus, the Ld. Counsel submits that had the respondent's been not satisfied with the reply of the petitioner dated 31.10.2022 and the clarification of Bank dated 3.11.2022, then they could have informed the petitioner, who would have deposited the earnest money in other forms given in Clause-12(c) of the Tender Document, much before the last date of submission of earnest money deposit. Thus, he draws an analogy to show that the purpose was only to oust the petitioner from the tender process and as such the impugned order had been passed in most arbitrary manner.

14. On the other hand, the Ld. Addl. Advocate General Shri Ramesh Kumar Singh, Sr. Advocate assisted by the Ld. Addl. Chief Standing Counsel appearing for the Respondents, took this court to condition No. 14.12 of the Uttar Pradesh Procurement Manual to show the powers of the tendering authority to seek clarification & accept response from any bidder, pursuant to which clarification was sought from the petitioner. Mr. Singh strenuously took this court to the queries raised by the respondent and the reply given by the petitioner to explain that although in sum and substance the letters of the State Bank of India are to the effect that the petitioner had got issued two Term Deposit Receipts in its own name for the purpose of EMD of a tender and got the same earmarked in the name of Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, but it was not clear as to under what circumstances the Petitioner had got issued the letter dated 21/10/2022 from the State Bank of India particularly when the query regarding EMD deposited by it was raised by the Department by its letter dated 28/10/2022. According to Mr.

Singh, the Technical Evaluation Committee in its decision dated 07/11/2022 has found the Petitioner as non-responsive for all five packages for the reason that the EMD deposited by it was not in terms of that Condition No. 12(c) of the lender where the requirement, in specific and unambiguous terms, is that the EMD should be in the Form of Bankers Cheque, Account Payee Demand Draft, Bank Guarantee /FDR, which shall be payable in favour of Director, Disease Control & Farms, Department of Animal Husbandry , Uttar Pradesh, Lucknow payable at Lucknow. The term deposit receipt submitted by the petitioner not being a negotiable instrument was thus disputed to be satisfying the requisite condition.

15. The Ld. Sr. Counsel took this court to the details of the EMD's submitted by various other bidders to show that the respondent have uniformly and fairly applied to all the bidders of the same conditions and have rejected all those bidders, who have not conformed to the condition No. 12 (c) of the Tender document relating to EMD. Mr. Singh has raised multiple grounds for rejections of the present petition, including (i) petitioner although participated in the pre-bid meeting dated 09/09/2022, however did not raise any question with respect to EMD, so there was no confusion in the mind of the petitioner (ii) Condition No. 12(C) in specific and unambiguous terms, mentions that EMD has to be made in the name of Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh payable Lucknow at Lucknow, (iii) Term Deposit Receipt was got issued, by the Petitioner, in its own name from the State Bank of India, Industrial Finance Branch, Mumbai and the name of the Petitioner is printed on the said Deposit Receipts and the name of the Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh is mentioned in hand writing in the said Deposit Receipts, which is unacceptable. Further, the said term deposit itself says that "Only Computer generated receipts is valid" and cautions to not accept hand receipt", (iv) The Term Deposit Receipt provides for PAN of the Petitioner, only and there is no mention of PAN of the "Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh", (v) The terms deposit itself contains the following printed; "This is not a negotiable document", (vi) The respondent have never sought any clarification from the State Bank of India, regarding the Term Deposit Receipts submitted by the petitioner as EMD, however, surprisingly the State Bank of India issued the above said two letters addressed to "Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh", only. However, no copy of the same has been endorsed to the petitioner/ owner of the Term Deposit Receipt. (vii) The State Bank of India is no authority to interpret the terms and conditions of the Tender, in question, (viii) There is no correlation between the FDR and the letters issued by the State Bank of India, (ix) The term deposit contains the mode of operation as "SINGLE" and as such it could be the petitioner only, who could operate the same, whose name appears in the FDR, (x) the provisions of Negotiable Instrument Act as argued by the petitioner is not applicable to the Term Deposit to show that the same is negotiable etc.

16. The Ld. Sr. Counsel for the respondent has also cited various judgments including (i) Afcons

Infrastructure Limited Versus Nagpur Metro Rail Corporation Limited And Another reported in (2016) 16 SCC 818, (ii) Municipal Corporation Ujjain and Another Versus BVG India Limited And Others reported in (2018) 5 SCC, (iii) Global Energy Limited and Another Versus Adani Exports Limited and Others reported in (2005) 4 SCC 435, (iv) LeelaDhar Gera and Another vs. Special Judge SC ST Act/Additional District Judge Bareilly reported in 2011(5) ADJ 604 to further his argument.

17. Thus, as per the respondent, since the FDR are not in the name of the Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh and are presented as EMD for the Tender then that will be odd man out for the reason that will not be in conformity of Condition No. 12(c) of Tender for the reason that the Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh the Authority when once takes a decision to forfeit EMD of any bidder then he has the right to obtain the amount forfeited directly from the concerned Bank without any reference and consent of the bidder which had furnished the EMD. However, in the present case, when the EMD is given in the nature as the Petitioner had submitted i.e. Term Deposit Receipt issued in the name of the Petitioner itself and lien marked in the name of the Director. Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, then the Authority would not be in a position to realize the money from the Bank just on intimation to the Bank that EMD is forfeited. This is said so for the reason that said Term Deposit Receipts being in the name of the Petitioner and singly operated, though lien marked to the Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh will be allowed to be operated by the Petitioner only as its name is printed on them and further that they are not negotiable. That being so the Authority would get the money of forfeited EMD only on the mercy of the bidder, which is not the intention of Condition No. 12(c) of Tender. Thus, it has been submitted by the respondent that the present writ petition as being devoid of any merits, may be dismissed and the interim order dated 10.11.2022 may be vacated.

18. This court has given its anxious thoughts to the rival contentions and the facts of the present case. The issue relating to the award of tender or tender documents, engaging the attention of this court is no longer res integra. Further, the extent of judicial review of the award of tender or tender documents comes with its own sets of limitations, considering the fact, that a contract is a commercial transaction and any evaluation of any such tenders would also be a commercial function. The Hon'ble Supreme Court time and again has kept a clear approach of not interfering in the tender jurisdiction of the government bodies or tendering authorities, unless the court senses any disregard of principles of natural justice or presence of any arbitrariness or malafide process.

19. The Hon'ble Supreme Court in **Tata Cellular vs. Union of India** (1994) 6 SCC 651, held that it cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations to the exercise of the power of judicial review. The Apex Court after referring to various judgments holding the ground, held at paragraph 94 of

the judgment that the principles for judicial review or interference would be; to quote:

" 94. The principles deducible from the above are:

(1) The modem trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

20. Explaining further, the limitation of Judicial review in tender matters, it would be appropriate to quote the judgment of the Apex Court in **Jagdish Mandal vs. State of Orissa, (2007) 14 SCC 51,** wherein the court held that, since the parties are governed by principles of commercial prudence, the extent of principles of equity and natural justice have to stay at a distance. To the same effect is the judgment passed by the Supreme Court in **Silppi Constructions Contractors vs. Union of India and other**s 2019 SCC OnLine SC 1133, wherein again the Supreme Court held that the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. Courts must realize the havoc and loss to the public exchequer that needless interference in commercial matters can cause. Moreover, the Hon'ble Supreme court has put to certain caveat on the entertaining of a writ petition in this kind of matter in the case of **National High-Speed Rail Corporation Limited vs. Montecarlo Limited,** 2022 SCC OnLine SC 111, wherein the the Supreme Court observed that while entertaining a writ or granting stay which ultimately may delay the execution of the mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State or its agencies from discharging the constitutional and legal obligation towards the citizens.

21. The argument of the Ld. Senior counsel for the petitioner, is twofold. His first limb of argument relates to the event of fixed deposit receipt submitted by the Petitioner, which has been lien marked in favour of the office of Director, Disease Control and Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow and the second limb relates to the circumstances in which these FDR were

lien marked and deposited with the Respondent.

22. As to the circumstances in which these FDR were lien marked and deposited with the respondent, it has been argued by the Ld. Senior Counsel of the petitioner that the respondent vide their letter dated 28.10.2022 has sought clarification from the petitioner relating to the FDR deposited as EMD, which had been duly replied by the petitioner on 31.10.2022. Moreover, the State Bank of India acknowledged the creation of lien on 03.11.2022. Thus, it has been argued that the respondent's would had been satisfied with the lien being marked on the FDR and had they not been satisfied, they could have informed the petitioner, who would have deposited the earnest money in other forms given in Clause-12(c) of the Tender Document, much before the last date of submission of earnest money deposit. Thus, according to the petitioner, the decision of tender being "non-responsive" by the Technical Evaluation committee, was merely to oust the petitioner from the tender process and as such the impugned order had been passed in most arbitrary manner. In the first blush the argument seems to be very attractive, however a deeper enquiry would reveal that the respondent's have never been satisfied with the lien being marked on the FDR to be in satisfaction of the EMD as provided under clause 12(c) of the Tender Document. The queries raised by the Respondent in clear and unequivocal terms, have mentioned and put the petitioner on caveat that the FDR in the name of the petitioner was non-negotiable instrument and was not as per clause 12(c) of the Tender Document. It seems the petitioner relied heavily on the confirmation letters issued by the State Bank of India and in their own words believed that requirement of 12(c) has been met by them by submitting the EMD in the form of lien marked on the FDR. Thus, it could not be said that the respondent were ever satisfied with the kind of EMD being provided by the petitioner. In fact, the petitioner has tried to beat around the bush, when the respondent asked the petitioner to clarify as to why the EMD was not in the name of the Authority and not as per the terms of the Tender Document. Thus, on the facts of the case, there is no arbitrariness in the act of the respondent and apparently it seems the petitioner, notwithstanding the clarification sought by the respondent, went ahead to take a chance of continuing the EMD in the form of a lien created on the FDR drawn in their own name. This court also finds certain force in the argument of the Ld. Sr. Counsel for the respondent, to the effect that, when the petitioner were themselves confident about the proposition of EMD being submitted in the form of lien created on a FDR in their own name, under what circumstances the petitioner got issued the confirmation letter dated 21.10.2022 from the State Bank of India and that too much before the clarification dated 28.10.2022 sought by the Respondent. Further, it is not the case of the petitioner that the Technical Evaluation Committee has accepted the tender of any proposed tenderer, who have offered EMD similar to as offered by the petitioner or has accepted tender of any person, who has submitted EMD not commensurate to the provisions of clause 12(c) of the tender document.

23. The next question, which falls for consideration of this court is as to whether the Earnest Money Deposit submitted by the petitioner fulfil the requirement of clause 12 (c) of the Tender Document? Apparently, clause 12 (c) of the tender Document read as follows:

" Earnest Money Deposit of Rs.33,36,260/-(Rupees Thirty three Lakhs

Thirty three Thousand Two Hundred Sixty Only) for each package severally in the form either of Account payee Demand Draft, Fixed Deposit Receipt, Banker's Cheque or Bank Guarantee from Scheduled/Nationalized Bank, drawn in favour of "Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow payable at Lucknow shall be submitted by Bidders. Bidders should submit separate EMD for separate Bids for separate Packages. The format for Bank Guarantee has been provided in Section-IX of this Tender Document."

A plain reading of the aforesaid terms would lead us to three things, (i) EMD is for Rs. 33,36,260/- for each package, (ii) EMD has to be in the form of Account payee Demand Draft, Fixed Reposit Receipts, Banker's Cheque or Bank guarantee from Scheduled/Nationalized Bank and (iii) the instrument mentions in (ii) shall be in favour of Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow payable at Lucknow.

24. Admittedly, the petitioner submitted two Term Deposit Receipt, one amounting to Rs. l,33,45,040/-and another amounting to Rs3336260/- for the five clusters/packages. Although, clause 12(c) provides for submitting EMD severally for each cluster, but since neither of the parties argued on the said point, this court would not tread on the path to examine as to whether the two fixed deposit receipts submitted by the petitioner could have been considered as a EMD for all the five cluster/packages. Interestingly, this court finds that these FDR from the Stale Bank of India, Industrial Finance Branch, Mumbai is in the name of the Petitioner printed and not in the name of "Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, Lucknow payable at Lucknow". It has been argued by the Ld. Sr. Counsel for the petitioner that lien have been marked in favour of the respondent by the Bank and as such the same are negotiable and should be considered at par with the instrument mentioned in clause 12 (c) of the Tender document. This court finds it difficult to accept the submission of the petitioner as the Tender evaluation Committee in no uncertain terms have refused to accept the EMD submitted in the form of a lien crated on a FDR to be in terms of clause 12 (c) of the Tender Document. As to whether this court can go into the said decision of the committee, the Hon'ble Supreme Court has already drawn a lakshman Rekha for all such consideration. Further, the Supreme Court in **Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and other** (2016) 8 SCC 622, held that if courts take over the decision-making functions of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby re-writing the arrangement, it could lead to all sorts of problems. In that case, the Hon'ble Apex Court held that when there is a condition that any bid not accompanied by an acceptable Bank Guarantee shall be rejected by the employer as non-responsive, then the High Court holding such a condition as non-essential has impermissibly rewritten the condition since the same was an ex-facie mandatory condition for the employer. In the same line of Judgment is the case of **Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and another** (2016) 16 SCC 818, wherein the Supreme Court held that the owner of the project having authored the tender documents, is

the best person to understand and appreciate its requirements and interpret its documents, and a constitutional court needs to appreciate the tender documents, unless there is mala fide or perversity in the understanding of the terms of the tender conditions.

25. Thus, this court refrains itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer, who has offered to submit the EMD in the form of lien created on an FDR in his name. Recently, the Supreme Court in the case of **M/S. N.G. Projects Limited vs. M/S. Vinod Kumar Jain and others,** (2022) 6 SCC 127, observed that, the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. The Supreme Court further observed that when it is not the case of the writ petitioner, whose bid was not accepted by the tender authority, that action of the tender authority was actuated by extraneous considerations or was malafide, then, only because the view of the tender authority was not to the liking of the writ petitioner, such decision does not warrant a court for interference in a grant of the contract to a successful bidder.

26. The Technical evaluation Committee has termed the tender of the petitioner as "non-responsive", since the FDR are not in the name of the Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh. The respondent before this court have expressed their reservation that, in case the respondent, takes a decision to forfeit EMD of any bidder , as per the terms of the Tender Document, then they have a right to obtain the amount forfeited directly from the concerned Bank without any reference and consent of the bidder which had furnished the EMD. However, in the present case, when the EMD is given in the nature as the Petitioner had given i.e. Term Deposit Receipt issued in the name of the Petitioner itself and lien marked in the name of the Director. Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, then the Authority would not be able to realize the money from the Bank just on intimation to the Bank that EMD is forfeited, because the said Term Deposit Receipts being in the name of the Petitioner and singly operated, though lien marked to the Director, Disease Control & Farms, Department of Animal Husbandry, Uttar Pradesh, will be allowed to be operated by the Petitioner only as its name is printed on them. That being so, the Authority would get the money of forfeited EMD only on the mercy of the bidder, which is not the intention of Condition No. 12(c) of Tender.

27. This court is of the view that the author of the tender documents, that is the tender authority, has been given a certain degree of leverage by the courts, being the best person to understand its requirements. Hence, a mere disagreement with the decision-making process of the tender authority is not a reason for a constitutional court to interfere with the same. We however strike a note of caution for the authorities to guide the timely approaching eligible bidders, fallen in confusion, so as to promote the object of healthy competition, as is not the case at hand. The reason being that the Director had reiterated the EMD to be in accordance with the terms of the Bid document vide letter dated 28.10.2022 and the burden of guidance was aptly discharged.

28. For all the above reasons, the present writ petition fails as the same is

devoid of any merits. Hence, the writ is dismissed. The interim order dated 10.11.2022 stands vacated. The respondent is free to go ahead with the Tendering process as per law. In the facts of the case, there shall be no order as to cost.

(2022) 12 ILRA 261
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.12.2022

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ C No. 8349 of 2022

Anita ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Akhilesh Kumar Srivastav, Desh Raj Chaurasiya, Priyanka Singh

Counsel for the Respondents:
C.S.C., Atul Kumar Dubey, Dev Mani Mishra

A. Civil Law - UP Panchayat Raj Act, 1947 – Section 12-C – Election petition for recounting – Maintainability – No prayer sought for setting aside the election of Pradhan – Only prayer for re-counting of votes was made – Election petition neither contains any specific pleading nor there is any evidence shown to support the case in the election petitioner – Effect – Once the respondent no. 6 is not aggrieved by the election, as there is no prayer for setting aside the same then there would be no occasion for passing an order for recounting of votes as the same will amount to be a futile exercise – An application u/s 12-C of the Act, 1947 confining the prayer only for recounting and nothing else, would not be maintainable. (Para 15, 23 and 24)

Writ petition allowed. (E-1)

List of Cases cited:

1. Udey Chand Vs Surat Singh & anr.; (2009) 10 SCC 170

2. Arikala Narasa Reddy Vs Venkata Ram Reddy Reddygari & anr.; (2014) 5 SCC 312

3. Writ C No. 63380 of 2011; Amit Narain Rai Vs St. of U.P. & ors. decided on 09.04.2012

4. Civil Misc. Writ Petition No. 47982 of 2009; Satyendra Pal Singh Vs St. of U.P. & ors. decided on 13.01.2010

5. Gurusewak Singh Vs Avtar Singh & ors.; 2006 4 SCC 542

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

1. The present writ petition has been preferred for quashing of the judgment and order dated 08.11.2022 passed by the District Judge, Pratapgarh in the revision filed by the petitioner under Section 12-C(6) of U.P. Panchayat Raj Act, 1947 (hereinafter referred to as 'the Act, 1947') holding the revision is not maintainable and the order dated 15.10.2022 passed by the respondent no. 3 i.e. the Prescribed Authority/ Sub Divisional Officer, Patti, District Pratapgarh in Election Petition filed under Section 12-C of the Act, 1947 filed by respondent no. 6 by which a direction was issued for re-counting of the votes and with a further prayer to issue an ad-interim mandamus staying the operation and implementation of the judgment/order dated 15.10.2022 passed by respondent no. 3.

2. Notices to the respondent nos. 7 to 11 are hereby dispensed with as they had neither filed the election petition nor raised any objection against the declaration of result of the election in favour of the petitioner. The respondent no. 6, who has filed the election petition is represented by her counsel.

3. With the consent of the parties, the present writ petition is decided at the admission stage.

4. The brief facts of the case as per the petitioner are that the polling was held on 19.04.2021 for election on the post of Pradhan in village Ashapur Athgawan, Block Baba Belkharnath Dham, Pargana and Tehsil Patti, District Pratapgarh and total 922 votes were casted amongst the seven persons, who contested the election for the post of Pradhan including the petitioner and the respondent no. 6. All the parties had appointed their Counting Agent, who were present at the time of counting of the votes.

5. The counting of the votes was held on 03.05.2021 in the presence of aforesaid duly authorized Counting Agents of respective contestants. Out of total votes, 216 votes were found to be casted in favour of the petitioner and the respondent no. 6 each, under the surveillance of CCTV camera on single table. When the equal votes were found casted in favour of the petitioner and the respondent no. 6, then the duly authorized Counting Agent of respondent no. 6 i.e. husband of respondent no. 6 namely Mr. Sushil Kumar made an oral request for re-counting of the votes before the respondent nos. 4 & 5 which was accepted and twice the votes were counted and both the time, the result was found to be the same.

6. In the event of equal votes, casted in favour of the petitioner and the respondent no. 6, the Returning Officer while following the procedure as provided under Rule 108 of the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994 (hereinafter referred to as the Rules, 1994 declared the result by adopting the procedure of lot and in the lot, the name of the petitioner had come so one additional vote was added in favour of the petitioner and the results were declared.

7. The petitioner after declaration of the result and issuance of certificate has taken the oath for the post of pradhan. After about two months of the declaration of the result, the election petition was filed by the respondent no. 6 on 01.07.2021 with a solitary prayer of recounting of votes.

8. Learned counsel for the petitioner has submitted that as per Section 12 C(1) of the Act, 1947 which provides for application of questioning the elections also mentions the grounds for challenging the election whereas in the present case, the respondent no. 6 has not challenged the election on none of the grounds provided under Section 12-C of the Act, 1947 but made a prayer only for recounting of the votes, which could be an ad-interim prayer in the election petition and once the respondent no. 6 has not challenged the election, the election petition is misconceived and is liable to be rejected. Section 12 C(1) provides for questioning the elections which has not been questioned in the election petition preferred by the respondent no. 6.

9. It is further submitted that in the election petition, the vague allegations have been made that polling agent of respondent no. 6 made a representation to the Returning Officer for recounting but neither the said representation has been enclosed in the list of the document filed along with the election petition nor any representation was made by the respondent no.6 or on her behalf to any higher authority that the Returning Officer had turned down their request for recounting of votes.

10. It is further submitted that Form 46 indicates 81 invalid votes. Respondent no. 6 in her election petition has alleged

that out of 81 invalid votes, maximum votes were casted in favour of respondent no. 6. In support of the said averment, no material or evidence has been enclosed alongwith the election petition.

11. It is further submitted that the election petition has been filed on vague and bald allegations just for conducting a fishing and roving enquiry, which is not permissible as per the law laid down by Hon'ble the Supreme Court in the case of ***Udey Chand Vs. Surat Singh and another*** reported in ***(2009) 10 SCC 170*** and the judgment in the case of ***Arikala Narasa Reddy Vs. Venkata Ram Reddy Reddygari and Another*** reported in (2014) 5 SCC 312.

12. On the other hand, learned counsel for the respondent no. 6 has submitted that the result was declared without adopting the procedure of lot as provided under Rule 108 of the Rules, 1994 and there is an overwriting on Form 46 which makes the counting of votes doubtful and there is no illegality in the order passed by the Prescribed Authority for recounting of votes.

13. It is further submitted that out of 81 votes shown to be invalid votes most of them were casted in favour of the respondent no. 6. Procedure of lot was not valid without there being any consent taken from the agent of respondent no. 6.

14. Learned Standing Counsel has submitted that there is no illegality in the revisional order as well as the in the order passed by the Prescribed Authority for recounting of votes.

15. Considering the submissions raised by learned counsel for the respective parties, going through the record, the provisions of the Act, 1947 as well as the Rules, 1994 and the judgments cited by learned counsel for the petitioner, the election petition preferred by the respondent no. 6 is only for recounting of votes without there being any prayer for setting aside the election and declare the candidate accordingly. The solitary prayer for recounting of votes could be an ad-interim prayer in the election petition with a prayer as provided under Section 12-C(4) of the Act, 1947 for setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner, but there is no such prayer made by the respondent no. 6 in the election petition. Once the respondent no.6 is not aggrieved by the election, as there is no prayer for setting aside the same then there would be no occasion for passing an order for recounting of votes as the same will amount to be a futile exercise.

16. In the election petition preferred by the respondent no. 6, none of the grounds as provided under Section 12-C has been taken. For the convenience, Section 12-C (1)-(4) of the Act, 1947 are quoted hereinbelow:-

"12-C Application for questioning the elections. (1) The election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of a Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that -

(a) the election has not been a free election by reason that the corrupt

practice of bribery or undue influence has extensively prevailed at the election; or

(b) that the result of the election has been materially affected-

(i) by the improper acceptance or rejection of any nomination, or

(ii) by gross failure to comply with the provisions of this Act or the rules framed thereunder.

(2) The following shall be deemed to be corrupt practices of bribery or undue influence for the purposes of this Act-

(A) Bribery, that is to say, any gift, offer or promise by a candidate or by any other person with the connivance of a candidate of any gratification of any person whomsoever, with the object, directly, or indirectly of including ?

(a) a person to stand or not to stand as, or withdraw from being, a candidate at any election; or

(b) an elector to vote or refrain from voting at an election; or as a reward to ?

(i) a person for having so stood or not stood or having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting.

(B) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or of any other person with the connivance of the candidate with the free exercise of any electoral right;

Provided that without prejudice to the generality of the provisions of this clause any such person as is referred to therein who ?

(i) threatens any candidate, or any elector, or any person in whom a candidate or any elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause.

(3) This application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.

Explanation ? Any person who filed a nomination paper at the election whether such nomination paper was accepted or rejected, shall be deemed to be a candidates at the election

4) The authority to whom the application under sub-section (1) is made shall in the matter of ?

(i) hearing of the application and the procedure to be followed at such hearing;

(ii) setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner, have such powers and authority as may be prescribed."

17. As far as the submission of learned counsel for the respondent that no consent was taken from the Polling Agent of respondent no.6 while adopting the procedure of lot as provided under Rule 108 of the Rules, 1994 is also not tenable as there is no such requirement under Rule 108 of the Rules, 1994.

18. Rule 108 of the Rules, 1994 provides that if there are equal number of votes, the Returning Officer will adopt the procedure of lot forthwith and proceed as if

the candidate in whose favour, the lot falls would be considered to have received an additional vote, for the convenience, the Rule 108 of the Rules, 1994 is quoted hereinbelow:-

"108. Equality of votes:- If after the counting of the votes is completed an equality of votes is found to exist between any candidates and the addition of one vote will entitle any of those candidates to be declared elected, the Nirvachan Adhikari shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received an additional vote."

19. The submission that there is an overwriting on Form 46 in the election petition is also not correct as there is no overwriting on Form 46 which has been enclosed as annexure no. 4 to the writ petition which has not been disputed by the learned counsel for the respondent no. 6 that the Form 46 enclosed by the petitioner is a forged document.

20. The submission of learned counsel for the respondent no. 6 that procedure for lot was not adopted is a vague averment in the election petition and the said submission also does not find support from the finding given in the order dated 15.10.2022 passed by the Prescribed Authority wherein a finding has been given that both the candidates had got the equal votes and from the record it has been found that one additional vote fell in favour of the petitioner but the same has been doubted by the Prescribed Authority merely on the ground that it is not disclosed as to by which order the procedure provided under Rule 108 of the Rules, 1994 was adopted, ignoring completely that there is no such requirement of passing an order under Rule 108 of the Rules, 1994 whereas, Rule 108 of the Rules provides that the Returning Officer will adopt the procedure of lot forthwith. The respondent no. 6 has not challenged this order passed by the Prescribed Authority that the findings given are wrong.

21. As per the law settled by Hon'ble the Supreme Court which has been followed by this Court in Writ C No. 63380 of 2011 in the case of Amit Narain Rai Vs. State of U.P. and others vide judgment and order dated 09.04.2012 and in Civil Misc. Writ Petition No. 47982 of 2009 in the case of Satyendra Pal Singh Vs. State of U.P. and others vide judgment and order dated 13.01.2010 wherein this Court has held that a petition for recount must contain adequate statement of material facts on which the election petitioner relies in support of his allegations and it must also be supported by some contemporaneous evidence to show any irregularity or illegality in the counting which are lacking in the present case as the respondent no. 6 in her election petition has not given any evidence in support of her submission to show any irregularity or illegality in the counting.

22. Hon'ble the Supreme Court in the case of Gurusewak Singh Vs. Avtar Singh and others reported in 2006 4 SCC 542 wherein it has been held that although we need not go into the law of re-counting, as the said question does not arise before us, we may notice a decision of this Court in Chandrika Prasad Yadav v. State of Bihar wherein it is stated: (SCC p. 337, para 20)

"20. It is well settled that an order of re-counting of votes can be passed when the following conditions are fulfilled:

(i) a prima facie case;

(ii) pleading of material facts stating irregularities in counting of votes;

(iii) a roving and fishing inquiry shall not be made while directing re-counting of votes; and

(iv) an objection to the said effect has been taken recourse to".

23. In the present case, the election petition neither contains any specific pleading nor there is any evidence shown to support the case in the election petitioner.

24. It is found that respondent no. 6 made no prayer for setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner. In these circumstances, any application under Section 12-C of the Act, 1947 confining the prayer only for recounting and nothing else, would not be maintainable. It has also been seen that the election petition does not plead any of the grounds challenging the election as prescribed under Section 12-C of the Act. There is also no reason to disbelieve that the Returning Officer adopted the procedure of lot in the event of equal votes in any manner not permissible under the law. He has to proceed with the procedure of lot 'forthwith' without there being any requirement of order in writing.

25. In view of the discussions made hereinabove, the writ petition is allowed. The impugned orders dated 08.11.2022 & 15.10.2022 passed by the District Judge, Pratapgarh and the respondent no. 3 i.e. the Prescribed Authority/Sub Divisional Officer, Patti, District Pratapgarh respectively are hereby quashed.

(2022) 12 ILRA 266

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 20.12.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ C No. 8505 of 2022

Balkaran Das Gupta ...Petitioner

Versus

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

Counsel for the Petitioner:

Sridhar Awasthi, Sr. Advocate

Counsel for the Respondents:

A.S.G.I., C.S.C.

A. Constitution of India, 1950 – Article 226 – Writ – Legal impediment to exercise discretionary power – Public law remedy, whether is available for private-law right – Held, damages/compensation can be awarded by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India only in case some infringement of public-law right is involved and found – For mere infringement of private-law right, public-law remedy under Article 226 of the Constitution of India is not available. (Para 8)

B. Constitution of India – Article 226 – Writ – Infringement of private-law right – Damage for demolition of construction done by the Railway authority was claimed – Exercise of discretionary power, extent of – Held, determination of the issue as to where exactly the building in question is situated, whether on the land belonging to the petitioner or on the railway land, will necessary require leading of the evidence by both the parties, which will not be permissible in exercise of jurisdiction of this Court under Article 226 of the Constitution of India. (Para 11)

C. Constitution of India, 1950 – Article 226 – Writ – Disputed question of fact, how far can be dealt with – Held, the disputed question of facts are not permissible to be delved into by the High Court while exercising its jurisdiction under Article 226 of the Constitution of India for the reason that the writ petitions are generally decided on the basis of uncontroverted facts to be deduced from the affidavits which the parties to a dispute are called upon to file – It is well settled that relief under Article 226 of the Constitution of India is not available for deciding disputes for which a remedy under general civil law is available to a party approaching the Court. (Para 9)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Chairman, Railway Board & ors. Vs Chandrima Das & ors.; (2000) 2 SCC 465

2. Common Cause, A Registered Society Vs U.O.I.; (1999) 6 SCC 667

3. H.S.E.B. & ors. Vs Ram Nath & ors.; (2004) SCC 793

4. St. of Mizoram & ors. Vs Hrangdawla & anr.; (2011) 3 Gauhati Law Reports 444

5. St. of Kerala & ors. Vs Safia; (2021) SCC Online Ker 3283

6. K.S. Puttaswamy & anr. Vs U.O.I. & ors.; (2017) 10 SCC 1

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Saurabh Srivastava, J.)

1. Whether in exercise of writ jurisdiction under Article 226 of the Constitution of India damages/compensation for alleged demolition of certain constructions belonging to the petitioner done by the State or any State instrumentality can be awarded in the facts of this case, is the issue, which engages our attention in this petition.

2. Heard Shri Sudeep Seth, learned Senior Advocate, assisted by Shri Sridhar Awasthi, for the petitioner, learned counsel representing the Union of India/Railways and learned counsel representing the State-respondents and perused the records available before us on this writ petition.

3. The petition has been filed with the allegation that certain constructions existing on khasra plot no.1689 (New No.163) situate in Tehsil-Rudauli, District-Ayodhya were demolished by the Railways authorities on 27.09.2019 without giving any show cause notice or prior information to the petitioner, that too, in his absence. It has been argued by the learned Senior Advocate, Shri Sudeep Seth representing the petitioner that on account of illegal demolition undertaken by the respondents, the petitioner has been deprived of his right of property to use the same in derogation of Article 300-A of the Constitution of India. Further submission is that the petitioner was never issued any notice prior to demolition; neither any proceedings under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 were undertaken, nor have the respondents followed the provisions of Railways Act, 1989 and the Indian Railways Court for Engineering Department. It has, thus, been argued by the learned counsel for the petitioner that by resorting to illegal demolition existing on khasra plot no.1689 (New No.163) the respondents have since breached Article 19 (1)(g) of the Constitution of India and such action is also in defiance of the constitutional right of the petitioner and enshrined under Article 14 of the Constitution of India as the same is completely arbitrary, hence they are liable

to be saddled with compensation and damages to be paid to the petitioner to the tune of Rs.50 lakh.

4. The facts, which have been narrated in the writ petition, are that khasra plot nos.1689 and 1688 (New Nos.163 and 164 respectively) have been inherited by the petitioner from his ancestor where he has made certain constructions and have been earning rent by leasing out the building to various tenants which is his only source of livelihood and by undertaking demolition respondents have thus unlawfully deprived the petitioner of his fundamental right under Article 19(1)(g) of the Constitution of India. It has, thus, been argued that since it is a case where constitutional rights of the petitioner have been infringed by the respondents by demolishing the construction belonging to him, hence even under public-law remedy under Article 226 of the Constitution of India, the respondents can be held liable to pay compensation/damages.

5. The petition, however, has been opposed by the learned counsel representing the respondents, who have submitted that the writ petition is highly misconceived for the reason that even if the assertions made by the petitioner are assumed to be correct, it will not be possible for this Court to award damages/compensation to the petitioner in exercise of its jurisdiction under Article 226 of the Constitution of India. Submission on behalf of the respondents, thus, is that the writ petition is liable to be dismissed at its threshold.

6. Considered the submissions advanced by the learned counsel representing the respective parties.

7. The first and foremost question, which falls for determination of this Court in these proceedings, is as to whether for the prayers made in the writ petition this Court ought to exercise its jurisdiction, which necessarily is discretionary, under Article 226 of the Constitution of India. In this regard, we find that there are two legal impediments before the petitioner which are to be sailed across by him if this petition is to succeed. The first such impediment is that any claim for damages/compensation for any damage caused to the property in question will necessarily require the Court to investigate various disputed facts, which, in our opinion, will not be permissible for the simple reason that such determination requires detailed examination of evidence which can better be made in a civil suit, which may be tried before a court of competent civil jurisdiction.

8. The second legal impediment, which comes in the way of the petitioner seeking the relief as prayed for in this petition is that damages/compensation can be awarded by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India only in case some infringement of public-law right is involved and found. For mere infringement of private-law right, public-law remedy under Article 226 of the Constitution of India is not available.

9. No doubt, this Court exercises very wide powers under Article 226 of the Constitution of India in the matter of issuing writs, however, there are well recognized limitations which the Court has to be conscious of while it is called upon to exercise its writ jurisdiction. One of the such limitations, which is rather self imposed limitation/restriction which needs to be observed by this Court while exercising its discretionary powers under

Article 226 of the Constitution of India, is that it should not enter into an issue which for its determination requires the parties to adduce evidence. The disputed question of facts, thus, are not permissible to be delved into by this Court while exercising its jurisdiction under Article 226 of the Constitution of India for the reason that the writ petitions are generally decided on the basis of uncontroverted facts to be deduced from the affidavits which the parties to a dispute are called upon to file. It is well settled that relief under Article 226 of the Constitution of India is not available for deciding disputes for which a remedy under general civil law is available to a party approaching the Court.

10. If we consider the reliefs as prayed for in this writ petition on the aforesaid well recognized principles evolved for exercising discretionary jurisdiction under Article 226 of the Constitution of India quo the facts pleaded in the writ petition, what we find is that determination of the issue as to whether alleged demolition of the building in question was done by the respondents in breach of law or not will require adjudication of factual aspects. The petitioner has though made mention in the writ petition of two khasra plot numbers, namely, khasra plot no.1689 (New No.163) and khasra plot no.1688 (New No.164), however, it has been stated that he renovated the building and raised constructions on khasra plot no.1689 (New No.163) and leased them out to various tenants, however, there appears to be some dispute in relation to area of these two khasra plot numbers. In the writ petition at one place, it has been stated by the petitioner that the petitioner's predecessor in interest got the land through Ezzaztnama executed by the erstwhile Zamindar in respect of 6 Biswa area of khasra plot no.1689 and also in respect of 6 Biswas out of total area of 12 Biswas of khasra plot no.1688, however, at another place, it has been stated by the petitioner that area of 6 Biswa of khasra plot no.1689 has been recorded in the name of the predecessor in interest of the petitioner but area of khasra plot no.1688 which was 12 Biswas had been mistakenly recorded as 6 Biswas. It has also been stated in para 17 of the writ petition that in khasra plot no.1688 names of grand father and father of the petitioner had not been recorded in the revenue records after consolidation proceedings were held in the year 1969. Thus, as per the averments made by the petitioner himself so far as khasra plot no.1688 (new no.164) is concerned initially an are of 6 Biswa was given to the predecessor in interest of the petitioner through Ezzaztnama by the Zamindar, however the said land was not recorded in the revenue records in the name of the predecessor-in-interest of the petitioner on completion of the consolidation proceedings held in the year 1969.

11. It is also to be noted that as per the averments made in the writ petition khasra plot nos.1689 and 1688 are contiguous to each other and further, various development projects have been carried out in past in the vicinity of khasra plot no.1689 including widening of sub railway track and road adjacent to the railway line in question. We may also note that as per the averments made by the petitioner himself, on enquiry from the opposite parties he was told that his building was constructed on railway land. Thus, determination of the issue as to where exactly the building in question is situated whether on the land belonging to the petitioner or on the railway land, will

necessary require leading of the evidence by both the parties which will not be permissible in exercise of jurisdiction of this Court under Article 226 of the Constitution of India. From the mentioned facts it is more than clear that the petitioner by instituting these proceedings calls upon us to enter into disputed questions of fact, investigation of which will necessarily involve leading evidence. Accordingly, on this count alone, we are unable to persuade ourselves to entertain this writ petition. It also appears that there is a dispute between the petitioner and his brother-respondent no.7-Prakash Chandra Gupta in respect of the property as has been admitted in the writ petition itself and that both these persons are said to be co-owners of the property in question.

12. Shri Seth, learned Senior Advocate has relied upon various judgments of Hon'ble Supreme Court and some High Courts to impress upon the Court that since it is a case of infringement of 19 (1)(g) of the Constitution of India as such even in public-law remedy under Article 226 of the Constitution of India this Court can award damages/compensation. The first judgment cited by the learned counsel for the petitioner is the case of **Chairman, Railway Board and others vs. Chandrima Das and others, reported in (2000) 2 SCC 465.** So far as the said case is concerned, Hon'ble Supreme Court has held that public-law remedies have to be extended to the realm of tort and the Court can award compensation to a person who suffers personal injuries amounting to tortious act at the hands of the officers of the Government, however, **Chandrima Das (supra)** was a case where damages were claimed by instituting the proceedings under Article 226 of the Constitution of India where violation of any ordinary right of a person was not involved but it was found a case of violation of fundamental right of a person guaranteed under Article 21 of the Constitution of India as the compensation was claimed for the victim who was gang-raped by many including employees of the Railways in a room at Yatri Niwas at a Railway Station.

In the facts of the said case, it was held that damages/compensation can be awarded against State or State instrumentalies in case violation of fundamental rights under Article 21 of the Constitution of India is established. There can not be any quarrel so far as the law laid down in the case of **Chandrima Das (supra)** is concerned, where relying upon the judgment of Hon'ble Supreme Court in the case of **Common Cause**, **A Registered Society vs. Union of India,** reported in (1999) 6 SCC 667, it was held that the High Court has jurisdiction not only to grant relief to enforce fundamental rights but also for 'any other purpose' which would include enforcement of public duties by public bodies. It has further been held that essentially under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. Hon'ble Supreme Court in the case of **Common Cause (supra)** further held that judicial review of every executive or administrative action of the State or other statutory or public bodies is permissible.

13. Hon'ble Supreme Court in cases relating to custodial death or medical negligence has observed that compensation under public law domain may be awarded but for such exercise of jurisdiction under Article 226 of the Constitution of India the party claiming damages or compensation

has to establish violation of fundamental rights.

14. No doubt, the allegations in this petition is against the railways authorities, however, the petitioner has pleaded violation of Article 19(1)(g) of the Constitution of India by stating that he had tenanted the building in question and he was earning rent. However, what Article 19(1)(g) of the Constitution of India guarantees right to practice any profession or carry out any occupation or trade or any business. There is no doubt that by renting the property its owner may gain its livelihood, however, the same in itself cannot, in our opinion, amount to any profession or occupation or trade or business. In this view, our opinion is that at the most, if the facts pleaded by the petitioner are proved, the petitioner may have some cause of action for breach of property rights alone. Thus, for breach of property rights, in our opinion, damages or compensation, if any, can be awarded by a court of competent civil jurisdiction on a suit to be instituted for the said purpose and not in proceedings under Article 226 of the Constitution of India which primarily operates in public-law realm.

15. Shri Seth, learned Senior Advocate has relied upon yet another judgment of Hon'ble Supreme Court in the case of **H.S.E.B. and others vs. Ram Nath and others,** reported in **(2004) SCC 793.**

16. We are afraid, the said judgment does not come to the rescue of the petitioner for the simple reason that it was a case of death of a child where compensation was awarded, however, the said judgment also does not discuss the scope of public-law remedies under

17. Reliance has also been placed by the learned counsel for the petitioner on a judgment in the case of **State of Mizoram and others vs. Hrangdawla and another,** reported in **(2011) 3 Gauhati Law Reports 444.** In the said case it has been held that public-law remedy serves a different purpose than private law remedy. It has also been held that public-law remedy for rights guaranteed under Article 21 of the Constitution of India is available to assure that citizens of this country to live under a legal system where their rights and interest are protected. So far as the legal principle enunciated in the said case of **State of Mizoram and others (supra)** is concerned, there cannot be any dispute, however, for invoking public-law remedy under Article 226 of the Constitution of India seeking relief of damages or compensation, the person approaching this Court has to establish infringement of any of the fundamental rights including those guaranteed under Article 21 of the Constitution of India.

18. Shri Seth then relies upon a judgment of Hon'ble High Court of Kerala at Ernakulam in the case of **State of Kerala and others vs. Safia,** reported in **(2021) SCC Online Ker 3283**. In the aforesaid case of **State of Kerala (supra)** a detailed discussion has been made by High Court of Kerala about the public-law remedy vis-a-vis award of compensation/damages. Hon'ble High Court of Kerala in the said case came to the conclusion that the building in question was being used for residential purposes and that for widening of road, the Public Works Department there undertook certain demolitions which violated Article 19(1)(e) i.e. right to reside and live in the building peacefully. It further came to the conclusion that by undertaking such

demolition of residential building right to privacy as recognized by Hon'ble Supreme Court in the case of **K.S. Puttaswamy and another v. Union of India and others,** reported in **(2017) 10 SCC 1** has also been violated.

19. In the instant case, the building in question in respect of which demolition by the petitioner has been alleged in this petition, as per the own showing of the petitioner, was rented to Bharat Sevak Samaj, Weight and Measurement Office, U.P. Agro Ltd., Consolidation Office, Food Corporation of India and some Liquor Shops. Thus, it was not being used for residential purposes. Further as already observed above, the matter at hand involves determination of disputed questions of facts which does not appear to us to be possible without the parties leading the evidence.

20. In the aforesaid view, we are of the opinion that judgment of Hon'ble Kerala High Court is of no avail to the petitioner.

21. For the aforesaid reasons, we are not inclined to entertain this writ petition which is hereby **dismissed.**

22. However, notwithstanding dismissal of this writ petition, it will be open to the petitioner to take recourse to any other remedy, which may be available to him under law, including the remedy of instituting appropriate suit before the court of competent civil jurisdiction.

23. Costs made easy.

(2022) 12 ILRA 272
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ C No. 19465 of 1998

Abhiraj Singh ...Petitioner
Versus
The Addl. Commissioner, Agra & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prakash Chandra

Counsel for the Respondents:
S.C., Sri Pushpendra Singh Yadav, Sri Rajeev Sharma, Sri V.K. Singh

A. Civil Law - UP Zamindari Abolition and Land Reform Act, 1950 – Sections 229-B & 333 – Revision against interlocutory order – Maintainability – Held, correcting/amending the mistake committed by the Court itself is an interlocutory order and it can be corrected at any time either suo moto or on the oral or in writing application of the either party and against such order no revision would lie – For maintainability of a revision, there must be a decision of any suit or proceeding. Here no suit or proceeding has been finally decided – The suit under Section 229 B is still pending and even by the impugned order it was not decided. Therefore, the forum to prefer revision was not available to the petitioner. (Para 17 and 20)

B. Civil Law - UP Zamindari Abolition and Land Reform Act, 1950 – Sections 229-B & 333 – Revision before the Commissioner – Calling of the record by the revisional court, whether mandatory or directory – Word 'may' used in S. 333 – Scope – Prayag Das Agarwal's case discussed – If the word 'may' is used in relation to an officer or for Court for respect then it is imperative rather than mandatory – Held, there was no occasion to look into the legality and propriety of the order of the lower Court and there was no need to

summon the records of the lower Court – By summoning the records the proceeding of the Lower Court are discontinued and the length of the case becomes too longer – High Court held the petition devoid of the merit. (Para 7 and 21)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Gunai Vs Gaon Sabha & ors.; 1990 RD (J) Page 30

2. Assistant Commissioner Vs Prayag Das Agarwal; AIR 1981 SC 1263

3. Raghunandan Vs Narain Das Balkrishna Das; 1950 ALJ 220

4. Beni Prasad Tiwari Vs Damodar Prasad Tiwari; 1979 AWC (Rev) 37

(Delivered by Hon'ble Umesh Chandra Sharma, J.)

1. This petition has been instituted to quash the order passed by Sub-Divisional Officer dated 29.12.1997 and order dated 5.5.1998 passed by Additional Commissioner.

2. In brief, facts of the case are that respondent no. 5 and 6 filed a suit under Section 229 -B of U.P. Z.A. & L.R. Act, which was dismissed in default on 4.8.1993. It was again dismissed in default on 7.11.1994. (Annexure No. 1 & 2 to the writ petition). Thereafter, respondent nos. 5 & 6 moved the restoration application which was rejected by Sub-Divisional Officer vide order dated 25.6.1996 (Annexure No. 3 to the writ petition). Later on they filed a review petition for recalling the order dated 25.6.1996 which was allowed by order dated 29.12.1997 (Annexure No. 4 to the writ petition) without serving notice to the petitioner.

3. Against the aforesaid order, the petitioner filed a revision before respondent no.1. Generally revisions are being admitted by the Commissioner and hence only on stay application case was heard on 20.1.1998. Neither it was heard on the point of maintainability nor on the merit. Records of the courts below were also not summoned and records were not available before respondent no.1 when the order rejecting the revision was passed. In fact 22.1.1998 was fixed for orders on stay application but to the utter surprise, the revision was denied as not maintainable on 31.1.1998 (Annexure No. 5 to the writ petition). As the aforesaid order was exparte, the petitioner filed restoration against the order dated 31.1.1998 which was rejected on 5.5.1998 (Annexure No. 6 to the writ petition).

4. Further proceedings are going on in the court and hence it is desirable in the interest of justice to stay the operation of the order dated 31.1.1998, passed by respondent no. 1.

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

6. Learned counsel for the petitioner has relied on the judicial precedent ***Gunai Vs. Gaon Sabha and Others 1990 RD (J) Page 30***, wherein it has been held that " whenever a revision under Section 333 of the U.P. Z.A. & L.R. Act, is moved before the Commissioner, Collector or Board of Revenue, before taking any decision on its maintainability, record of the lower court must be summoned.

Section 333 is as under:

Power of Board to Call for Cases- *the Board may call for the record of any suit or proceeding by any subordinate court in which no appeal lies or where an*

appeal lies but has not been preferred and if such subordinate court appears-

(a) to have exercised a jurisdiction not vested in it in law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of jurisdiction illegally or with material irregularity, the Board may pass such order in the case as it thinks fit."

7. In para 5 of the judgment, the learned Single Judge has held that " it appears from the perusal of Section 333 that the word 'may' is (if desired) is used for the Collector to exercise his judicial power and to call for files of the lower court. This question has to be considered as to whether word 'may' in Section 333 is mandatory or directory in nature. If the word 'may' is used in relation to an officer or for Court for respect then it is imperative rather than mandatory. In this regard the interpretation given in the case of ***Assistant Commissioner Vs. Prayag Das Agarwal, AIR 1981 SC 1263***, is important.

8. In para 7 of the judgment, the learned Single Judge has held that intention of the legislature is clear from the interpretation of the above word 'may' that when a revision is presented before the Collector or Board of Revenue, he must call for record/files of the lower court or subordinate court before deciding it as to whether it should be admitted or not.

9. The Commissioner has rejected the revision without considering the provisions of Section 333 as mandatory and without calling for the records of the subordinate courts. Therefore, the prayer has been made to allow the petition and direct the Commissioner to summon the lower court record and pass the order afresh.

10. In Para 9, the learned Single Judge has observed that-

"it is clear from the provision of S. 332 (A) that the word 'may' has been used in relation to the revision presented before the Commissioner or the Assistant Collector. But there also the meaning of the word 'may' is mandatory and not directory. This is another thing that it would be appropriate to call for the subordinate courts file only after accepting primafacies for the decision. But if there is any such order as an exception in which after listening to it, it seems necessary to call for the file of the subordinate court, then there should be no hesitation in calling for it."

11. The facts and circumstances of the cited case and the case in hand are quite different. The only similarity is that in both the cases revision was preferred.

12. In the cited case, the petitioner was served a notice u/s 122 B of the U.P. Z.A. & L.R. Act for illegal occupation of the Gram Sabha land and an order of his eviction, payment for damages and execution expenditure was passed by Tehsildar, against which he moved revision before the Collector and the Collector Azamgarh, without summoning the Lower Courts records and without assigning any reason dismissed the revision. In this regard para 8 of the judgment is noted hereunder:

'Apart from this, from the prima facie observation of the impugned order dated 27.12.1990, it appears that there is no clarity in that order. In that case the petitioner was also claiming his rights under Section 122 B (4-F) thus a legal right was sincerely involved in it.

13. Contrary to the above in this case due to misconception that the restoration application is for the restoration of the

rejected restoration, the restoration application was rejected by S.D.O. on 25.6.1996. Later on after knowing that mistake apparent on the face of record has been committed by him and the restoration was for the restoration of original suit, he cancelled the order on 29.12.1991 against which the petitioner moved revision no. 106 of 98 under Section 333 which was rejected with comments on 31.01.1998. Later on the petitioner moved restoration application no 106 of 1997-98 u/s 333A which was also rejected alleging that the revision (of the petitioner) was preferred against the interlocutory order hence it was not maintainable and it was rightly rejected.

14. Now the petitioner has come to this Court and has taken same ground that without summoning the lower court's record a revision can not be decided. It can not be decided even on the point of admission and maintainability.

15. The petitioner has not attached all the relevant papers but has filed only the copies of the orders from which the facts of the case which appear before this Court are that respondent nos. 5 & 6 filed a suit under Section 229B of the U.P. Z.A. & L.R. Act No. 122/1517/1993 which was dismissed in default on 4.8.1993 and it was again dismissed in default on 7.11.1994. The respondents-plaintiffs moved restoration application No. 6/1995 which was rejected by the lower Court on 25.6.1996 that the case u/s 122B has been dismissed and one restoration has also been dismissed earlier. Though after dismissal of the case on 7.11.1994 the restoration application was moved on 21.11.1994 alongwith the application under Section 5 of Limitation Act. If it was so, and the restoration has been moved just after 14 days, there was no need to pray to condone the delay under Section 5 of the Limitation (provided the dates mentioned in the order are correct and true). However, the restoration was rejected on the ground that it was not a restoration application to restore the original case but it is a restoration of restoration. This misconception was created by the petitioner in the mind of the Court while the facts were not so.

16. The S.D.O. Aliganj, on 29.12.1997 knowing that a mistake has been committed, recalled the order dated 25.6.1996 and allowed the restoration application dated 8.7.1996 and fixed further date for disposal. He found that he was misled. Virtually against the order of dismissal on 4.8.1993, a restoration application was moved and which was allowed on 14.9.1994 and the original suit was again dismissed on 7.11.1994. He found that the order dated 25.6.1996 was passed in misconception that even after the rejection of a restoration application, an application for restoration of the original suit is being moved whereas only one restoration application was pending to recall the order of dismissal dated 7.11.1994. Conceding the own mistake, the Court itself recalled the order dated 25.6.1996 and allowed the restoration application dated 8.7.1996 and fixed the date for further proceeding.

17. This Court is of the view that correcting/amending the mistake committed by the Court itself is an interlocutory order and it can be corrected at any time either suo moto or on the oral or in writing application of the either party and against such order no revision would lie.

18. In **Raghunandan Vs. Narain Das Balkrishna Das, 1950 ALJ 220** it is held

that neither a mistake nor an irregular exercise of jurisdiction gives a ground for interference.

19. In **Beni Prasad Tiwari Vs. Damodar Prasad Tiwari, 1979 AWC (Rev) 37** it is held that mistake of fact, an omission by trial court to record proper and detailed reason is not a ground for revision.

20. By this order no injustice had been caused to the petitioner. The effect of the order of S.D.O. or the Commissioner was only this that the original suit would be disposed of on merit. This is also the basic purpose of justice and the judicial system. It appears that the petitioner does not want disposal of original suit on merit, so he preferred revision and thereafter restoration application and caused more delay by filing this writ petition. If the impugned orders remain intact, no prejudice is caused to the petitioner. For maintainability of a revision, there must be a decision of any suit or proceeding. Here no suit or proceeding has been finally decided. The suit under Section 229 B is still pending and even by the impugned order it was not decided. Therefore, the forum to prefer revision was not available to the petitioner. In the cited case the matter under Section 122B and right of the petitioner under Section 122B (4-F) was finally and completely adjudicated by the S.D.O. Hence, the revision was maintainable which should have been decided on merit but in this case it is not so. The petitioner has levelled the charges against the revisional Court but to establish the same he has not filed the certified copies of the order-sheet to establish that the date was fixed only for order on stay application. Considering the facts of the case this Court is also in conformity with the view expressed by Additional Commissioner expressed in his order on 31.1.1998 that the petitioner wants to keep the matter pending for an indefinite period.

21. Facts of this case and the cited case are not similar. Hence there was no occasion to look into the legality and propriety of the order of the lower Court and there was no need to summon the records of the lower Court only on this ground that revision has been preferred. By summoning the records the proceeding of the Lower Court are discontinued and the length of the case becomes too longer. Thus this petition is devoid of the merit and is dismissed with cost.

22. Let the copy of the judgment be sent to the District Magistrate, Etah to direct Additional S.D.O. Ist Aliganj, to proceed with the case No. 122/15/71/1993 under Section 122 B of the U.P. Z.A. & L.R. Act after affording the opportunity to both the parties at the earliest as the matter has already become so old.

(2022) 12 ILRA 276
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT SINGH, J.

Writ C No. 28230 of 2022

Dinesh Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Udayan Nandan, Sri Shashi Nandan (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Vinay Kumar Pathak, Sri H.N. Singh (Sr. Advocate)

A. Civil Law - UP Panchayat Raj Act, 1947 – Section 27 – UP Panchayat Raj Rules, 1947 – R. 256 & 257 – Allegation of committing irregularities of public money against Pradhan & ors. – Enquiry was conducted by Deputy Director of Agriculture, not by Chief Audit Officer – Effect – Surcharge for the loss etc. – Validity challanged – Held, there is not an iota of doubt that the enquiry, which was conducted by the Deputy Director (Agriculture), Basti, was an enquiry which was without jurisdiction – As per Rules 256 and 257 of the 1947 Rules, the enquiry ought to have been conducted by the Chief Audit Officer and now as per the order of delegation made by the Chief Audit Officer by the District Audit Officers – High Court set aside the impugned order. (Para 15)

Writ petition allowed. (E-1)

List of Cases cited:

1. Smt. Shyam Wati Vs St. of U.P & ors.; 2013 (6) AWC 6339

2. Uday Pratap Singh @ Harikesh Vs St. of U.P. & ors.; 2019 (10) ADJ 443

3. Ram Vilas Vs Commissioner Devi Patan Mandal Gonda & ors.; 2022 (1) ADJ 1

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

1. The petitioner no. 1-Dinesh Kumar is the Gram Pradhan, Gram Panchayat - Sewra Lal, Vikas Khand - Vikramjot, District - Basti; the petitioner no. 2-Hariom Pal is the Additional Development Officer, Gram Panchayat - Sewra Lala, Vikas Khand - Vikramjot, District - Basti; the petitioner no. 3-Awadhesh Jaiswal is the Gram Panchayat Adhikari, Gram Panchayat - Sewra Lala, Vikas Khan - Vikramjot, District - Basti; the petitioner no. 4-Suraj Kumar Pandey, is the Village Development Officer, Gram Panchaat - Sewra Lala, Vikas Khand - Vikramjot, District - Basti and the petitioner no. 5-Vijay Kumar Malviya, is the Technical Assistant, Gram Panchayat - Sewra Lala, Vikas Khand - Vikramjot, District Ballia.

2. A complaint was filed by one Prince Kumar Shukla regarding the alleged irregularities committed by the petitioners. On 12.5.2022, the Chief Development Officer passed an order for conducting an enquiry. On 1.6.2022, an enquiry report, which as per the petitioner was an ex parte one, was submitted by the Deputy Director of Agriculture, Basti.

3. Thereafter, on the basis of the ex parte enquiry, the District Magistrate issued show cause notices to the petitioners asking them to submit replies to the charges levelled against them and to explain as to why under the provisions of Section 27 (2) of the U.P. Panchayat Raj Act, 1947 (hereinafter refer to as "the Act of 1947') recovery of Rs. 19,95,110/- be not initiated jointly against the petitioners.

4. The petitioners submitted their replies and, thereafter, when on 29.8.2022, the District Magistrate, Basti, passed the order impugned, the instant writ petition was filed.

5. Learned counsel for the petitioners Sri Udayan Nandan, Advocate, argued that the order dated 29.8.2022 was passed on an enquiry report dated 1.6.2022 which report was a result of an enquiry which was conducted by the Deputy Director (Agriculture), Basti. As per the learned counsel for the petitioner, the Deputy Director (Agriculture), Basti, was not a person authorized to conduct the enquiry for the purposes of imposition of surcharge. Since the learned counsel for the petitioner

relied upon Section 27 of the Act of 1947 and the Rules 256 and 257 of the U.P. Panchayat Raj Rules, 1947 (hereinafter referred to as "the Rules of 1947"), the same are being reproduced here as under:-

27. Surcharge. - (1) Every Pradhan or [***] of a [Gram Panchayat], every member of a [Gram Panchayat] or of a Joint Committee or any other committee constituted under this Act [shall be liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan or Member]

Provided that such liability shall cease to exist after the expiration of ten years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.

(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realise it as if it were an arrear of land revenue.

(3) Any person aggrieved by the order of the prescribed authority fixing the amount of surcharge may, within thirty days of such order, appeal against the order of the State Government or such other appellate authority as may be prescribed.

(4) Where no proceeding for fixation and realization of surcharge as specified in sub-section (2) is taken the State Government may institute suit for compensation for such loss, waste or misapplication, against the person liable for the same."

CHAPTER XIII
SURCHARGE RULES

"256. (1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gaon Sabha as a direct consequence of the negligence or misconduct of a Pradhan, he may call upon the Pradhan, Up-Pradhan, Member, Officer or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gaon Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned.

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gaon Panchayat shall be called for through the District Magistrate and from the officer or servant through the Panchayat Raj Officer:

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gaon Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

Note. - Any information required by the Chief Audit Officer, Co-operative Societies and Panchayats or any officer subordinate to him not below the rank of auditor, Panchayats for preliminary enquiry, shall be furnished and shall be connected papers and records shall be shown to him by the Pradhan immediately on demand.

(2) Without prejudice to the generality or the provisions contained in sub-rule (1) the Chief Audit Officer, Co-operative Societies and Panchayats, may call for the explanation in the following cases:

(a) where expenditure has been incurred in contravention of the provisions of the Act or of the rules or regulations made thereunder;

(b) where loss has been caused to the Gaon Sabha by acceptance of a higher tender without sufficient reasons in writing;

(c) where any sum due to the Gaon Sabha has been remitted in contravention of the provisions of the Act or the rules or regulations made thereunder;

(d) where the loss has been caused to the funds or other property of the Gaon Sabha on account of want of reasonable care for the custody of such money or property.

(3) On the written request of the Pradhan, Up-Pradhan, Member, Officer or servant from who an explanation has been called for, the Gaon Panchayat shall give his necessary facilities for inspection of the records connected with the requisition for surcharge. The Chief Audit Officer may, on application from the person surcharged allow a reasonable extension of time for submission of his explanation if he is satisfied that the person charged has been unable, for reasons, beyond his control, to consult the record for the purpose of furnishing his explanation.

Explanation. - Making of an appointment in contravention of the Act, the rules or the regulations, made thereunder shall amount to misconduct or negligence and payments to employees of salaries and other dues on account of such irregular appointments shall be deemed to be a loss, waste or misuse of Gaon Fund.

257.(1) After the expiry of the period prescribed in sub-rule (1) or (3) of Rule 256, as the case may be, and after examining the explanation, if any, received within time, the Chief Audit Officer shall submit the papers along with his recommendations to the District Magistrate of the district in which the Gaon Sabha is situated in case of Pradhan, Up-Pradhan and Members and to the District Panchayat Raj Officer of the district in which

(2) The District Magistrate or the District Panchayat Raj Officer as the case may be, after examining and after considering the explanation, if any, shall require the Pradhan, Up-Pradhan, Member, Officer or servant of the Gaon Panchayat to pay the whole or part of the sum to which such Pradhan, Up-Pradhan, Member, Officer or servant is found liable:

Provided, firstly, that no Pradhan, Up-Pradhan, Member, Officer or servant of a Gaon Panchayat would be required to make good the loss, if from the explanation of the Pradhan, Up-Pradhan, Member, Officer or servant concerned or otherwise the District Magistrate of the District Panchayat Raj Officer, as the case may be, is satisfied that the loss was caused by an act of the Pradhan, Up-Pradhan, Member, Officer or servant in the bona fide discharge of his duties.

Provided, secondly, that in case of loss, waste or misuse occurring as a result of a resolution of the Gaon Panchayat or any of its committees the amount of loss to be recovered shall be divided equally among all the members including Pradhan and Up-Pradhan, who are reported in the minutes of the Gaon Panchayat or any of its committee as having voted for or who remained neutral in respect of such resolution:

Provided, thirdly, that no Pradhan, Up-Pradhan, Member, Officer or servant shall be liable for any loss, waste or misuse after the expiry of four years from the occurrence of such loss, waste or misuse or after the expiry of three years

from the date of his ceasing to be a Pradhan, Up-Pradhan, Member, Officer or servant of the Gaon Panchayat whichever is later."

6. Learned counsel for the petitioners submitted that a perusal of Section 27 of the Act of 1947 read with Rule 256 of the Rules of 1947 clearly shows that surcharge was leviable on an enquiry which was conducted by the Chief Audit Officer and which had to be forwarded to the District Magistrate in the case of Pradhan, Up-Pradhan and Members of Gram Panchayat and to the District Panchayat Raj Officer in the cases of officers and servants of the Gaon Sabha.

7. Learned counsel for the petitioners, therefore, submitted that it was the Chief Audit Officer of the Cooperative Societies and Panchayat who was the officer authorized to conduct the enquiry for the purposes of the imposition of surcharge.

8. He further submitted that after the report was submitted to the District Magistrate, the order ought to have been passed by the Competent Authority and the learned counsel for the petitioners submitted that since there was yet no competent authority appointed, the order of the District Magistrate was also beyond jurisdiction.

9. To bolster his argument, learned counsel for the petitioners relied upon the judgement of this Court in **Smt. Shyam Wati vs. State of U.P and others** reported in **2013 (6) AWC 6339**. This judgement was cited to show that if the enquiry was not conducted by the Chief Audit Officer then the enquiry as had been done in this case by the Deputy Director (Agriculture) Basti, was without jurisdiction. He further submitted that when there was no Prescribed Authority as has been referred to in Section 27(2) of the Panchayat Raj Act then the District Magistrate had no jurisdiction to impose the surcharge. For this purpose, learned counsel for the petitioner relied upon **Uday Pratap Singh @ Harikesh vs. State of U.P. and others** reported in **2019 (10) ADJ 443.**

10. Sri H.N. Singh, Sr. Advocate, assisted by Sri Vinay Kumar Pandey, learned counsel for the complainant while making the submissions very fairly conceded that as far as the jurisdiction with the Deputy Director (Agriculture), Basti, was concerned, it was only the Chief Audit Officer who was authorized to conduct the enquiry. He, however, submitted and also placed a written submission that now when the Panchayat had attained constitutional status and as per Article 243, 243(A) to 243(O) of the Constitution of India there were provisions in the Constitution to provide for a three tier Panchayat system such as the Village Panchayat, Kshetra Panchayat and the District Panchayat instead of the Chief Audit Officer, some more powerful body should be brought into existence. He submitted that further since as per Article 243(I) of the Constitution, a Finance Commission to review the financial position of Panchayats had been formed, on which there was the duty to enquire into the financial deals of the Panchayat then the finances of a gram panchayat should be monitored by a much more powerful body. While making his submissions, he also submitted that under Article 243 (G), there were various powers, authorities and responsibilities bestowed upon the Panchayat, so much so that under Article 243 (H) even powers to impose taxes had been given to the panchayats. He submits that though various amendments

had been made in the Panchayat Raj Act, the provision for enquiry for the purposes of surcharge had remained only with the Chief Audit Officer. He submits that the various Panchayat work had to be supervised and had to be audited and there were times that even before the audit could take place after the completion of work, the responsibilities had to be fixed for the works which had commenced and which were not being done properly.

11. The relevant portions of the written submissions which Sri H.N. Singh, Sr. Advocate assisted by Sri Vinay Kumar Pathak learned counsel for the complainant, had submitted are being reproduced here as under:

"I. By 73rd Amendment of Constitution with effect from 24.4.1993, the Panchayats have attained the constitutional status and in Article 243, 243-A to 243-O Constitutional provisions has been provided for Constitution of 3 tier Panchayat such as Gram Panchayat, Kshetra Panchayat and Zila Panhcayat and Article 243-I for Constitution of Finance Commission to review financial position of the Panchayt whereas Article 243-G provide for powers, authority and responsibilities of Panchayats whereas Article 243-H empowers the Panchayats to impose taxes. The U.P. Panchayat Raj Act was amended in the year 1994 according to the Constitutional Mandate and now the huge fund is being made available by the State Government to Gram Panchayat as provided under Section 32 of the Act of 1947 and function of the Gram Panchayat is provided under Section 15 of the Panchayat Raj Act. U.P. Panchayat Raj Rules, 1947, is an old Rule and consequently amendment in the Rule has not been made in view of the Amendment in Panchayat Raj Act according to 73rd Amendment of the Constitution of India.

II. Rules of 1947 appears to have been framed to prescribe the procedure of surcharge under Rule 256 to 259 keeping in view the position as was in the year 1947 when hardly the fund was available to Gram Panchayat and very nominal fund was available which was to be audited by the Chief Audit Officer.

III. By the time the Finance Commission has been constituted, huge fund for development work is being released to the Gram Panchayat by which the Gram Panchayats are making constructions which requires monitoring on spot, whether amount has been actually utilized, construction according to norms has been done and material has been used as per standards prescribed.

IV. To monitor the spot position and to prevent the misappropriation of the huge fund release mere audit on record is not sufficient and it requires monitoring and supervision on spot and also require enquiry by any technical person having knowledge in the field. In this view of matter the Rules 256 to 259 of Rules of 1947 is not competent. In view of the amendment of the Constitution and Panchayat Raj Act for removal of the Pradhan, a specific rule has been framed known as Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 but no fresh rule has been framed for fixing surcharge and supervision of the utilization of the fund released to Gram Panchayat.

V. That in the facts and circumstances in view of the change which has taken place from 1947 till date it has become necessary to prescribe a specific Rule for utilization of the fund by the Gram Panchayat and for determining the liabilities of the Pradhan, Members of Gram Panchayat and concerned officer and servants of Gram Panchayat."

12. Learned counsel for the complainant, however, submitted that so far as the jurisdiction under Section 27(2) of the 1947 Act for imposing the surcharge with the District Magistrate had been questioned, the question was no longer res intergra as now a Division Bench of this Court in the case of **Ram Vilas vs. Commissioner Devi Patan Mandal Gonda and others** reported in **2022 (1) ADJ 1** had decided that the District Magistrate could impose the surcharge.

13. Learned Standing Counsel though was asked to place before the Court the record of the Chief Audit officer by the order of this Court dated 19.9.2022, a counter affidavit has been filed in which he had appended two Government Orders dated 14.8.2019 and 8.6.2022. By the Government Order dated 14.8.2019, he has only brought on record the Government Order by which the enquiry as per the U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997, was to be conducted. With regard to the Government Order dated 8.6.2022, suffice it to say that the learned Standing Counsel has brought on record the fact that the District Magistrate had been made the Prescribed Authority.

14. Still further the learned Standing Counsel has brought to the notice of the Court an order dated 26.9.2022 by which the Chief Audit Officer had delegated his powers to the District Audit Officers.

15. Having heard the learned counsel for the parties, there is not an iota of doubt that the enquiry which was conducted by the Deputy Director (Agriculture), Basti, was an enquiry which was without jurisdiction. In fact, as per Rules 256 and 257 of the 1947 Rules, the enquiry ought to have been conducted by the Chief Audit Officer and now as per the order of delegation made by the Chief Audit Officer by the District Audit Officers.

16. Under such circumstances, the impugned order dated 29.8.2022 passed by the District Magistrate, Basti, is quashed and is set aside.

17. However, the Court suggests that the Law Commission may take up the matter and as per the conditions prevailing now i.e. as per the various powers which have been bestowed upon the Panchayats after the amendment of the Constitution of India by the 73rd Amendment by which Articles 243(A) to 243 (O) have been added in the Constitution of India and the Panchayats have attained constitutional status, a body which has powers to supervise the working of the Pradhans and its officials should be constituted for monitoring of the Panchayats and for supervising the work which is being done by them.

18. For the reasons stated above, the writ petition stands allowed.

19. A copy of this order be sent by the Registrar General of this Court to the State Law Commission.

(2022) 12 ILRA 282
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2022 & 30.05.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 29479 of 2021

Shweta Pathak ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Balram Jee Verma, Sri B.D. Pandey

Counsel for the Respondents:
A.S.G.I., Sri Dhananjay Awasthi

A. Education – Correction in Spelling of name in the education certificate – Limitation of three years provided, but the petitioner approached after eight years – Effect – Jigaya Yadav's case relied upon – Technicalities of delay in approaching the authority concerned should not come in the way of redressal of genuine grievance of the petitioner – Held, the principle laid down in the case of Jigya Yadav as well as in the case Anand Singh basically aimed at facilitating such corrections and the direction is to the Board to amend its bye laws as per the directions issued – Direction for necessary correction was issued. (Para 4, 6 and 8)

Writ petition disposed of. (E-1)

List of Cases cited:

1. Jigaya Yadav Vs Central Board of Secondary Examination & ors.; 2021 (7) SCC 535

2. Anand Singh Vs U.P. Board of Secondary Education & ors.; 2014 3 ADJ 443

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

1. Heard Sri V.B. Pandey, learned Advocate holding brief of Sri Balram Jee Verma, learned counsel for the petitioner, Sri Dhananjay Awasthi, learned counsel appearing for respondent Nos. 2 and 3 and perused the record.

2. The issue raised in the present writ petition is with regard to correction in the spelling of the name of petitioner mentioned in the intermediate marks-sheet-cum-certificate issued by the National Institute of Open Schooling, New Delhi (hereinafter referred to as 'the N.I.O.S.). From the pleadings of the petition as well as the documents brought on record, it is apparent that everywhere in the academic record, the name of the petitioner has been spelled as "Shweta Pathak" whereas in the intermediate marks-sheet-cum-certificate issued by the N.I.O.S., it is shown as "Sweta Pathak". The name of the mother and that of the father of the petitioner are correctly spelled as "Bindu Pathak and Prabhat Kumar Pathak" in all the academic records right from High School upto the University and even in the intermediate marks-sheet-cum-certificate issued by the N.I.O.S., the name of the mother of the petitioner is spelled as Bindu Pathak and that of father as Prabhat Kumar Pathak.

3. In the counter affidavit, the stand taken by the respondents is that the name of the petitioner, even if, it is a spelling mistake occurred in printing process, cannot be corrected because the limitation prescribed for applying for correction in the marks-sheet-cum-certificate issued by the N.I.O.S. is three years whereas the petitioner has approached the N.I.O.S. for necessary correction after eight years.

4. Learned counsel for the petitioner has relied upon the judgment of the Supreme Court in the case of Jigaya Yadav vs. Central Board of Secondary Examination and others; 2021 (7) SCC 535 and that of this Court in the case of Anand Singh vs. U.P. Board of Secondary Education and others; 2014 3 ADJ 443, and submits that the technicalities of delay in approaching the authority concerned should not come in the way of redressal of genuine grievance of the petitioner. He has drawn the attention of the Court towards the pleadings raised in the counter affidavit in which nowhere it is stated that the petitioner has come with uncleaned hands, nor fraud or otherwise forgery is alleged to have been committed at the end of

petitioner. He submits that it is true that the petitioner ought to have approached the institution well in time but such spelling mistake often evades the eyes and at time it is taken to be so nominal that students do not get affected. He submits that the petitioner had been admitted to higher studies with the same marks-sheet and no objection had been raised anywhere but the question would be of employment to which strict verification is done and there this mistake may be prejudicial.

5. Having heard learned counsel for the respective parties and the arguments raised across the bar, I find that the spellings of "Shweta" and "Sweta" are so common that at times it may be pronounced in such a manner that difference cannot be noticed and letter 'H' becomes silent and so it can evade the eyes so genuinely of those, who have to check the relevant record before final print is given and, therefore, it could be genuinely attributed to a mistake inadvertently committed by the respondents. This appears to be, so also, because the names of the father and mother are correctly printed and, therefore, it cannot be said under any circumstances that the petitioner delayed the matter for any other extraneous consideration. So at the best it is a case of correction only.

6. The principle laid down in the case of Jigya Yadav (supra) as well as in the case Anand Singh (supra) basically aimed at facilitating such corrections and the direction is to the Board to amend its bye laws as per the directions issued and till such amendment is carried out process the pending applications and even future applications, which may on the face of it appear to be genuine. Vide paragraph nos. 170, 171 and 172 the Supreme Court has held thus:-

"170. The first is where the incumbent wants "correction" in the certificate issued by the CBSE to be made consistent with the particulars mentioned in the school records. As we have held there is no reason for the CBSE to turn down such request or attach any precondition except reasonable period of limitation and keeping in mind the period for which the CBSE has to maintain its record under the extant regulations. While doing so, it can certainly insist for compliance of other conditions by the incumbent, such as, to file sworn affidavit making necessary declaration and to indemnify the CBSE from any claim against it by third party because of such correction. The CBSE would be justified in insisting for surrender/return of the original certificate (or duplicate original certificate, as the case may be) issued by it for replacing it with the fresh certificate to be issued after carrying out necessary corrections with caption/annotation against the changes carried out and the date of such correction. It may retain the original entries as it is except in respect of correction of name effected in exercise of right to be forgotten. The fresh certificate may also contain disclaimer that the CBSE cannot be held responsible for the genuineness of the school records produced by the incumbent in support of the request to record correction in the original CBSE certificate. The CBSE can also insist for reasonable prescribed fees to be paid by the incumbent in lieu of administrative expenses for issuing fresh certificate. At the same time, the CBSE cannot impose precondition of applying for correction consistent with the school records only before publication of results. Such a condition, as we have held, would be unreasonable and excessive. We repeat that if the application for recording correction is based on the school records as it

obtained at the time of publication of results and issue of certificate by the CBSE, it will be open to CBSE to provide for reasonable limitation period within which the application for recording correction in certificate issued by it may be entertained by it. However, if the request for recording change is based on changed school records post the publication of results and issue of certificate by the CBSE, the candidate would be entitled to apply for recording such a change within the reasonable limitation period prescribed by the CBSE. In this situation, the candidate cannot claim that she had no knowledge about the change recorded in the school records because such a change would occur obviously at her instance. If she makes such application for correction of the school records, she is expected to apply to the CBSE immediately after the school records are modified and which ought to be done within a reasonable time. Indeed, it would be open to the CBSE to reject the application in the event the period for preservation of official records under the extant regulations had expired and no record of the candidate concerned is traceable or can be reconstructed. In the case of subsequent amendment of school records, that may occur due to different reasons including because of choice exercised by the candidate regarding change of name. To put it differently, request for recording of correction in the certificate issued by the CBSE to bring it in line with the school records of the incumbent need not be limited to application made prior to publication of examination results of the CBSE.

171. As regards request for "change" of particulars in the certificate issued by the CBSE, it presupposes that the particulars intended to be recorded in the CBSE certificate are not consistent with the school records. Such a request could be made in two different situations. The first is on the basis of public documents like Birth Certificate, Aadhaar Card/Election Card, etc. and to incorporate change in the CBSE certificate consistent therewith. The second possibility is when the request for change is due to the acquired name by choice at a later point of time. That change need not be backed by public documents pertaining to the candidate.

(a) Reverting to the first category, as noted earlier, there is a legal presumption in relation to the public documents as envisaged in the 1872 Act. Such public documents, therefore, cannot be ignored by the CBSE. Taking note of those documents, the CBSE may entertain the request for recording change in the certificate issued by it. This, however, need not be unconditional, but subject to certain reasonable conditions to be fulfilled by the applicant as may be prescribed by the CBSE, such as, of furnishing sworn affidavit containing declaration and to indemnify the CBSE and upon payment of prescribed fees in lieu of administrative expenses. The CBSE may also insist for issuing Public Notice and publication in the Official Gazette before recording the change in the fresh certificate to be issued by it upon surrender/return of the original certificate (or duplicate original certificate, as the case may be) by the applicant. The fresh certificate may contain disclaimer and caption/annotation against the original entry (except in respect of change of name effected in exercise of right to be forgotten) indicating the date on which change has been recorded and the basis thereof. In other words, the fresh certificate may retain original particulars while recording the change along with caption/annotation referred to above (except in respect of

change of name effected in exercise of right to be forgotten).

(b) However, in the latter situation where the change is to be effected on the basis of new acquired name without any supporting school record or public document, that request may be entertained upon insisting for prior permission/declaration by a Court of law in that regard and publication in the Official Gazette including surrender/return of original certificate (or duplicate original certificate, as the case may be) issued by CBSE and upon payment of prescribed fees. The fresh certificate as in other situations referred to above, retain the original entry (except in respect of change of name effected in exercise of right to be forgotten) and to insert caption/annotation indicating the date on which it has been recorded and other details including disclaimer of CBSE. This is so because the CBSE is not required to adjudicate nor has the mechanism to verify the correctness of the claim of the applicant.

172. In light of the above, in exercise of our plenary jurisdiction, we direct the CBSE to process the applications for correction or change, as the case may be, in the certificate issued by it in the respective cases under consideration. Even other pending applications and future applications for such request be processed on the same lines and in particular the conclusion and directions recorded hitherto in paragraphs 170 and 171, as may be applicable, until amendment of relevant Byelaws. Additionally, the CBSE shall take immediate steps to amend its relevant Byelaws so as to incorporate the stated mechanism for recording correction or change, as the case may be, in the certificates already issued or to be issued by it."

7. In my view above law would be equally applicable to the National Institute of Open Schooling as well. The broad principles qua correction at the instance of students in the academic certificates are fully attracted in rspect of all such statutory bodies that perform public functions. The principles of law laid in the aforesaid judgment is aimed at removing unnecessarily created fetters upon public bodies in discharging their public functions in larger public interest. Vide paragraphs 136, 137 and 139, the Supreme Court has discussed law on the issue thus:-

"139. Law gives no recognition to an act of shunning essential duties by an entity of the State. There is a settled body of cases which expounds that a body entrusted with essential public functions cannot unduly put fetters on its powers. In Indian Aluminium Company51, this Court noted the proposition thus:

"12. This case was followed by Russell. J. in York Corporation v. Henry Leetham & Sons Ltd.52. There, the plaintiff corporation was entrusted by statute with the control of navigation in part of the rivers Ouse and Fose with power to charge such tolls within limits, as the corporation deemed necessary to carry on the two navigations in which the public had an interest. The corporation made two contracts with the defendants under which they agreed to accept, in consideration of the right to navigate the Ouse, a regular annual payment of £600 per annum in place of the authorised tolls. The contract in regard to navigation of the Fose was on similar lines. It was held by Russell, J. that the contracts were ultra vires and void because under them the corporation had disabled itself, whatever emergency might arise, from exercising its statutory powers to increase tolls as from time to time might be necessary. The learned Judge, after citing Ayr Harbour's case53 and another

case Straffordshire and 51 supra at Footnote No.6 52 (1924) 1 Ch 557 53(1883) 8 App 623 Worcestershire Canal Navigation v. Birmingham Canal Navigation54 observed:

The same principle underlies many other cases which show the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers.

13. Finally Lord Parker, C.J. said in SouthendonSea Corporation v. Hodgson (Wickford) Ltd.55:

There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion." (emphasis supplied) Similar proposition is enunciated in J.K. Aggarwal56 In the context of CBSE, the Delhi High Court in Dhruva Parate57 noted how CBSE has created selfimposed restrictions in its Byelaws by permitting no change of name. The Court deprecated this exercise of discretion and noted thus:

"8. The interests of efficiency of an organization ordinarily determine the guidelines that have to be administered; yet when they constrain the authorities of the organization, which is meant to sub-serve the general public, from doing justice, in individual cases, the guidelines become selfdefeating. In such cases, as in the present one, the end result would mean that the petitioner would be left with two certificates with different names and a whole lifetime spent possibly on explaining the difference - hardly conducive to him, reflecting the inadequacy in the system." 541866 LR 1 HL 254 551961 2 All ER 46 56 supra at Footnote No.7 57 supra at Footnote No.4 In light of the above discussion, we must note that there are no restrictions on the power of CBSE to permit change of name. The Constitution, Resolution and Regulations are functional documents of the Board and none of these documents provide for any such fetters. Therefore, in the exercise of its discretion, the Board cannot put fetters on its duties so as to cause grave prejudice to the students with legitimate causes for changing their certificates. The exercise of discretion in this negative manner would be arbitrary and unreasonable, at best"

8. In view of the above, the respondents are, therefore, directed to reconsider the matter. If the petitioner submits relevant public documents including the high school and B.Sc. marks-sheet-cum-certificates within a period of four weeks from today before the Regional Director, Allahabad, he shall forward the requisite papers after due verification within a week, to the higher authorities to do the needful without getting prejudiced by the decision already taken by it. Necessary correction should be carried out and corrected document shall be issued within a period of six weeks thereafter. The above directions are issued looking to the special facts and circumstances of the case.

9. With the above observations and directions, the writ petition is disposed of.

In Re: Civil Misc. Correction Application No.3 of 2022

Heard.

Allowed.

Name of Advocate holding brief of Sri Balram Jee Verma occurring as 'V.B. Pandey' in my order dated 14.03.2022 is corrected as 'B.D. Pandey' and the same may be read as such.

(2022) 12 ILRA 288
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 33577 of 2022

Sri Ganga Charan Aryawardhan Hospital, Bareilly ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan, Sri Ashok Kumar Dwivedi, Sri Shashi Nandan (Sr. Counsel)

Counsel for the Respondents:
C.S.C., Sri Dharmendra Singh Chauhan

A. Civil Law - UP Urban Planning and Development Act, 1973 – Sections 14 (2) & 16 Compounding of illegal construction – Residential building was converted into a hospital – Petitioner failed to comply with the condition of the authority regarding demolition of the non-compoundable part – The petitioner has no sanctioned plan for running nursing home in its premises – Effect – Held, the petitioner cannot be permitted to continue using the building as a hospital in violation of the existing law, throwing all principles of town planning to winds and least concerned with the safety and security of even those who are availing medical services in the hospital, being illegally run from the building in question. (Para 9, 13 and 22)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Jayant Banerji, J.)

1. Counsel for the parties are agreeable that the matter be heard and decided at this stage itself without calling for affidavits from respondents. Accordingly, the present writ petition is being taken up for consideration.

2. Heard Shri Shashi Nandan, learned Senior Counsel assisted by Shri Udayan Nandan and Shri Ashok Kumar Dwivedi, learned counsel for the petitioner and Shri D.S. Chauhan, learned counsel appearing for the respondent nos. 2 and 3. The State-respondents, namely, respondent no. 1 and 4 are represented by learned Standing Counsel.

BACKGROUND:

3. In the present writ petition, the petitioner seeks to challenge an order dated 17.10.2022 passed by the Vice-Chairman of Bareilly Development Authority1 rejecting the proposal for compounding of the nursing home of the petitioner. Further under challenge are the orders/letters both dated 22.10.2022 informing the petitioner, respectively, that as per the approved layout, on a residential plot, a nursing home cannot be sanctioned, therefore, the proposal for compounding of the nursing home has been rejected by the Vice-Chairman on 17.10.2022, and, that within 15 days the admitted patients in the nursing home be transferred to another nursing home and the premises be vacated, failing which, the premises of the nursing home would be sealed. Further, mandamus has been sought commanding the respondents not to interfere in the peaceful running of the nursing home in question and for commanding respondents to decide the application of the petitioner dated 3.10.2022 for change of land use.

4. It is stated in the writ petition that by means of a sale deed dated 12.5.1997, House No. 35/2, Rampur Garden, Bareilly was purchased by the Managing Director of the petitioner for establishing a hospital. A nursing home was constructed over the plot in question and a certificate of registration was obtained from the Chief Medical Officer, Bareilly, in the year 2004. It is stated that the nursing home has been running continuously in the aforesaid premises and was also issued a certificate of renewal of medical establishment by the office of the Chief Medical Officer, Bareilly on 17.5.2022. It is stated that on 18.2.2020, the Executive Engineer of the respondent no. 2, BDA, issued a communication to the petitioner that the constructions raised by the petitioner are not in accordance with the building bye-laws and, therefore, a total amount of Rs. 81,62,123/- is liable to be deposited by the petitioner toward compounding of the constructions in question. It is stated that the demanded amount was deposited on 30.9.2022 by cheque and through cash. Thereafter, by a communication dated 1.10.2022, the petitioner was directed to shift the patients in the nursing home to another hospital and vacate the nursing home by 3.10.2022 failing which the premises of the nursing home would be sealed. The petitioner submitted a letter dated 3.10.2022 along with an affidavit seeking land use conversion of the premises as per the guidelines and for that purpose the petitioner deposited a sum of Rs. 50 Lacs by cheque. It is stated that without considering the application of the petitioner for change of land use, the aforesaid impugned orders/communications dated 22.10.2022 were issued. It has been stated that the order dated 17.10.2022 passed by the Vice-Chairman of the BDA has not been served on the petitioner. Copies of the minutes of the 82nd, 83rd and 84th meetings of the Board of the BDA have been enclosed in an effort to demonstrate that conversion of land usage was permissible under the circumstances.

SUBMISSIONS OF THE LEARNED COUNSEL:

5. Learned counsel for the petitioner has strongly urged that the petitioner has been running the nursing home for approximately 20 years without any break, which nursing home has been duly registered by the Chief Medical Officer. It is contended that the bonafide of the petitioner is reflected from its compliance of the letter dated 18.2.2020 issued by the BDA demanding a sum of Rs. 81,62,123/- for compounding of the constructions of the nursing home but without looking into this aspect of the matter and without considering the application dated 3.10.2022 made by the petitioner for change of land use, the impugned orders have been passed which is a clear violation of principles of natural justice. It is further contended that given the resolution of the BDA made in its 83rd meeting, objections and suggestions are necessary to be invited from persons with respect to the proposed amendments in the master plan. The petitioner, by his application dated 3.10.2022 showed willingness to deposit the charges for conversion of land use from residential to hospital. The said application could only be considered and decided by the State Government in exercise of power under Section 13 (3), but the Vice-Chairman, BDA, has wrongly proceeded to reject the said application. Lastly, it is contended that the Rampur Garden Colony, Bareilly, in which the nursing home is situated, is being used for various commercial activities including hospitals, shops and malls since a

long period of time and the area in question is completely commercial in nature but the BDA has singled out the petitioner by issuing the impugned orders/letters.

6. Shri D.S. Chauhan, learned counsel appearing for the BDA has strongly opposed the writ petition and has drawn attention of the Court to the conditions attached to the letter dated 18.2.2020 issued by the Executive Engineer of BDA. It is contended that the very fact that compounding application had been filed by the petitioner in respect of sanctioned and constructed residential building, reflects that the nursing home was not sanctioned by the BDA. Learned counsel has referred to the letter dated 1.10.2022 of the BDA sent to the Managing Director of the petitioner informing him that the petitioner had failed to demolish the non-compoundable part of the building, accordingly, the petitioner was directed to shift its patients to another hospital by 3.10.2022. It is further stated that the impugned letters dated 22.10.2022 clearly reflect that as per the sanctioned layout of Rampur Garden, no nursing homes can be permitted on residential plots. It was, therefore, by order dated 17.10.2022, the Vice Chairman of the BDA had canceled the proposal for compounding of the constructions. Learned counsel has urged that the reference to the additional resolutions passed in the 83rd meeting of the Board of the BDA refers to the proposed master plan of 2031 and no benefit of the same can accrue to the petitioner.

ANALYSIS:

7. A perusal of the sale-deed dated 12.05.1997 reveals that the Managing Director of the petitioner had purchased an unfinished two storied residential building. He raised further constructions and converted the building into a hospital. There is no evidence that the additional constructions raised were according to any sanctioned plan. The building is situated in Rampur Garden, Bareilly, which is residential area as per the master-plan. The petitioner started using the building for running a nursing home/hospital, without any permission in this behalf from the BDA. The aforesaid acts were in clear violation of Sections 14 (2) and 16 of the U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'the Act'). These provisions are reproduced below for ready reference:-

"14 (2) After the coming into operation of any of the plans in any development area no development shall be undertaken or carried out or continued in that area unless such development is also in accordance with such plans.

16. Uses of land and buildings in contravention of plans- *After the coming into operation of any of the plans in a zone no person shall use or permit to be used any land or building in that zone otherwise that in conformity with such plan :*

Provided that it shall be lawful to continue to use, upon such terms and conditions as may be prescribed by bye-laws made in that behalf, any land or building for the purposes and to the extent for and to which it is being used upon the date on which such plan comes into force."

8. The petitioner was conscious of the gross violations of provisions of law on its part. It applied for compounding of the illegal constructions. On 18.2.2020, the compounding plan was sanctioned subject to various conditions/ compliances. Condition no.1 states that the petitioner was

illegally running a hospital in the building constructed and sanctioned for residential use. Therefore, the petitioner shall have to convert the building to residential use and submit an undertaking in shape of an affidavit that in future it would only be used for residential purposes. Condition No.2 is that every floor of the building would only be used for that purpose for which the plan is sanctioned i.e. residential. Condition No.11 states that as per the compounding plan, the non-compoundable part of the building would be demolished within one month by the petitioner and an affidavit will be filed in that regard. In case of failure on part of the petitioner in getting the demolition done on its own, the demolition would be done by the BDA, cost of which has to be borne by the petitioner. Further, there was condition No.12 that on violation of any of the conditions, the map/plan would automatically stand cancelled.

9. The petitioner did not comply with any of the above conditions. Neither non-compoundable part of the constructions were demolished nor the building was put to residential use. The petitioner continued to use the building as a hospital. This attracted Condition No.12 of the compounding order and the compounding plan stood automatically cancelled. The BDA, however, gave one more opportunity to the petitioner to comply with the conditions stipulated in the compounding order. By letter dated 1.10.2022, it required the petitioner to demolish the non-compoundable part of the building and put the building to permissible usage and submit an affidavit to the said effect, failing which, the petitioner was warned that the premises would be sealed and further action taken in the matter in accordance with law.

10. The petitioner, instead of complying with the conditions stipulated in the provisional compounding order dated 18.2.2020, moved fresh applications praying (1) for permission to use compoundable part of the building for hospital purposes and showed willingness to deposit conversion charges and (2) for notice dated 1.10.2022 being cancelled. The petitioner also claims to have tendered to BDA a cheque of Rs.50 lakhs therefor.

11. The applications of the petitioner were considered by the BDA. The prayers made by the petitioner were found to be impermissible as per the master-plan. Accordingly, the request for compounding/ conversion to hospital use was rejected by the Vice-Chairman, BDA on 17.10.2022 and it was communicated to the petitioner by the competent authority, BDA vide its letter dated 22.10.2022 which is as follows:-

"पत्रांक/3251/का०ब०वि०प्रा०/2022-23
दिनांक 22/10/22
डा० नवल किशोर गुप्ता (प्रबन्ध निर्देशक)
श्री गंगा चरण आर्य वर्धन अस्पताल,
सिविल लाईन्स बरेली

<u>निरस्तीकरण-पत्र</u>

कृपया वाद सं०- 113/2019-20 (जोन-1 सेक्टर-3) से आप द्वारा नर्सिग होम हेतु प्रस्तुत शमन प्रस्ताव पर जॉचोपरान्त आपत्ति पायी गयी कि 83वीं बोर्ड बैठक के अनुसार रामपुर बाग में महायोजना के कार्यालय भू-उपयोग में केवल कार्यालय एवं सम्बन्धित क्रिया प्रभाव शुल्क लेते हुये स्वीकृत किये जा सकते है। बरेली महोयोजना-2001-2021 के अध्याय-6 के प्रस्तर-6.1.5 के अनुसार रामपुर बाग, बरेली के स्वीकृत ले-आउट के आवासीय प्लाट में नर्सिग होम स्वीकृत नहीं किया जा सकता है। जिस कारण

आपके द्वारा प्रस्तुत नर्सिंग होम के शमन प्रस्ताव उपाध्यक्ष महोदय के अनुमोदन दिनांक 17.10.2022 के द्वारा निरस्तर कर दिया गया है।

सक्षम प्राधिकारी
बरेली विकास प्राधिकरण
बरेली।

प्रतिलिपि- तददिनांकः-

1. क्षेत्रीय सहायक/ अवर अभियन्ता को आवश्यक कार्यवाही हेतु प्रेषित।

सक्षम प्राधिकारी"

Translated, this letter states that after inquiry, there is objection to the proposal regarding compounding submitted by the petitioner in respect of nursing home, which is that, according to the 83rd meeting of the Board, in Rampur Garden, in the office land-use permitted under the master plan, only office and related activity can be sanctioned after accepting impact fee. According to Chapter 6 paragraph 6.1.5 of Bareilly Master Plan 2001-2021, in the approved layout of Rampur Garden, Bareilly, on residential plots, nursing home cannot be approved. For this reason the compounding proposal for nursing home submitted by the petitioner has been rejected by means of the approval of the Vice-Chairman dated 17.10.2022.

12. The impugned order/letter no.3252 dated 22.10.2022 reads as under:

"पत्रांक/3252/का०ब०वि०प्रा०/2022-23
दिनांक: 22/10/22
सेवा में,
डा० नवल किशोर गुप्ता (प्रबन्ध निर्देशक)
श्री गंगा चरण आर्य वर्धन अस्पताल,
गांधी उधान के सामने, प्लाट नं०-ए-2 रामपुर गार्डन,
बरेली।

विषयः- वाद सं०-113/2019-20 (जोन-1 सेक्टर-3) के संबंध में।

महोदय,

कृपया आपके द्वारा वाद सं०-113/2019-20 (जोन-1 सेक्टर-3) में पूर्व आवेदित आवासीय शमन प्रस्ताव के विरूद्ध संचालित किये जा रहे नर्सिंग होम को शमन कराये जाने हेतु दिनांक 03.10.2022 को प्रार्थना पत्र दिया गया था, जिसके संबंध में आपके शमन प्रस्ताव को 83वीं बोर्ड बैठक के अनुसार रामपुर बाग में महायोजना के कार्यालय भू-उपयोग में केवल कार्यालय एवं सम्बन्धित क्रिया प्रभाव शुल्क लेते हुये स्वीकृत किये जाने एवं बरेली महायोजना- 2001-2021 के अध्याय-6 के प्रस्तर- 6.1.5 के अनुसार बाग, बरेली के स्वीकृत ले-आउट के आवासीय प्लाट में नर्सिंग होम स्वीकृत का प्रावधान न होने के कारण आपके द्वारा प्रस्तुत नर्सिंग होम के शमन प्रस्ताव को उपाध्यक्ष महोदय के अनुमोदन दिनांक 17.10.2022 के द्वारा निरस्त किया जा चुका है।

अतः उपरोक्त संदर्भित प्रकरण में आपको निर्देशित किया जाता है कि आप 15 दिन के अन्दर श्री गंगा चरण आर्यवर्धन अस्पताल में भर्ती समस्त मरीजो को अन्य किसी नर्सिंग होम में स्थानान्तरित करते हुये नर्सिंग होम खाली करना सुनिश्चित करें, अन्यथा उक्त नर्सिंग होम परिसर को सील कर दिया जायेगा। जिसमें मरीजो को होने वाली परेशानी की समस्त जिम्मेदारी आपकी होगी।

सक्षम प्राधिकारी
बरेली विकास प्राधिकरण
बरेली।

प्रतिलिपि- तददिनांकः-

1. आयुक्त महोदय को सादर सूचनार्थ प्रेषित।

2. जिलाधिकारी महोदय को सादर सूचनार्थ प्रेषित।

3. वरिष्ठ पुलिस अधीक्षक, बरेली को सादर सूचार्थ प्रेषित।

4. सचिव महोदय को सूचनार्थ प्रेषित।

5. मुख्य चिकित्सा अधिकारी, बरेली को इस आशय से प्रेषित कि निर्धारित अवधि में मरीजो को स्थानान्तरित कराते हुये नियमानुसार कार्यवाही करने का कष्ट करें।

6.थानाध्यक्ष/ थानाप्रभारी, थाना-कोतवाली, बरेली को सूचनार्थ।

सक्षम प्राधिकारी"

Translated, this letter states that against the petitioner's earlier application of residential compounding proposal, the petitioner has given an application on 03.10.2022 for the existing nursing home. In that respect, according to the 83rd Board meeting, in Rampur Garden the provision in the Master plan for office land-use approval being of office and related activities after accepting impact fee; and, there being no provision for nursing home on a residential plot in the approved lay-out for Rampur Garden, Bareilly in terms of paragraph 6.1.5 of Chapter 6 of the Bareilly Master Plan 2001-2021, therefore, the compounding proposal for nursing home submitted by the petitioner has been rejected by the recommendation of the Vice-Chairman dated 17.10.2022. Therefore, in the aforesaid matter, the petitioner is directed to ensure the evacuation of the nursing home by transferring all the patients admitted in Shri Ganga Charan Aryavardhan Hospital into any other Nursing home within 15 days else the premises of the said nursing home shall be sealed. The petitioner shall be solely responsible for all the inconvenience caused to the patients.

13. Indisputably, the petitioner has no sanctioned plan for running nursing home in its premises. The map submitted by the petitioner for compounding was provisionally approved subject to the condition that the petitioner would use the compoundable part of the building exclusively for residential purpose and the non-compoundable part of the building would be demolished. However, the petitioner did not comply with any of the above conditions. Neither the petitioner stopped using the building as a hospital/nursing home nor demolished the non-compoundable part of the building. The petitioner was issued warning by letter dated 1.10.2022 and one more opportunity was granted to ensure compliance. Instead of complying with the conditions stipulated, the petitioner continued to violate the law with impunity.

14. It is noteworthy that in the application dated 3.10.2022, the petitioner admitted that the earlier compounding plan was sanctioned for residential use. It thus becomes clear that the petitioner has been using the building for running hospital showing no respect for the laws. The applications dated 3.10.2022 are silent in regard to the non-compoundable part of the building which was required to be demolished, but is also being used for running the Hospital, putting at peril public safety and security of the patients and neighbours.

15. The request of the petitioner for permitting the building to be used as a nursing home/hospital has been turned down on the ground that as per master-plan 2001-21 and decision taken in 83rd meeting of the Board, the only non-compliant activity which is permissible over a residential plot in Rampur Garden is running of office and related activity, and

that too, on payment of impact fee and not a nursing home.

16. Learned counsel for the petitioner has not placed before us any material to show that under the master-plan, zoning regulations or the building by-laws, running of a nursing home/hospital is permissible in Rampur Garden even upon payment of impact fee or conversion charges.

17. Learned counsel for the petitioner has placed reliance on the resolutions passed by the BDA in its 82,nd 83rd and 84th Board meetings in contending that there was proposal for regularising non-confirmatory uses of the buildings in Rampur Garden and in this behalf objections and suggestions were invited from the public and, therefore, the application of the petitioner should not have been rejected by the Vice-Chairman, BDA but should have been forwarded to the State Government.

18. It is pertinent to note that in 82nd Board meeting, objections and suggestions were invited under Section 13 (3) in relation to Rampur Garden and Model Town Colonies. It was ratified in the 83rd Board meeting.

19. Section 13 relates to amendment of master-plan or the zonal development plan. Relevant part of Section 13 is reproduced below:-

"13. Amendment of Plan.- (1) The Authority may make any amendments in the master plan or the zonal development plan as it thinks fit, being amendments which, in its opinion do not effect important alteration in the character of the plan and which do not relate to the extent of land uses or the standards of population density.

(2) The State Government may make amendments in the master plan or the zonal development plan whether such amendments are of the nature specified in Sub-section (1) or otherwise.

(3) Before making any amendments in the plan, the Authority, or as the case may be, the State Government shall publish a notice in at least one newspaper having circulation in the development area inviting objections and suggestions from any person with respect to the proposed amendments before such date as may be specified in the notice and shall consider all objections and suggestions that may be received by the Authority or the State Government."

20. The power to amend the master-plan is vested in the Development Authority, if it does not effect important alterations in the character of the plan and also does not relate to the land uses or the standard of population density. These excepted categories require approval of the State Government. The 82nd resolution of BDA inviting objections and suggestions under Section 13 (3) has to be interpreted in the context of the above statutory provisions. Concededly, the master-plan which is in force earmarks Rampur Garden as a residential area. At present, the only deviant use permitted in the area is office and related activities. This too, requires a special permission from the Authority, subject to payment of impact fee. However, in no event, running of a hospital/nursing home is permissible. The objections and suggestions invited by BDA under Section 13 (3) would only enable it to make such amendments as would not change the land use of the area. There is no material on record to show that the State Government is

undertaking any exercise for change of the land use of Rampur Garden as it would require a notice to be published by it in atleast one news paper. No such notice has been brought on record. Consequently, the submission advanced that the application filed by the petitioner is referable to the resolution passed by the Board inviting objections under Section 13 (3) and the State Government alone could have dealt with it, is devoid of merit.

21. The other resolution which has some relevance is the one passed at item No.4 with the permission of the Chairman in the Board's 83rd meeting. It is in relation to proposed master-plan 2031. It mentions that a presentation of the master-plan was given and the members made suggestions for getting a booklet of proposed master-plan printed for sale to general public to facilitate filing of objections and suggestions. One of the suggestion also was that where constructions had been raised in violation of the prescribed uses, wherever possible, the same should be adjusted and the land use be determined in the light of objections/suggestions. The said decision taken in the Board only indicates that preparation of new master-plan is in progress. The proposals made by the members and as recorded in the minutes of the meeting of the Board are only recommendatory in nature. The final master-plan 2031 has still not seen the light of the day. At best, the petitioner can also make/submit its objection/proposal in accordance with law, but at present, in absence of any provision in the master-plan, building by-law or zoning regulation, allowing usage of a residential plot in Rampur Garden as a nursing home/hospital, we find no illegality or impropriety in the impugned decision.

22. The petitioner cannot be permitted to continue using the building as a hospital in violation of the existing law, throwing all principles of town planning to winds and least concerned with the safety and security of even those who are availing medical services in the hospital, being illegally run from the building in question.

23. The contention that there exist various other hospitals and commercial establishments in Rampur Garden Colony and no action is being taken against them, is of no help to the petitioner inasmuch as no negative parity can be claimed. The petitioner has failed to demonstrate any illegality or arbitrariness on part of the BDA that may entail interference by this Court in exercise of writ jurisdiction under Article 226 of the Constitution.

24. Under the facts and circumstance of the present case, no interference is called for. The writ petition is, accordingly, **dismissed.**

(2022) 12 ILRA 295
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2022

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ C No. 33783 of 2022

National Insurance Co. Ltd., Kolkata & Anr. ...Petitioners
Versus
K.P.S. Educational Trust, Agra ...Respondent

Counsel for the Petitioners:
Sri Ashok Kumar Srivastava

Counsel for the Respondent:
Sri Vinay Kumar Singh, Sri Kartikeya Saran

A. Civil Law – Legal Services Authorities Act, 1987 – Sections 22 & 22-C – Permanent Lok Adalat – Ex-parte award was passed without providing opportunity of hearing – Legality challenged – No conciliation process adopted – Effect – Held, the proposed terms of settlement u/s 22-C(7), and the conciliation proceedings preceding it, are mandatory – If Permanent Lok Adalats are allowed to bypass this step just because a party is absent, it would be tantamount to deciding disputes on their merit ex parte and issuing awards which will be final, binding and will be deemed to be decrees of civil courts – This was simply not the intention of the Parliament – High Court found the award vitiated and illegal in the eye of law. (Para 6, 8 and 10)

Writ petition disposed of. (E-1)

List of Cases cited:

1. Canara Bank Vs G.S. Jayarama (2022) 7 SCC 776

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Ashok Kumar Srivastava, learned counsel for the petitioner and Sri Kartikeya Saran and Sri Vinay Kumar Singh, learned counsel for the respondents.

2. The petitioner has preferred the present writ petition with the prayer to quash the ex-parte judgement and order dated 29.06.2022 passed by Permanent Lok Adalat, Agra in Complaint Case No.35 of 2020 (K.P.S Educational Trust Vs. National Insurance Company Limited and another).

3. It is argued by learned counsel for the petitioner that the order impugned has been passed by the Permanent Lok Adalat, Agra without providing any opportunity of hearing to the petitioner. It is further argued that no reasons whatsoever has been recorded in the order impugned. Hence, on both the grounds, the order passed by the Permanent Lok Adalat, Agra dated 29.06.2022 is liable to be set aside.

4. On the other hand, it is argued by Sri Kartikeya Saran, learned counsel for the respondents that if the order impugned has been passed in the absence of the petitioner, the only remedy lies with the petitioner to move a recall application before the Permanent Lok Adalat, concerned.

5. Heard learned counsel for the parties present. With the consent of learned counsel for the parties present, the present writ petition is disposed of at the admission stage itself.

6. From perusal of he order passed by the Permanent Lok Adalat, Agra, it appears that the same has been passed without providing opportunity of hearing to the petitioner. After going through the aforesaid order, the Court is of the firm opinion that no reasons whatsoever has been given while allowing the petition filed by the claimant-respondent. A complete procedural has been prescribed under Section 22(C) of the Legal Services Authorities Act, 1987 (In short "Act, 1987") to decide the dispute by the Permanent Lok Adalat and Section 22 (C) of the Act, 1987 provided that conciliation proceedings are mandatory, thereafter the the Permanent Lok Adalat have adjudicatary function under Legal Services Act. Section 22 outlines the powers of the Lok Adalats and Permanent Lok Adalats. Section 22 is extracted below:

Section 22. Powers of Lok Adalats.--

(1) The Lok Adalat or Permanent Lok Adalat shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a

civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:?

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document;

(c) the reception of evidence on affidavits;

(d) the requisitioning of any public record or document or copy of such record or document from any court or office; and

(e) such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat or Permanent Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(3) All proceedings before the Lok Adalat or Permanent Lok Adalat shall be deemed to be judicial proceedings within the meaning of Sections, 193, 219 and 228 of the Indian Penal Code (45 of 1860) and every Lok Adalat shall be deemed to be a civil court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

7. Section 22-C of the Legal Services Authorities Act, 1987 stipulates the instances in which Permanent Lok Adalats can take cognizance of cases. Section 22-C provides as follows:

*"**22-C. Cognizance of cases by Permanent Lok Adalat.**--(1) Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:*

Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:

Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

Provided also that the Central Government, may, by notification, increase the limit of ten lakh rupees specified in the second proviso in consultation with the Central Authority.

(2) After an application is made under sub-section (1) to the Permanent Lok Adalat, no party to that application shall invoke jurisdiction of any court in the same dispute.

(3) Where an application is made to a Permanent Lok Adalat under sub-section (1), it?

(a) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application, points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the application;

(b) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings;

(c) shall communicate any document or statement received by it from any party to the application to the other

party, to enable such other party to present reply thereto.

(4) When statement, additional statement and reply, if any,have been filed under sub-section (3), to the satisfaction of the Permanent Lok Adalat, it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstances of the dispute.

(5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

(6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.

(7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(8) Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute."

8. Taking into consideration of the aforesaid aspect of the matter, very recently the Hon'ble Supreme Court in the case of ***Canara Bank Vs. G.S. Jayarama (2022) 7 SCC 776,*** it is held that Section 22-C(8) is amply clear that it only comes into effect once an agreement under Section 22-C(7) has failed. The corollary of this is that the proposed terms of settlement under Section 22-C(7), and the conciliation proceedings preceding it, are mandatory. ***If Permanent Lok Adalats are allowed to bypass this step just because a party is absent,*** it would be tantamount to deciding disputes on their merit ex parte and issuing awards which will be final, binding and will be deemed to be decrees of civil courts. This was simply not the intention of the Parliament when it introduced the Legal Services Authorities Amendment Act. Its main goal was still the conciliation and settlement of disputes in relation to public utilities, with a decision on merits always being the last resort. Therefore, we hold that conciliation proceedings under Section 22-C of the Legal Services Authorities Amendment Act are mandatory in nature. Paragraph 37 of the aforesaid judgement is reproduced below:-

"37. Section 22-C(8) is amply clear that it only comes into effect once an agreement under Section 22-C(7) has failed. The corollary of this is that the proposed terms of settlement under Section 22-C(7), and the conciliation proceedings preceding it, are mandatory. If Permanent Lok Adalats are allowed to bypass this step just because a party is absent, it would be tantamount to deciding disputes on their merit ex parte and issuing awards which will be final, binding and will be deemed to be decrees of civil courts. This was simply not the intention of the Parliament when it introduced the Legal Services Authorities

Amendment Act. Its main goal was still the conciliation and settlement of disputes in relation to public utilities, with a decision on merits always being the last resort. Therefore, we hold that conciliation proceedings under Section 22-C of the LSA Act are mandatory in nature."

9. From perusal of the aforesaid, this Court is of the opinion that the law is now well settled that in the absence of following the prescribed procedure as specially provided under Section 22(C)(7) of the Legal Services Authorities Amendment Act by the Permanent Lok Adalat, the order/award is vitiated.

10. In the present case, Permanent Lok Adalat Agra does not follow the aforesaid procedure as provided under the Legal Services Authorities Amendment Act, therefore, the award is vitiated and illegal in the eyes of law, the same is liable to be set aside and is hereby set aside.

11. Since no reply has been filed by the complainant, he is directed to file reply in the aforesaid case within three week from today.

12. Permanent Lok Adalat Agra is directed to pass fresh order after following the complete procedure under the law as well as the laid down by the Hon'ble Apex Court in the case of ***Canara Bank (supra)*** most expeditiously and preferably within a period of three months from the date reply filed by the claimant/respondent.

(2022) 12 ILRA 299
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT SINGH, J.

Writ C No. 61914 of 2017
With
Writ C No. 30548 of 2008

Super Seal Flexible Hose Ltd., Noida ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Prakhar Tandon, Sri V.K. Singh, Sri S. Shekhar, Sri Nagendra Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Stamp Act, 1899 – Sections 33 & 47-A – UP Stamp (Valuation of Property) Rules, 1997 – Rules 7, 8, 9 &10 – Lease deed executed – Earlier reply to the recovery notice was filed, thereafter a report was called on 13.04.2009, in pursuance whereof the report dated 4.4.2016 was filed after 7 years. Relying upon report dated 4.4.2016, the impugned ex-parte order was passed – Validity challenged – Held, when on 4.4.2016 after a lapse of seven years, the report had been filed then the petitioner also ought to have been given an opportunity to object to the report – When the Collector was aware of the fact that the petitioner had not appeared for the last 70 dates and when the Collector was also aware of the fact that the report, which was called on 13.4.2009, was submitted on 4.4.2016, then also the Collector ought to have issued notices to the petitioner to appear and to file his objection to the report. (Para 17 and 19)

B. Constitution of India,1950 – Article 226 – Writ – Alternative remedy – Remedy of statutory appeal, when is liable to be ignored – High Court refused to relegate the petitioner to avail the remedy of appeal as the order impugned dated 28.8.2017 itself was an ex-parte order and

the petitioner was not heard before the order was passed. (Para 19)

Writ petition partly allowed. (E-1)

List of Cases cited:

1. M/s. Hero Motors Ltd. Vs St. of U.P. & ors.; 2009 (1) ADJ 569

2. Anshu Chhabara Vs Collector and Commissioner, Jhansi Division; 2009 (1) AWC 512

3. Veer Bal Singh Vs St. of U.P. & ors.; 2009 (2) ADJ 481

4. Aegis B.P.O. Service Ltd. Vs St. of U.P. & ors.; 2011 (1) AWC 33

5. Satya Vijay Vs St. of U.P. & ors.; 2012 (6) ADJ 188

6. Duncans Industries Ltd. Vs St. of U.P. & ors.; AIR 2000 SC 355

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

1. Writ-C No.30548 of 2008 was filed with a prayer that the notice dated 5.5.2008 which was issued by the Collector, Gautam Budh Nagar and the letter dated 11.1.2008 which was issued by the respondent no.3-Sub-Registrar, Gautam Budh Nagar be quashed.

2. The notice which was served upon the petitioner was a notice under sections 17, 27, 33, 40, 47-A and 64 of the Indian Stamp Act, 1899 read with Rules 7, 8, 9 and 10 of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997. The notice was to the effect that the document i.e. the lease deed which was executed by the U.P. State Industrial Development Corporation-respondent no.4 (hereinafter referred to as the "UPSIDC") on 17.12.2007 had not stated about certain properties which were leased out to the petitioner and, therefore, as per the notice there was a shortage of stamp duty to the extent of Rs.74,08,000/-. The petitioner was required to appear on 4.6.2008 and was required to place before the Stamp Authorities its version. Apparently, the notice was based upon an inspection report of the Sub-Registrar of the Registration Department dated 11.1.2008. When the writ petition was filed, an order was passed by a Division Bench of this Court on 2.7.2008. The same is being reproduced here as under :-

"1. Heard Sri V.K. Singh in support of this petition. Sri Goswami appears for Respondents no.1, 2 and 3. Sri Mahesh Narain Singh appears for Respondent no.4. Sri V.K. Singh states that he will file reply to the notice which the petitioner has received.

2. Matter to stand over to 30.7.2008."

3. As per the order, the petitioner was required to file a reply to the notice which was challenged in the writ petition.

4. When on 5.12.2017 a citation to appear was issued by the respondent no.3 i.e. the Tehsildar, Gautam Budh Nagar for depositing Rs.1,48,16,000/- as deficient stamp duty, the petitioner filed Writ-C No.61914 of 2017 for quashing of the citation dated 5.12.2017 and for the quashing of the recovery certificate which was issued earlier by the Collector on 10.11.2017. The petitioner also had sought the quashing of the order dated 28.8.2017 which was the order of the Collector under section 33/47-A of the Indian Stamp Act, 1899. The complete copy of this order was brought on record by a Supplementary Affidavit dated 28.9.2022. The Writ-C No.61914 of 2017 was entertained by this Court and order dated 21.12.2017 was passed which is being reproduced here as under :-

"Connect with Writ C No.30548/2008.

Learned Standing Counsel has accepted notice on behalf of the respondents, who may file counter affidavits within a month. Rejoinder if any, within two weeks thereafter.

List in the week commencing 12.3.2018.

Till the next date of listing, the recovery proceedings pursuant to citation dated 5.12.2017, shall remain stayed, provided the petitioner deposits 1/3rd of the entire deficiency with upto-date-interest, before the Collector concerned within 2 months from today. Previous deposit, if any, shall stand adjusted.

However, in the event of default, the interim order shall stand automatically vacated."

5. Thereafter, affidavits between the parties were exchanged. However, since the petitioner was aggrieved by the fact that the High Court had directed by its order dated 21.12.2017 to deposit 1/3rd of the entire amount of deficiency as was found by the Stamp Authorities, the petitioner had filed a Special Leave Petition (Civil) No.3465 of 2018. The Supreme Court in the SLP refused to interfere but directed the petitioner to bring on record all the Government Orders before the High Court which it was producing before the Supreme Court and the SLP was finally disposed of. While disposing the SLP, the amount which was directed to be deposited by the petitioner was deferred. The order of the Supreme Court is being reproduced here as under :-

"Mr. K.V. Vishwanathan, learned senior counsel appearing for the petitioner, has invited our reference to the Government Order dated 06.07.2006. It is submitted that in a case of undisputed demerger, the petitioner is entitled to the benefit of the Deferment Order and, therefore, the stamp duty need not be paid afresh.

The petitioner is permitted to file an application before the High Court on this specific contention within a period of three weeks from today, in which case, we request the High Court to consider the application for modification of the interim order dated 21.12.2017 and pass appropriate orders within thirty days from the date of filing of the application.

Till orders are passed on the application to be filed by the petitioner, the direction for deposit may be deferred.

In view of the above, the Special Leave Petition is disposed of.

Pending Interlocutory Applications, if any, stand disposed of."

6. The matter was heard on 21.10.2022. Sri V.K. Singh, learned Senior Counsel assisted by Sri S.Shekhar and Sri Nagendra Singh, Advocates argued for the petitioner. Sri Nimai Das, learned Additional Chief Standing Counsel assisted by Sri R.D. Mishra, Advocate argued for the State and Sri Mahesh Narain Singh appeared for respondent no.4-UPSIDC in Writ-C No.30548 of 2008.

7. Facts leading to the filing of the two writ petitions are that M/s. Super Seals India Limited (the transferor company) had two divisions namely, Sealing Products Division and Hose Division. The transferee company i.e. the petitioner-Super Seal Flexible Hose Limited was dealing only in the Hose Division. Therefore, the company-M/s. Super Seals India Limited (the transferor company) demerged its Sealing Product Division from the Hose Division and the Hose Division of Super

Seals India Limited was amalgamated with the petitioner company M/s. Super Seal Flexible Hose Limited.

8. The transferor company, therefore, had filed an application under section 391(2) of the Companies Act, 1956 before the Delhi High Court for the approval of the Scheme of Arrangement. The Delhi High Court as per its order dated 22.11.2006 sanctioned the Scheme as was placed before it and, therefore, the shares which were of the transferor company to the extent they dealt with Hose Division stood transferred to the transferee company. The Delhi High Court while sanctioning the Scheme directed that the transferor company and the transferee company would comply with the statutory provisions and if the stamp duty was payable then it shall be paid in accordance with law. The operative portion of the order dated 22.11.2006 passed by the Delhi High Court is being reproduced here as under :-

"In view of the undertakings given above and the affidavit dated 20th November, 2006 of Mr. Deepak Talwar agreeing to change the appointed dated to 1st December, 2005, I allow the present petition. Subject to above modification and undertakings, the scheme is sanctioned. The transferor company and the transferee company will comply with the statutory provisions. Certified copy of the order will be filed within the ROC within five weeks from the date of the order. Stamp duty, if payable, shall be paid in accordance with law.

The petitions are disposed of."

9. After having complied with all the formalities, the transferee company i.e. the petitioner took over the manufacturing of flexible hose pipes. From the record, we find that after the Scheme of the transferor and transferee company was sanctioned under section 391(2) and Section 394 read with sections 100 and 103 of the Companies Act, 1956, all formalities as were required to be undergone as per the order of the Delhi High Court dated 22.11.2006 were undergone. The petitioner, which was the transferee company, thereafter became entitled to get its name recorded in the place of M/s. Super Seals India Limited. Here it may be noted that M/s. Super Seals India Limited and the petitioner Super Seal Flexible Hose Limited, both had separate lease deeds with the UPSIDC and, therefore, now the necessity arose to get only the name of Super Seal Flexible Hose Limited recorded in the records of UPSIDC. The UPSIDC thereafter taking into consideration the change which had taken place, executed a fresh lease deed in favour of the petitioner Super Seal Flexible Hose Limited on 17.12.2007. This document dated 17.12.2007 is the vortex of all controversy. It appears that an inspection was conducted by the Sub-Registrar, Registration Department of Gautam Budh Nagar on 24.12.2007 and it was found that in the total area of the plot no.B-7 which was measuring 19992.78 sq. meters, 11000 sq. meters (66% of the land) had constructions and there was a factory for the purposes of manufacturing of hose pipes running in the constructed portion and, therefore, the Sub-Registrar found that stamp worth Rs.74,08,000/- was deficient on the lease deed and thereafter he submitted his report dated 11.1.2008. The Collector, Gautam Budh Nagar thereafter under sections 17, 27, 33, 40, 47-A and 64 of the Indian Stamp Act 1899 read with Rules 7, 8, 9 and 10 of the U.P. Stamp (Valuation of

Property) Rules, 1997 issued a notice to the petitioner to show cause as to why the deficiency of stamp be not recovered from the petitioner. This notice was issued on 5.5.2008. The petitioner thereafter challenged the inspection report and the notice by means of Writ-C No.30548 of 2008.

10. The petitioner has filed the order sheet of the case before the Collector and from the order sheet it appears that on 4.6.2008, 16.6.2008, 27.6.2008 dates were fixed and the petitioner continuously appeared and prayed for time for filing of the objection. On 10.7.2008 the order sheet indicates that the petitioner appeared and filed its objection to the show cause notice and also submitted certain evidence. The case was thereafter fixed for 16.7.2008 for arguments. On 16.7.2008 the Presiding Office was busy and, therefore, the case could not be taken up and 21.7.2008 was fixed as the next date for arguments. On 21.7.2008, arguments were heard and the case was fixed for orders on 4.8.2008. On 4.8.2008 again the officer was busy and therefore, the case could not be taken up. On 10.8.2008 again, date was fixed for 1.9.2008. On 1.9.2008 again the officer was busy and the case was fixed for 18.9.2008 on which date again the matter was adjourned for 16.10.2008. On 16.10.2008, the officer was again busy and the case was fixed for 19.11.2008. On 19.11.2008, the officer was once again busy and the case was adjourned for 19.1.2009. Again the case could not be taken up and was fixed for 7.2.2009. On 7.2.2009, the officer was busy and the case was adjourned for 16.3.2009. On that date the petitioner had taken time and the arguments of D.G.C. (Revenue) were heard and the case was fixed for 23.3.2009 for orders. On 23.3.2009 again date was fixed for 13.4.2009. On 13.4.2009, an order was passed that the plant, machinery and the factory were to be inspected by the Executive Engineer of the Prantiya Khand, Lok Nirman Vibhag, Gautam Budh Nagar and the case was thereafter fixed for 7.8.2009. After 7.8.2009, the order sheet indicates that only general dates were fixed for 9.1.2010, 12.4.2010, 21.6.2010, 13.9.2010, 10.12.2010, 14.3.2011, 13.6.2011, 23.9.2011, 16.12.2011, 19.6.2012 and 20.7.2012. On 20.7.2012 there appears to be some order in the order sheet by which the report of the Executive Engineer was awaited. On 14.9.2012 again a date was fixed for 24.12.2012. On 24.12.2012, date was fixed for 14.1.2013. Thereafter date was again fixed for 11.2.2013 and thereafter again 18.3.2013 and 22.4.2013 were fixed. On all these dates the report of the Executive Engineer was awaited. On 22.4.2013, it appears that the petitioner did not appear and the case was fixed for 23.5.2013 on which date again the report of the Executive Engineer was not there and the case was adjourned for 17.6.2013. Thereafter 15.7.2013, 2.8.2013, 16.8.2013, 26.8.2013, 13.9.2013, 7.10.2013, 11.11.2013, 2.12.2013, 23.12.2013, 13.1.2014, 27.1.2014, 24.2.2014, 28.3.2014, 5.5.2014, 2.6.2014, 30.6.2014, 28.7.2014, 18.8.2014, 12.9.2014, 27.10.2014, 1.12.2014, 5.1.2015, 9.3.2015, 6.4.2015, 27.4.2015, 25.5.2015, 22.6.2015, 20.7.2015, 17.8.2015, 12.10.2015, 2.11.2015, 30.11.2015, 14.12.2015, 18.1.2016, 8.2.2016 and 7.3.2016 were fixed but no report from the Public Works Department was presented before the Prescribed Authority. Suddenly, on 4.4.2016, it appears that the report was placed and on that date the petitioner was not present. Yet, the case was fixed for 18.4.2016. Thereafter the order sheet reveals that dates

were fixed for 2.5.2016, 23.5.2016, 27.6.2016, 11.7.2016, 8.8.2016, 5.9.2016, 19.9.2016, 24.10.2016, 28.11.2016, 26.12.2016, 23.1.2017, 13.2.2017, 20.3.2017, 24.4.2017, 22.5.2017, 12.6.2017, 3.7.2017 and 31.7.2017. On all these dates the petitioner had not appeared and on 14.8.2017, the case was ordered to proceed ex-parte against the petitioner and the opportunity to place its side of the case was withdrawn. The DGC (Revenue) ofcourse was heard in detail and the case was fixed for 28.8.2017 for orders. On 28.8.2017, the impugned order was passed. In pursuance of the impugned order, a recovery certificate was issued on 10.11.2017 by the Collector and the Collector thereafter forwarded the matter to the Tehsildar to recover the arrears by recovering them as arrears of land revenue.

11. Aggrieved thereof, the petitioner has filed the instant writ petition.

12. Learned counsel for the petitioner essentially made the following submissions :-

i. When the transferor company i.e. M/s. Super Seals India Limited demerged its Sealing Product Division from the Hose Division and the Hose Division got merged with the transferee company namely Super Seal Flexible Hose Limited then the scheme was placed before the Delhi High Court which sanctioned the scheme and it was categorically stated in the order that the transferor company and the transferee company would comply with all the statutory provisions. It had further stated that the certified copy of the order of the Delhi High Court would be placed before the Registrar of the Companies and all necessary formalities would be completed. Further the order of the Delhi High Court dated 22.11.2006 had stated that if any stamp was payable then it shall be paid in accordance with law. Learned counsel, therefore, submitted that if there was any transfer, it was between the transferor company and the transferee company and whatever stamp had to be levied, was also levied. Learned counsel for the petitioner has submitted that any stamp which was leviable had to be levied as per the judgment reported in **2009 (1) ADJ 569 : M/s. Hero Motors Ltd. vs. State of U.P. & Others.**

ii. Learned counsel for the petitioner submitted that both the transferor company and the transferee company had separate leases with the UPSIDC and it was only to smoothen matters, the UPSIDC, after entering the name of the petitioner-company, requested the petitioner to enter into a fresh lease deed so that with regard to the land over which structures of the transferor company stood could be mutated in the name of the transferee company i.e. the petitioner Super Seal Flexible Hose Limited in its records.

iii. Learned counsel for the petitioner submitted that when the lease was signed on 19.12.2007 between the petitioner Super Seal Flexible Hose Limited with the UPSIDC, only the land was the subject matter of the lease. All transfer of the factories etc. of the transferor company was already stamped as per the order of the Delhi High Court dated 22.11.2006 and, therefore, the lease viz.-a-viz. the UPSIDC and the petitioner could be stamped only with regard to the land which was the subject matter of the lease.

iv. Learned counsel for the petitioner submits that if the order sheet of the case which was proceeded with before the Collector, was seen then it would be clear that the Collector had proceeded with the case in a very lackadaisical manner.

Notice was issued to the petitioner on 5.5.2008. The petitioner had appeared and was sincerely pursuing the matter. On 10.7.2008, the petitioner had also submitted his objection to the notice and had also filed all the evidence and thereafter continuously only dates were fixed despite the fact that the petitioner had appeared. Till 13.4.2009 the petitioner had appeared but when on that date a report was called for from the Executive Engineer, Public Works Department, the Collector as also the petitioner thereafter awaited the report from the Executive Engineer. The petitioner, it appears, began to lose interest in the case as only dates were being fixed. Learned counsel submitted that ideally the petitioner ought to have appeared on all the dates fixed but when the Prescribed Authority from the order sheet was seeing that the petitioner had stopped attending the proceedings after 13.4.2009 then it was the duty of the Prescribed Authority to have issued notices afresh, specially when a report had come on record on 4.4.2016 and which necessarily had to be objected to.

v. Learned counsel for the petitioner states that when the report ultimately was produced on 4.4.2016, at least a notice ought to have been issued to the petitioner for appearing and for objecting to the notice. Learned counsel, therefore, submits that the order dated 14.8.2017, by which it was decided to proceed ex-parte against the petitioner and by which the opportunity to adduce evidence by the petitioner was closed, was an absolutely illegal order. He, therefore, submits that the impugned order dated 28.8.2017 was also absolutely an illegal order.

vi. Learned counsel for the petitioner submits that definitely the objections of the petitioner were on record. The objection could have been looked into before the passing of the order. He, however, submits that instead of looking into the objection, the Collector had only relied upon the order dated 14.8.2017 by which the case was ordered to proceed ex-parte.

vii. Learned counsel for the petitioner further submits that even if the Collector was passing the order ex-parte then he could not have relied upon the ex-parte report of the Sub-Registrar, Gautam Budh Nagar dated 11.1.2008 and he should have personally visited the spot and thereafter should have come to the conclusion as to what was the deficiency in the document. Learned counsel submitted that the report could have been used to initiate the proceedings but could not have been used to finally decide the deficiency. He relied upon a judgment of this Court dated 4.3.2005 passed in Writ Petition No.36661 of 2004 (Ram Khelawan alias Bachcha vs. State of U.P. & Ors.). He also relied, for laying stress further on this issue, on the judgments of this Court in **Anshu Chhabara vs. Collector and Commissioner, Jhansi Division** reported in **2009 (1) AWC 512** and in the case of **Veer Bal Singh vs. State of U.P. & Ors.** reported in **2009 (2) ADJ 481.**

viii. Learned counsel for the petitioner submitted that when the report was called for from the Public Works Department on 13.4.2009 and the same was submitted on 4.4.2016 then definitely the petitioner expected a notice from the Authorities to present himself and also to object to the report.

ix. Learned counsel for the petitioner further submitted that the recital in the order that the petitioner had objected to the inspection which was sought to be done by the Executive Engineer was absolutely baseless.

x. Learned counsel for the petitioner further submitted that the penalty which had been imposed was also illegal as

the same had been imposed without recording any reason. To bolster this argument of his, learned counsel relied upon the judgments of this Court in **Aegis B.P.O. Service Ltd. vs. State of U.P. & Ors.** reported in **2011 (1) AWC 33** and in **Satya Vijay vs. State of U.P. & Ors.** reported in **2012 (6) ADJ 188.**

xi. Learned counsel also relied upon a Government Order dated 6.7.2006 which dealt with cases of undisputed demerger.

13. In reply, Sri Nimai Das, learned counsel appearing for the respondent nos.1, 2 and 3 which are the State respondents in both the writ petitions submitted that when the authority concerned has to come to a conclusion as to what was the stamp payable on a document then it had to see all the facts and circumstances and had to take into account the intentions of the parties. Learned Additional Chief Standing Counsel Sri Nimai Das has submitted that when the lease deed transferred a certain land in favour of the petitioner then all plants and machineries which were established on the land should have been taken into account after dealing with the valuation of the property for concluding as to what stamp had to be levied. Sri Nimai Das submitted that there was no defect in the notice and the notice ought to have been replied to and contested by the petitioner. He, therefore, submitted that no fault could be found in the order dated 28.8.2017. Learned Additional Chief Standing Counsel relied upon a decision of the Supreme Court in **Duncans Industries Ltd. vs. State of U.P. & Ors.** reported in **AIR 2000 SC 355** to support his arguments. Learned Additional Chief Standing Counsel further submitted that the order impugned in the Writ-C No.61914 of 2017 was appellable and the writ petition may not be entertained.

14. A perusal of the counter affidavit filed by UPSIDC shows that the petitioner was given only the land on account of the lease which was executed by the UPSIDC.

15. Having heard learned counsel for the parties, this Court is of the view that the order dated 28.8.2017 which was passed by the Collector under section 33/47A of the India Stamp Act, 1899 cannot be sustained in the eyes of law inasmuch as the manner in which the order was passed was not correct.

16. From the record the Court finds that a notice was issued to the petitioner on 5.5.2008. The petitioner thereafter had appeared and on 10.7.2008 had filed objections to the show-cause notice. He had also submitted certain evidence which according to it were in its favour. Thereafter from the order sheet, which has been filed by the petitioner along with the rejoinder affidavit, it becomes clear that almost 70 dates were fixed. The petitioner had continued to appear. On 13.4.2009 an order was passed that the plant, machinery and the factory were to be inspected by the Executive Engineer of the Prantiya Khand, Lok Nirman Vibhag, Gautam Budh Nagar. Thereafter also several dates were fixed but on all these dates neither was the report filed by the Executive Engineer nor was the case taken up and after 22.4.2013 the petitioner had stopped appearing. Even after 22.4.2013 number of dates were fixed and the case was not taken up. Ultimately when on 4.4.2016, the report of the Executive Engineer of the Public Works Department was filed, the petitioner had no knowledge of the filing of the report and the case proceeded ex-parte by an order dated 14.8.2017 and ultimately it was decided on 28.8.2017. Ideally, as the petitioner's counsel had argued, the

petitioner ought to have appeared on all the dates. However, the Court finds that when on 13.4.2009 the Executive Engineer of the Prantiya Khand, Public Works Department, Gautam Budh Nagar was directed to file the inspection report after a due inspection and after that when he had not filed the report on almost 50 dates, it was but natural that the petitioner had stopped appearing. The petitioner had no knowledge of the fact that the report was ultimately filed on 4.4.2016. The Court is, therefore, of the view that when the Prescribed Authority was looking at the order sheet and and was seeing that the petitioner was not appearing for the past so many dates, then a notice ought to have been given to the petitioner to appear in the case.

17. What is more, when on 4.4.2016 after a lapse of seven years when the report had been filed then the petitioner also ought to have been given an opportunity to object to the report. The report had stated that the petitioner had not allowed the Executive Engineer to inspect the premises. This the petitioner had stated in the writ petition was a false fact. All these facts could have been resolved had an opportunity been given to the petitioner to object to the report.

18. Further the Court finds that two firms had merged by an order of the Delhi High Court dated 22.11.2006 wherein it was held that the stamp duty, if any was payable by the transferee company, would be paid in accordance with law. Learned counsel for the petitioner has argued that any stamp duty which was payable on a merger had to be paid as per the law laid down in the judgment reported in **2009 (1) ADJ 569 : M/s. Hero Motors Ltd. vs. State of U.P. & Others** and therefore, the question for paying stamp duty on the plant and machinery again did not arise. The Court definitely is of the view that the Prescribed Authority ought to have looked into this aspect of the matter. The merger had taken place between the transferor company namely M/s. Super Seals India Limited and the transferee company namely Super Seal Flexible Hose Limited as per the order of the Delhi High Court dated 22.11.2006. If any stamp duty had to be imposed, it must have been imposed at that point of time itself. What is more, the Court finds that even the stamp duty which was leviable at the time of the merger/demerger was also not a point in issue in the instant case. The only issue which was there before the Prescribed Authority was as to what was the property which was being leased out by the UPSIDC to the petitioner-company. The Court finds that only the land was the subject matter of the transfer by means of a lease. When the Additional Chief Standing Counsel argued by taking support of the judgment of the Supreme Court in **Duncans Industries Ltd. vs. State of U.P. & Ors. reported in AIR 2000 SC 355** then definitely the Court went through that judgment and found that it was with regard to transfer which had taken place on account of a deed. If paragraph 10 of the judgment is seen, then it becomes clear that even the deed which was the subject matter before the Stamp Authorities was a sale deed which contained the details of all the plant etc. which were being transferred. In the instant case, if the lease deed is perused it would become apparently clear that only the land measuring 19992.78 sq. meters, [11000 sq. meters (66% of the land) which was transferred by the transferee company], was to be registered and, therefore, the Court is also of the view that the Prescribed Authority erred in law while taking into account the plant and machinery which were situate over the land in question. The

Court also finds from the order dated 28.8.2017 that the Prescribed Authority i.e. the Collector had relied upon the submissions made by the District Government Counsel who had argued the matter and had laid stress on the issue that the petitioner had not appeared for almost 70 dates. The Court is of the view that this fact should have definitely been taken into account and the Collector should have at least issued a notice to the petitioner to appear in the case. The Court is also of the view that when the Executive Engineer had come up with the report and had stated in the report that the petitioner had created hindrance at the time of inspection then also the petitioner should have been given an opportunity to rebut the averments made in the report. Still further, the Court is of the view that the stamp Authority passed the order relying upon an ex-parte report dated 11.1.2008 of the Sub-Registrar, Gautam Budh Nagar. The ex-parte report could have been used for initiating a case but it could not have been used for deciding the case. Even if the Collector had to decide the case without issuing notice to the petitioner then it would have been in the fitness of things that he should have visited the spot in question and should thereafter have concluded as to what was the valuation on which the stamp duty ought to have been imposed. Still further, the Court is of the view that no reason has been given while imposing the penalty.

19. In his arguments, learned Additional Chief Standing Counsel had argued that the petitioner had an alternative remedy of filing an appeal under the Stamp Act. However, we are not relegating the petitioner to avail the remedy of appeal as we find that the order impugned dated 28.8.2017 itself is an ex-parte order as the petitioner was not heard before the order was passed. When the Collector was aware of the fact that the petitioner had not appeared for the last 70 dates and when the Collector was also aware of the fact that the report which was called on 13.4.2009 was submitted on 4.4.2016, then also the Collector ought to have issued notices to the petitioner to appear and to file his objection to the report.

20. All these having not been done, we are definitely of the view that the order dated 28.8.2017 cannot be sustained in the eyes of law and, therefore, has to be set-aside and also since the order is an ex-parte one, we find that the question of relegating the petitioner to file an appeal does not arise. The order dated 28.8.2017 which was an ex-parte one, is, therefore, being quashed and is being set-aside. The recovery proceeding initiated by the recovery certificate dated 10.11.2017 is also quashed and is set aside. The matter is being remitted back to the Collector to decide the matter afresh. He shall now issue fresh notice to the petitioner. If the need arises for an inspection, he shall also get the inspection done of the premises and only thereafter would he decide the case. Also, if any penalty is to be imposed then reasons would have to be given. The whole exercise shall be completed within a period of six months. The liability shall be assessed as would have been there on the date when the lease was executed.

21. Since we find that there is an order dated 14.8.2017 by which the case was ordered to be proceeded ex-parte and the opportunity to place the petitioner's case was withdrawn, we also set-aside the order dated 14.8.2017.

22. The writ petition being Writ-C No.61914 of 2017 is, therefore, partly allowed.

23. Since, we are not setting aside the notice dated 5.5.2008, the writ petition being Writ-C No.30548 of 2008 stands dismissed.

24. Also, we are not elaborating on the Government order dated 6.7.2006 as that appears to be with regard to the stamp duty leviable in the cases of undisputed demerger.

(2022) 12 ILRA 309
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2022

BEFORE

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

Government Appeal No. 2075 of 1987

State of U.P. ...Appellant
Versus
Krishna Kumar Duggal ...Accused-Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:
Sri K.K. Arora, Sri Shashank Shekhar, Sri Abhishek Srivastava, Sri Ashutosh Kumar Tiwari

Criminal Law - Criminal Procedure Code, 1973 – Section 378 - Appeal in case of acquittal - It is an established principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - Interference with an acquittal order can only be justified when it is based on a perverse view - if the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court - In acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper (Para 14, 19, 23)

Dismissed. (E-5)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St.of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St.of Karn., (2007) 4 S.C.C. 415

3. St.Of Goa Vs Sanjay Thakran & anr. (2007) 3 S.C.C. 75

4. St.Of U. P. Vs Ram Veer Singh & ors. 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (dead) By L.R.S Vs St.of M.P. 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) Scc 749

7. Mookkiah & anr. Vs State, Rep. By The Inspector Of Police, Tamil Nadu", Reported In Air 2013 Sc 321

8. St.of Karn.Vs Hemareddy", Air 1981, Sc 1417

9. Shivasharanappa & ors. Vs St.of Karn.Jt 2013 (7) Sc 66

10. St.of Pun. Vs Madan Mohan Lal Verma (2013) 14 Scc 153

11. Jayaswamy Vs St.of Karn., (2018) 7 Scc 219

12. Shailendra Rajdev Pasvan Vs St.of Guj., (2020) 14 SC 750

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

&
Hon'ble Ajai Tyagi, J.)

1. This appeal under Section 378 (3) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 04.03.1987 passed by learned III Additional Sessions Judge, Kanpur Nagar acquitting accused-respondent in Sessions Trial No.73 of 1985, who was tried for commission of offence under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

2. Brief facts as culled out from the record are that a First Information Report was lodged by informant Smt. Jayraji against the respondent Krishna Kumar Duggal, which was registered at Police Station Govind Nagar, District Kanpur Nagar under Section 302 I.P.C. with the averments that deceased Nirmala Duggal was married with the accused-respondent about 14 years before her death. At the time of marriage, the accused-respondent told that he was a engineer but after marriage it was revealed that he was not the engineer but merely a fitter in Small Arms Ordinance Factory, Kanpur Nagar. After the marriage, behaviour of accused was cruel towards the deceased and deceased had written various letters to her parents explaining the agony, anguish and merciless beating to her by husband/respondent. Respondent/husband was a man of bad character, having illicit relations with other woman.

3. It is also stated in the F.I.R. that once the deceased had lodged F.I.R. against the accused-respondent on account of his cruelty and torturing behaviour. During the fateful day of 28.09.1984, the accused-respondent had assaulted his wife and set her on fire, which resulted into severe burn injuries to her, ultimately, resulting in her death. With the intention of escaping the offence of murder, the accused-respondent lodged F.I.R. at Police Station Govind Nagar that deceased had committed suicide. Investigation was taken up by the concerned police station, I.O. visited the spot and prepared the site plan. No kerosene oil, petrol bottle or container, match box, stove or any other thing was found by the I.O. near the dead body of the deceased.

4. Thereafter, I.O. has prepared the inquest report and dead body was sent for post-mortem. Post-mortem report was prepared by the doctor, who found several injuries on the body of the deceased. Statement of witnesses were recorded during the course of investigation. After completion of investigation, I.O. has submitted the charge sheet against the accused-respondent under Section 302 I.P.C.

5. Charges were framed against the accused-respondent and prosecution examined 11 witness. Documentary evidence was also filed by the prosecution. After completion of prosecution evidence, statement of accused-respondent was recorded under Section 313 Cr.P.C., in which he stated that false evidence has been led against him and he was falsely implicated in the case.

6. The accused-respondent examined five witnesses in defence. After hearing the parties, learned trail court reached to the conclusion that no offence is committed by the accused-respondent and the deceased had committed suicide, therefore, learned trial court acquitted the accused-respondent of the charges framed against him.

7. Heard Mr. Abhishek Srivastava, learned Advocate assisted by Mr. Ashutosh

Kumar Tiwari, learned counsel for the accused-respondent and learned A.G.A. for the State-appellant.

8. On being summoned, the accused-person pleaded not guilty and wanted to be tried. The offence for which accused was charged was triable by the Court of Sessions, hence, the accused-respondents were committed to the Court of Sessions.

9. At the end of the trial and after recording the statement of the accused persons under section 313 Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge acquitted the respondent as mentioned above.

10. Learned A.G.A. for the State has submitted that the order of acquittal is not justified in the eye of law as the prosecution had very well established the case against the accused. It is further submitted by learned A.G.A. that the learned Sessions Judge has misread the evidence. Learned A.G.A. has lastly submitted the the judgment impugned is erroneous and liable to be set aside.

11. Before we embark on testimony and the judgment of the Court below, the contours for interfering in criminal appeals where accused has been held to be non guilty would require to be discussed.

12. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39***, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

13. Further, in the case of ***"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415***, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to

curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

14. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

15. In the case titled ***"STATE OF GOA Vs. SANJAY THAKRAN & ANR.", reported in (2007) 3 S.C.C. 75***, the Apex Court has reiterated the powers of the High Court in appeals against acquittal. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

16. Similar principle has been laid down by the Apex Court in cases titled ***"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553*** and in ***"GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589***. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

17. In the case of ***"LUNA RAM VS. BHUPAT SINGH AND ORS.", reported in (2009) SCC 749***, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye

witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

18. In a recent decision of the Apex Court in the case titled ***"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU", reported in AIR 2013 SC 321,*** the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

19. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***"STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417***, wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

20. The Apex Court in ***"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66*** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

21. Further, in the case of ***"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153***, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

22. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219***, has laid down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal

particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of ***Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606****, which reads thus:*

"21. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

23. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750***, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

24. It appears that most of the witnesses have not supported the case of the prosecution. The learned trial judge has not found F.I.R. free from any kind of suspicion.

25. We have perused the depositions of prosecution witnesses, documentary evidence supporting ocular versions, arguments advanced by learned counsel for the parties. We have been taken through the record. We are unable to accept the submissions of the State counsel for the following reasons and the judgments of the Apex Court which lay down the criteria for consideration of appeals against acquittal. The chain has been found to be incomplete. While going through the judgment it is very clear that the court below has given a categorical finding that the evidence is so scanty that the accused cannot be punished and or convicted for the offences for which they are charged. The factual scenario in the present case will not permit us to take a different view than that taken by the court below. In that view of the matter we are unable to satisfy ourselves. Thus we concur the findings of the court below.

26. Hence, in view of the matter & on the contours of the judgment of the Apex Court, we concur with the learned Sessions Judge.

27. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below. The bail and bail bonds are cancelled.

28. We are thankful to learned A.G.A. for ably assisting the Court.

(2022) 12 ILRA 316
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 689 of 2022

Sri Amalendu Chandra & Anr. ...Appellants
Versus
Prof. Rajiv Shekhar, Director, I.I.T., (I.S.M.), Dhanbad ...Respondent

Counsel for the Appellants:
Sri Rohan Gupta, Sri Manish Goyal, Sr. Advocate

Counsel for the Respondent:
Sri Avneesh Tripathi, Sri Ashok Khare, Sr. Advocate

A. Education/Service Law – Appointment – Disciplinary Proceeding/Enquiry - Institute of Technology Act, 1961 - Section 17(1); Statutes of older IIT's - Clause 15(3).

Jurisdiction - If the High Court, for whatever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal u/Article 136 of the Constitution of India (in other cases). (Para 8)

B. Interpretation of order in contempt jurisdiction - While exercising contempt jurisdiction, the court must not travel beyond the four corners of the order of which violation is alleged and it should not enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment and order. (Para 9 to 11)

In the instant case, the writ petitioner (Prof. Rajiv Shekhar) had filed Writ-A No. 16060 of 2019 for the limited relief of quashing the letter dated 23.08.2019 conveying that approval for disciplinary proceeding against the writ petitioner may be obtained at the level of IIT Council. The writ petitioner also prayed for quashing the memorandum by which a penalty was proposed against him. There was no prayer in the writ petition w.r.t. emoluments payable to him as an appointee on the post of Director. The order dated 19.10.2019 recording the undertaking of the counsel representing the respondents in Writ-A No. 16060 of 2019 is only in respect of putting those impending proceeding in abeyance. The scope of a writ petition is ordinarily determined by the prayer made therein. In such circumstances, **the undertaking recorded in the order dated 19.10.2019, could not have been interpreted as an undertaking to the effect that all the emoluments that are attached to the post of Director shall be admissible to the writ petitioner particularly, when there was no such prayer in the writ petition. The direction of the learned Single Judge, vide order dated 21.10.2022,** requiring the respondents to grant HAG scale in compliance of the writ court order and, on failure to do so, to appear before the contempt court, **is beyond the scope of the order of the writ court of which contempt was alleged and is, therefore, liable to be set aside.** (Para 12)

Respondent (Prof. Rajiv Shekhar) can move an appropriate application either in the pending writ petition or can file a fresh writ petition

w.r.t. grant of HAG scale as has been claimed by him in the contempt jurisdiction. (Para 13)

Special appeal allowed. (E-4)

Precedent followed:

1. Midnapore Peoples Coop. Bank Ltd.Vs Chunilal Nanda, (2006) 5 SCC 399 (Para 3)

2. Jhareshwar Prasad Pal Vs Tarak Nath Ganguly, (2002) 5 SCC 352 (Para 9)

3. Sudhir Vasudeva, Chairman & Managing Director, Oil & Natural Gas Corporation Ltd. & ors. Vs M. George Ravishekaran & ors., (2014) 3 SCC 373 (Para 10)

Present special appeal assails order dated 21.10.2022, passed by learned Single Judge in Contempt Application (Civil) No. 5669 of 2022.

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Manish Goyal, learned senior counsel, assisted by Sri Rohan Gupta, for the appellants and Sri Ashok Khare, learned senior counsel, assisted by Sri Avneesh Tripathi, for the respondent.

2. This intra court appeal under Chapter VIII Rule 5 of the High Court Rules is against the order dated 21.10.2022 passed by the learned Single Judge in Contempt Application (Civil) No. 5669 of 2022. The operative portion of the order dated 21.10.2022 with which the appellants are aggrieved is extracted below:-

"This Court directs the opposite party to file an affidavit before this Court within three weeks complying with the order of Writ Court in granting of HAG scale which was subject to decision of writ petition. In case of failure, the opposite party shall remain present in the Court on 06.12.2022."

3. The case of the appellant is that they were opposite parties in Contempt Application (Civil) No. 5669 of 2022 filed by the respondent alleging violation of court's order dated 19.10.2019 in Writ A No. 16060 of 2019; that the order dated 19.10.2019 nowhere mandates grant of HAG scale to the writ petitioner; and, therefore, the learned Single Judge exercising contempt jurisdiction exceeded its jurisdiction by issuing a direction as if it were a writ court. It is thus prayed that the order of the learned Single Judge be quashed. With regard to the maintainability of the intra court appeal, it is submitted that the impugned direction is beyond the scope of the order of which wilful disobedience is alleged hence, the intra court appeal is maintainable in light of Supreme Court decision in ***Midnapore Peoples Coop. Bank Ltd. v. Chunilal Nanda, (2006) 5 SCC 399.***

4. The learned counsel for the respondent submits that the natural consequence of the interim order dated 19.10.2019 passed in Writ A No. 16060 of 2019 would be that the writ petitioner (the respondent herein) would be entitled to the benefit of HAG scale therefore, denial of such benefit amounts to wilful disobedience of the writ court's order, as a result whereof, the learned Single Judge while exercising contempt jurisdiction is well within its jurisdiction to direct for grant of HAG scale. Consequently, the order impugned is not liable to be interfered with.

5. To have a clear understanding of the issues that arise for our consideration in

this appeal, a glimpse at the relevant facts would be apposite. These are as follows:-

(i) The respondent, that is, the contempt-applicant in Contempt Application (Civil) No.56669 of 2022 is the writ petitioner, who filed Writ A No.16060 of 2019. He was facing an enquiry in respect of certain allegations concerning harassment of an appointee under the Scheduled Caste quota. During that enquiry, in exercise of the powers conferred under Section 17(1) of the Institutes of Technology Act, 1961 read with Clause 15(3) of the Statutes of older IIT's, the President of India, in his capacity as a Visitor of the Indian Institute of Technology (Indian School of Mines), Dhanbad approved appointment of the writ petitioner (the respondent herein) as Director of IIT (ISM), Dhanbad. As the proceedings pending/ proposed against the writ petitioner were in respect of his conduct as Professor, Department of Material Science and Engineering, IIT, Kanpur, he being appointed as Director of IIT (ISM), Dhanbad by order of the Visitor, a question arose as to whether those proceedings could continue without approval of the Visitor. The concerned ministry, however, conveyed vide letter dated August 23, 2019 that the matter may be resolved at the level of IIT Council. Questioning this letter dated August 23, 2019 and the memorandum proposing punishment, the respondent herein i.e. the writ petitioner filed Writ A No. 16060 of 2019. In this writ proceeding, on 19.10.2019, following order was passed:-

"Heard Shri G.K. Singh, learned Senior Counsel assisted by Shri Avneesh Tipathi, learned counsel for the petitioner, Shri Rohan Gupta, learned counsel appearing for the second & third respondent and Shri Shabhajeet Singh, learned counsel appearing for the Union of India.

All the respondents shall file counter affidavit within four weeks. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List thereafter before appropriate Bench. It shall not be treated as tied up or part heard to this Bench.

Petitioner is presently posted as Director, Indian Institute of Technology, (Indian School of Mines), Dhanbad. The instant petition is directed against the order dated 23 August 2019 passed by the first respondent-Secretary, Ministry of Human Resources & Development, New Delhi, whereby, the Chairman, IIT Council who happens to be Hon'ble Minister of Human Resources & Development has conveyed his approval for proceeding against the petitioner.

On specific query, learned counsels appearing for the first and third respondent submit that till date approval pursuant to the directions of the Hon'ble Visitor, has not been obtained from the IIT Council. It is urged that matter is yet to be placed before the Council. In view thereof, learned counsel for the second and third respondent, on instructions, submits that without seeking view/opinion of the Ministry of Human Resources & Development, New Delhi, in terms of the direction of the Hon'ble Visitor, the second respondent-Registrar, Indian Institute of Technology, Kanpur, would keep the matter in abeyance.

The undertaking is recorded and accepted.

In view thereof, no order is required to be passed on the stay application at this stage."

(ii) By alleging that consequent to his appointment as Director, IIT (ISM), Dhanbad, the respondent (Prof. Rajiv

Shekhar) was entitled to HAG scale; whereas, its payment was withheld on account of impending disciplinary proceeding against him, which were kept in abeyance by the undertaking recorded in the order dated 19.10.2019 and, till date, approval of the Visitor or consent of IIT Council was not obtained, Contempt Application (Civil) No. 5669 of 2022 was filed by claiming that denial of HAG scale amounts to violation of the undertaking recorded on 19.10.2019.

(iii) It is in this background, the learned Single Judge entertained the contempt proceeding and issued the impugned direction dated 21.10.2022, after recording its reasons, which are extracted below:-

"After hearing learned counsel for respective parties, this Court finds that opposite party was not justified in issuing the letter dated 08.08.2022 withholding the grant of HAG scale to the applicant once the writ Court had kept the proceedings in abeyance subject to the opinion of the Ministry of Human Resources & Development, New Delhi in terms of direction of Hon'ble Visitor. As the Hon'ble Visitor had declined to interfere in the matter and relegated the same to the IIT Council and IIT Council has not taken any unanimous decision in the proceedings against the applicant for initiating the proceedings, the unilateral decision of the Chairman, IIT Council cannot be made basis for withholding the grant of HAG scale to the applicant."

6. The contention of the learned counsel for the petitioner is that the direction issued, vide order dated 21.10.2022, is, firstly, beyond the scope of the writ petition as well as writ court's order dated 19.10.2019 as there was no prayer for HAG scale in the writ petition moreover the order dated 19.10.2019 does not at all deal with the admissibility of HAG scale to the writ petitioner (contempt-applicant /respondent herein) and, secondly, the contempt court could not have acted as a writ court as to issue directions in respect of a cause of action which was not within the scope of the writ proceeding. It has been contended that in the writ petition the prayer was limited to quashing the order dated 23.08.2019, whereby the approval of Minister of Human Resource Department for proceeding against the writ petitioner (i.e. the respondent herein) was conveyed; and to quash the memorandum proposing a penalty upon the writ petitioner. It was urged that in these circumstances the order of the learned Single Judge, while exercising contempt jurisdiction, was in excess of its jurisdiction and, therefore, liable to be set aside.

7. Sri Ashok Khare, who appears for the respondent, submitted that although there may not be a clear direction of the writ court for payment of HAG scale but the payment of HAG scale is a natural consequence of appointment as a Director and since it has been withheld because of the impending disciplinary proceeding which was put in abeyance vide undertaking given to the writ court dated 19.10.2019, the act of withholding the same amounted to violating the undertaking, therefore, while exercising contempt jurisdiction, the learned Single Judge was well within its jurisdiction in issuing such directions which were necessary to enforce writ court's order. He, therefore, submits that the order of the learned Single Judge calls for no interference.

8. We have accorded consideration to the rival submissions and have also noticed

the relevant facts of the case for the purposes of deciding this intra court appeal. Before we proceed further, it would be useful to address the issue with regard to maintainability of the intra court appeal under the High Court Rules against an order passed by a learned Singe Judge in contempt jurisdiction. In this regard we may observe that in **Midnapore's case (supra),** the apex court in respect of maintainability of an intra court appeal against orders in contempt proceedings, in paragraph 11 (V), observed: *"If the High Court, for whatever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."* In light of the decision noticed above, as the impugned order of the learned Single Judge amounts to a direction as a writ court and there exists right of an intra court appeal under the Rules of the Court, in our view, the intra court appeal is maintainable.

9. At this stage, it would be useful to notice the law as to what extent the court exercising contempt jurisdiction can interpret the order of which violation is alleged and issue directions. In **Jhareshwar Prasad Paul v. Tarak Nath Ganguly, (2002) 5 SCC 352,** in paragraph 11, the Supreme Court observed: *"The court exercising contempt jurisdiction is not entitled to enter into questions which have not been dealt with and decided in the judgment or order, violation of which is alleged by the applicant. The court has to consider the direction issued in the judgment or order and not to consider the question as to what the judgment or order should have contained. ..... If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment and order."*

10. Similar view has been reiterated by a three-judge bench of the Supreme Court in **Sudhir Vasudeva, Chairman & Managing Director, Oil And Natural Gas Corporation Ltd. & others v. M. George Ravishekaran & others, (2014) 3 SCC 373,** wherein, in paragraph 19, it was observed: *"The courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self-evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or wilful violation of the same. .....The Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions."*

11. From the law noticed above, it is clear that while exercising contempt jurisdiction, the court must not travel beyond the four corners of the order of which violation is alleged and it should not enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment and order.

12. In light of the law noticed above, we now proceed to examine whether while issuing the impugned direction, the learned Single Judge exceeded its jurisdiction as a contempt court. In the instant case, on the basis of facts noticed above, we find that the writ petitioner (Prof. Rajiv Shekhar) had filed Writ A No. 16060 of 2019 for the limited relief of quashing the letter dated 23rd August 2019 conveying that approval for disciplinary proceeding against the writ petitioner may be obtained at the level of IIT Council. The writ petitioner also prayed for quashing the memorandum by which a penalty was proposed against him. There was no prayer in the writ petition with regard to emoluments payable to him as an appointee on the post of Director. The order dated 19.10.2019 recording the undertaking of the counsel representing the respondents in Writ A No. 16060 of 2019 is only in respect of putting those impending proceeding in abeyance. The scope of a writ petition is ordinarily determined by the prayer made therein. In such circumstances, the undertaking recorded in the order dated 19.10.2019, in our view, could not have been interpreted as an undertaking to the effect that all the emoluments that are attached to the post of Director shall be admissible to the writ petitioner particularly, when there was no such prayer in the writ petition. In such view of the matter and in light of the judicial precedents noticed above, governing the scope of contempt jurisdiction, we are of the considered view that the direction of the learned Single Judge, vide order dated 21.10.2022, requiring the respondents to grant HAG scale in compliance of the writ court order and, on failure to do so, to appear before the contempt court, is beyond the scope of the order of the writ court of which contempt was alleged and is, therefore, liable to be set aside. The appeal is **allowed**. The direction to the extent indicated above is set aside.

13. It is clarified that our order will not preclude the respondent (Prof. Rajiv Shekhar) to move an appropriate application either in the pending writ petition or to file a fresh writ petition in respect of grant of HAG scale as has been claimed by him in the contempt jurisdiction.

(2022) 12 ILRA 321
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 7697 of 2022

Shree Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Maithali Sharan Pipersenia

Counsel for the Respondents:
C.S.C., Sri Mrigraj Singh

A. Service Law – Pension - U.P. (Zila Panchayat) Employees Post Retiral Benefits Service Rules, 1972 - Clause 7(b) of Rule 2 - Service rendered in ad-hoc, temporary establishment and work charge establishment is considered as qualifying service subsequent to regularisation of the incumbent. (Para 15)

In case of the petitioner, he was engaged as a Paid Apprentice without any post. The proposal for converting the post of Paid Apprentice into the post of Tax Collector/Pound Keeper was rejected by the Government long ago. The petitioner was never regularised on any sanctioned post. No doubt, the petitioner was asked to work on in various capacities for 26 years by the respondents but such work that was taken from him, was out of administrative exigency and paid from contingency fund. There being no post in the regular establishment ever sanctioned by any competent Authority on which the petitioner could be said to have been engaged in accordance with the Rules framed by the Government in this regard, this Court cannot grant the relief as prayed for in this petition. (Para 15)

Writ petition dismissed. (E-4)

Precedent considered:

1. Babu Ram Vs St. of U.P. & ors., 2016 (3) ADJ 149 (Para 3) court

2. Mahendra Singh Vs St. of U.P. & ors., Writ-A No. 8535 of 2014 (Para 8)

3. Prem Singh Vs St. of U.P., AIR 2019 SC 4390 (Para 8)

4. Habib Khan Vs St. of Uttarakhand, Civil Appeal No. 10806 of 2017, decided on 23.08.2017 (Para 8)

5. Om Prakash Singh Tomar Vs St. of U.P. & ors., Writ-A No. 14387 of 2017 (Para 9)

6. Dr. Hari Shankar Ashopa Vs St. of U.P. & ors., 1989 (59) FLR 110 (Para 9)

7. Rakesh Kumar & ors. Vs St. of U.P. & ors., Writ-A No. 6627 of 2021 (Para 10)

8. St. of U.P. Vs Mahendra Singh, Special Appeal Defective No. 1003 of 2020 (Para 10)

9. St. of U.P. & ors. Vs Bhanu Pratap Sharma, Special Appeal No. 97 of 2021 (Para 10)

10. Madan Gopal Pandey Vs St. of U.P., Service Single No. 12417 of 2018 (Para 13)

11. A.P. Srivastava Vs U.O.I., 1995 LawSuit (SC) 921 (Para 14)

Present petition assails order dated 13.04.2018, passed by the Secretary, Panchayat Raj, Government of U.P., whereby the St. Government has rejected the claim of the petitioner for post retiral dues.

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

1. Heard learned counsel for the petitioner and Sri Mrigraj Singh, learned counsel appearing on behalf of Zila Panchayat as well as the learned Standing Counsel who appears on behalf of the respondent nos.1 and 2.

2. This petition has been filed by the petitioner praying for quashing of the order dated 13.04.2018 served on the petitioner's counsel on 27.04.2022 in Contempt Petition No.1587 of 2018 and praying for a mandamus to be issued to the respondents to pay entire pension along with interest thereon w.e.f. 31.07.1999.

3. It is the case of the petitioner that he was initially engaged as a Paid Apprentice Vaccinator in Zila Panchayat Gorakhpur in 1974. The District of

Gorakhpur was bifurcated and new District of Maharajganj was created. The petitioner was transferred to Maharajganj along with other staff and had been working in Maharajganj since 1993. The petitioner retired on 31.07.1999 after rendering more than 26 years of service. He could not get post retiral benefits and therefore, he filed Writ Petition No.61840 of 2005 (Shree Ram Vs. State of U.P. and others) which was allowed by learned Single Judge on 11.08.2009 with a direction to the respondent to pay retiral dues to the petitioner treating him to have retired from the post of Pound Keeper. A special appeal, namely, Special Appeal No.785 of 2010 was filed by the Zila Panchayat Maharajganj which was allowed by the Division Bench on 28.02.2013 with a direction to the Single Judge to reconsider the matter afresh. Learned Single Judge thereafter rejected the writ petition of the petitioner by his order dated 12.04.2016 placing reliance upon the judgment of Full Bench of this Court in **Babu Ram Vs. State of U.P. and others [2016 (3) ADJ 149),** wherein the Court had held that period spent by an employee on work charge, cannot be counted for the purposes of calculating the qualifying service for retiral dues. The petitioner filed special appeal against the order of the Single Judge which special appeal was decided on 26.05.2017 with a direction to the Secretary, Department of Panchayat Raj to look into the grievance of the petitioner and to pass appropriate order thereon within a period of four months from the date of receipt of certified copy of that order.

4. Now by the impugned order passed by the Secretary, Panchayat Raj, Government of U.P. dated 13.04.2018, the State Government had rejected the claim of the petitioner. Hence this petition.

5. It has been argued by learned counsel for the petitioner that the petitioner has been working since 1974 in District Gorakhpur and was thereafter transferred in 1993 to Zila Panchayat Maharajganj. The Zila Panchayat Maharajganj has been taken work from the petitioner and also paying him salary as is evident from the orders filed as Annexure-9 and 10 to the petition. It has been argued that the Zila Panchayat Maharajganj has been referring to the petitioner as Pound Keeper sometimes and also as Tax Collector at other time. After rendering 26 years of service, the petitioner has been left on road. Learned counsel for the petitioner has placed reliance upon several judgments of the coordinate Benches of this Court to say that in similar matters, this Court has directed payment of pension and other retiral benefits. Copies of the orders have been annexed as Annexure-13 to the petitioner collectively.

6. Learned Standing Counsel and Sri Mrigraj Singh have pointed out from the counter affidavit filed by them and also from the impugned order that the petitioner was initially engaged as a Paid Apprentice Vaccinator in Zila Panchayat Gorakhpur. The Paid Apprentice Vaccinator has no right to be appointed on a regular post. There was one post of Assistant Vaccinator/Superintendent and 21 Vaccinators in Zila Panchayat Gorakhpur which were converted into post of Pound Keepers/Tax Collectors by an order of Commissioner, Gorakhpur dated 14.08.1987. Three posts of Paid Apprentice Vaccinator however were not converted into the regular post. The petitioner as well as two others Paid Apprentice were transferred to Zila Panchayat Maharajganj on its creation in 1993. The petitioner reached the age of superannuation and retired in July 1999. Although it has been

accepted by the respondents that the petitioner has been working on various assignments given to him and salary has been paid to him by the Zila Panchayat Gorakhpur and thereafter Zila Panchayat Maharajganj. It has been pointed out that there was no post created by any competent Authority on which the petitioner could be said to have been engaged at any point of time. Provident Fund Contributory deductions from the salary of the petitioner was also not done at any point of time. The proposal sent to the Government for conversion of Paid Apprentice Vaccinator to post of Pound Keeper, had been rejected long ago. The petitioner was asked to work on various assignments due to administrative exigency and he was paid from contingency fund. The post on which the petitioner was working, was neither substantive nor permanent and therefore could not be said to be a post on the pensionable establishment as per clause **7(b) of Rule 2 of the U.P. (Zila Panchayat) Employees Post Retiral Benefits Service Rules, 1972.** The petitioner's case has therefore been rejected by the respondent no.1.

7. This Court has considered the judgements passed by the coordinate Benches which have been placed on record collectively as Annexure-13 to the writ petition.

8. In Writ A No. 8535 of 2014 (Mahendra Singh vs. State of U.P. and 2 others), the writ petitioner was given temporary appointment in 1981 as Godown Chaukidar and was regularised with effect from 05.10.1997 and he retired on 30.06.2011. The Court placed Reliance upon the judgement of the Supreme Court in **Prem Singh Vs. State of U.P. (AIR 2019 SC 4390)** and judgement of the Supreme Court in **Habib Khan Vs. State of Uttarakhand (Civil Appeal No.10806 of 2017, decided on 23.08.2107)** to say that the petitioner was entitled for benefit of counting his previous service rendered before his regularisation in Department as temporary employee as qualifying service for pension.

9. In Writ A No.14387 of 2017 (Om Prakash Singh Tomar vs. State of U.P. and others) the petitioner was a Seasonal Collection Amin and his service rendered as such w.e.f 16.04.1990 to 09.06.2006 when he was regularised as Collection Amin, were not been counted for the purposes of qualifying service of pension. The Court placed reliance upon the judgement rendered in **Prem Singh (supra)** and also order passed in **Dr. Hari Shankar Ashopa Vs. State of U.P. and others [1989 (59) FLR 110]** to say that temporary service rendered before regularisation can be counted as qualifying service after regularisation.

10. In Writ A No.6627 of 2021 (Rakesh Kumar and 5 others Vs. State of U.P. and 2 others), the Court was considering various orders passed against the writ petitioners rejecting their claim for counting their service on work charge establishment as qualifying service for pension. The Court also considered the U.P. Qualifying Service for Pension and Validation Ordinance, 2020 and the Court relied upon the judgement rendered by the Division Bench in **State of U.P. Vs. Mahendra Singh (Special Appeal Defective No.1003 of 2020)** wherein the Division Bench directed that service rendered in work charge establishment should be considered for calculating qualifying service for pension. Such judgement of the Division Bench was also

relied upon by another Division Bench in **State of U.P. and others Vs. Bhanu Pratap Sharma (Special Appeal No.97 of 2021).**

11. In Writ A No.35301 of 2017 (Bhanu Pratap Sharma Vs. State of U.P. and 4 others), the learned Single Judge had considered service rendered in work charge establishment by the writ petitioner as qualifying service for pension in view of the law settled by the Supreme Court in the case of **Prem Singh (supra).** The Special Appeal arising out of the judgement of the Single Judge had considered the U.P. Qualifying Service for Pension and Validation Ordinance, 2020 which was latter converted into Act No.1 of 2021 on 05.03.2021 and Section 2 thereof where 'Qualifying Service' has been defined to mean the service rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of Service Rules prescribed by the Government for the post. In the counter affidavit, it had come out that the writ petitioner Bhanu Pratap Sharma had been appointed in the office of the Executive Engineer on the post of Rig Assistant on work charge establishment and thereafter petitioner was regularised on 18.03.2006. The Court observed that since the writ petitioner was appointed on a post in work charge establishment, the service rendered on such post shall be considered as qualifying service as he was regularised immediately thereafter.

12. In State of U.P. and others Vs. Mahendra Singh (Special Appeal Defective No.1003 of 2020) also, the Division Bench placed reliance upon admission in the counter affidavit that 415 temporary posts were created in persuance of the Government order issued in 1990 and the petitioner was appointed as Watchman on such temporary post which was latter converted into a regular post and the writ petitioner was regularised on 06.10.1997. The Court relied upon the judgement in **Prem Singh (supra)** and considered services reinded in temporary establishment immediately before regularisation as qualifying service for pension.

13. In Service Single No.12417 of 2018 (Madan Gopal Pandey vs. State of U.P.), the Single Judge placed reliance upon the judgement rendered in **Habib Khan (supra)** and held that the petitioner who was working as Seasonal Collection Amin before his regular appointment as Collection Amin, shall be entitled to get his services rendered prior to his regularisation as qualifying service.

14. Learned counsel for the petitioner has placed reliance upon the judgement in **AP Srivastava Vs. Union of India [1995 LawSuit (SC) 921]** where the Supreme Court was considering the case of the appellant who had been appointed as temporary Lower Division Clerk and later on promoted on Upper Division Clerk thereafter again reverted and compulsory retirement order was passed under Rule 56 of the Fundamental Rules. The Court placed reliance upon the Rule 56(j) of the Fundamental Rules and observed that once an incumbent is compulsorily retired after rendering required number of years of service, he shall be allowed to be paid pension. The condition precedent for being entitled to pension in case of a temporary Government servant is rendering 20 years of service and the appellant had completed more than 20 years of service.

15. As is evident from a perusal of the orders passed by the co-ordinate Benches

and Division Bench of this Court and the Supreme Court as aforesaid, service rendered in ad-hoc, temporary establishment and work charge establishment has been considered as qualifying service subsequent to regularisation of the incumbent. In case of the petitioner, he was engaged as a Paid Apprentice without any post. The proposal for converting the post of Paid Apprentice into the post of Tax Collector/Pound Keeper was rejected by the Government long ago. The petitioner was never regularised on any sanctioned post. No doubt, the petitioner was asked to work on in various capacities for 26 years by the respondents but such work that was taken from him, was out of administrative exigency and paid from contingency fund. There being no post in the regular establishment ever sanctioned by any competent Authority on which the petitioner could be said to have been engaged in accordance with the Rules framed by the Government in this regard, this Court cannot grant the relief as prayed for in this petition.

16. The writ petition lacks merit and is hereby **dismissed**.

(2022) 12 ILRA 326
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 11776 of 2017
With
Writ-A No. 4315 of 2017 & Other Cases

Union of India & Anr. ...Petitioners

Versus

C.A.T., Allahabad & Anr. ...Respondents

Counsel for the Petitioners:
Sri Shekhar Kumar Yadav, Sri Krishna Agarawal, Sri Lal Mani Singh

Counsel for the Respondents:
Sri Shyamal Narain, Sri Siddharth Khare, Sri Ajai Singh, Sri Ashok Khare (Sr. Advocate)

A. Service Law – Recruitment/Selection - Apprentices Act, 1961 - Sections 18 & 22 - Ordnance Factories Group C & D Industrial Posts Recruitment Rules, 1994 - Schedule to the Recruitment Rules, 1994 - Column (11) of clause (5).

Recruitment on the post of "Semi-Skilled Workman" is governed by the Recruitment Rules, 1994. The vacancies of "Semi-Skilled Workman" are liable to be filled in accordance with the Recruitment Rules, 1994 r/w Section 22 of the Act, 1961. (Para 11, 13 to 16)

B. In direct recruitment for the post of "Semi Skilled Workman" trade test as prescribed is mandatory. The term "Non-Selection Post" used in Column 5 of Clause 5 of the Schedule of the Recruitment Rules, 1994 read with Column 11 clearly establishes that the term "Non-Selection Post" has been used in Column 5 for posts to be filled by promotion/ transfer and also by direct recruitment. The term "Non-Selection Post" used in Column 5 has not been used in a strict sense to indicate only for posts to be filled by promotion/ transfer. Therefore, posts to be filled by direct recruitments as mentioned in Column 11 has to be filled following the procedure provided in the Recruitment Rules, 1994 read with the aforequoted policy decisions and particularly Annexure to the policy decision dated 06.01.2011. (Para 11, 17 to 24)

C. Obligation on the St. - It has been well settled that **an apprentice does not have a statutory right to claim an appointment and the employer is not under any statutory obligation to give him**

employment. However, <u>if the terms of the contract of apprenticeship lay down a condition that on successful completion of apprenticeship an employer would offer him an employment, then it is obligatory on his part to do so.</u> In the absence of such a condition, there is no obligation. (Para 25)

The St. is the model employer. **The obligation casts on the St. under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood.** Therefore, appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before us. **The Directive Principles of St. Policy have to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the St. to one and all and not to a particular group of citizens or class who in the present set of facts are respondents asserting for automatic employment in the Ordnance Factory where they completed their apprenticeship, in exclusion to other eligible candidates for recruitment on the post of Semi-Skilled Workman (Group 'C' posts), is against the basic principles applicable for public employment**. (Para 28)

It is held in the present case, the respondent-candidates do not have any statutory right for compulsory or automatic recruitment on the post of "Semi-Skilled Workman" in the Ordnance Factory where they have undergone apprentice training under the Act, 1961 and merely because they possess NCVT certificate. They have a right to participate in the recruitment process in terms of the Recruitment Rules, 1994 and the aforequoted policy decisions provided they fulfill the educational and other qualifications required for direct recruitment as prescribed in Column 8 of Clause 5 of Annexure to the Recruitment Rules, 1994. (Para 11, 25 to 29)

D. Words and Phrases – '*preference*' - Use of the word 'preference' in clause 5(C) of the Annexure to the policy decision dated 06.01.2011 does not mean that trained apprentices will have an exclusive right to the exclusion of all others to be considered for appointment. (Para 27, 30)

Apprentice trainees are also required to participate in competitive examination or test as may be provided by the rules of the concerned employers in respect of recruitments and when any of them is found equal to a non-apprentice candidate after the selection test then only preference is to be given in such a case to the apprentice trainee. This protects the possibility of meritorious non-appearance candidates from being discriminated vis-a-vis apprentice trainee. (Para 26)

The field of choice cannot be limited only to those who have undergone their apprenticeship training… since that would patently violate Article 14 and 16 of the Constitution of India depriving those who have not undergone apprenticeship training …of an equal opportunity for applying for these posts. (Para 27)

E. The impugned order of the Tribunal drawing inference of preference and treating it as a right of the respondent-candidates to get employment as "Semi-Skilled Workman" without facing selection process to the exclusion of all others, is incorrect, unsustainable and contrary to the law laid down by Hon'ble Supreme Court.

Legitimate Expectation - The inference drawn by the Tribunal that on being selected by National Council for Vocational Training to award certificate under the Act, 1961, **candidates have legitimate expectation and thus have preference in employment over the direct recruits, in the Ordnance Factory where they undergone apprenticeship.** This finding of the Tribunal is not referable to any of the provisions of the Recruitment Rules, 1994. Use of the word 'preference' in clause 5(C) of the Annexure to the policy decision dated 06.01.2011, provides

that in the selection process, other things being equal, i.e. marks being equal, trained ex-Trade apprentices of the recruiting Ordnance Factory and sister Ordnance Factories shall be given preference in the order in which they are St.d.

In other words, **if two or more ex Trade apprentices secure the same marks then preference shall be given on the basis of seniority and for this purpose the Ex-TA who has passed NCTVT examination in earlier batch (NCTVT) shall be senior to the Ex-TA passed in subsequent batch.** That apart, the Central Government has now amended policy in this regard by policy decision dated 09.05.2016 in line with Section 22 of the Act, 1961 making "Provision of granting five extra marks to Ex-Trade Apprentices in the final merit list of the written examination conducted for a total of 100 marks". The advertisement being notifications dated 20.06.2015 to 26.06.2015 are not in conflict with the Recruitment Rules, 1994 and the aforequoted policy decision of the Ordnance Factory Board and, therefore, the Tribunal has committed a manifest error of law and fact to quash it. (Para 30)

All writ petitions are quashed. (E-4)

Precedent followed:

1. M. Sabarinathan Vs The General Ordinance Factory & ors., Writ Appeal (MD) No. 316 of 2007, decided by Madras High Court (Madurai Bench) on 14.12.2007 (Para 9(iii))

2. U.O.I. & ors. Vs M. Sabarinathan & ors., Special Leave to Appeal (Civil) No. 21454 of 2008, decided on 15.11.2010 (Para 9(iii))

3. Puneet & ors. Vs U.O.I. & ors., Writ Petition (C) No. 26 of 2009, Judgment of Delhi High Court dated 20.07.2010 (Para 10(iv))

4. Ajay Kumar Das Vs St. of Orissa, Civil Appeal No. 4977 of 2009, decided on 31.07.2009 (Para 10(vi))

5. Vijay Singh Vs St. of U.P. & ors., 2004 (3) UPLBEC 2789 (Para 10(vi))

6. Haryana Power Generation Corp. Ltd. & ors. Vs Harkesh Chand & ors., (2013) 2 SCC 29 (Para 25)

7. Nanhey Singh & ors. Vs St. of U.P. & ors., Special Appeal (Defective) No. 110 of 2015, decided on 06.02.2015 (Para 26)

8. Abdul Hamid & ors. Vs U.O.I. & ors., (2017) 11 SCALE 627; 2017 (16) SCC 346 (Para 27)

9. St. of Karn. Vs Uma Devi (3), (2006) 4 SCC 1 (Para 28)

Present petitions assail order dated 06.10.2016, passed by Central Administrative Tribunal Allahabad Bench, Allahabad.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Krishna Agarawal and Sri Lal Mani Singh, learned Central Government Standing Counsel for the petitioners and Sri Shyamal Narain, learned Counsel for the respondents.

FACTS

2. Briefly stated the facts of the present case are that all the private respondents / candidates have completed apprenticeship in different trades under The Apprentices Act, 1961 (hereinafter referred to as Act, 1961). **Advertisement for direct recruitment process (OPF/DR/2015A) for Group ''C' posts was issued by the Government of India, Ministry of Defence, Indian Ordnance Factories, Ordnance Parachute Factory, Napier Road, Cantonment Kanpur** in the month of April, 2015, inviting applications for the post of Tailor (ss), Machnist (ss), Fitter General Machanic (ss), Carpenter (ss), Fitter Electronic (ss), Examiner Clothing (ss). In Clause 9 of the advertisement it has been provided that the factories website address is www.parachutekanpur.gov.in, which may seen by the intending candidates for any purpose pertaining to

this recruitment process. In Claus11 and 24 of the advertisement, it was mentioned as under:-

"11. All necessary information pertaining to this Recruitment Process including the FTA. OLAs. HCAs etc. and also all required Links pertaining to various activities of this Recruitment Process / Selection Process shall be displayed / available in the above Line / Page from the required date and time onwards and shall remain no displayed / available for the prescribed periods only.

24. It is emphasized and reassured to all intending Candidates that the selection to these Posts shall be done strictly based on the merit of the Candidates as adjudged from their performance in the Selection Process in a fair and transparent manner. "

3. Looking into the advertisement, **all the petitioners of this batch of writ petitions applied for the post advertised for recruitment through direct recruitment process.** The petitioners of this batch of writ petitions, except the petitioner of Writ-A No.11776 of 2017, have challenged separately the advertisement issued by different Ordnance Factories of the Ministry of Defence, which are similar to the advertisement as noted above.

4. Learned Counsel for the private respondents / candidates states that the candidate Aditya Kumar is respondent in Writ A No.11776 of 2017 and Writ A No.9563 of 2017 and he has neither applied nor participated in the selection process.

5. All the respondents / candidates filed **Original Applications** before the Central Administrative Tribunal Allahabad Bench, Allahabad which have been **disposed of by the impugned common order dated 06.10.2016.** In paragraph no.5 of the impugned common order, the tribunal has noted in nutshell the controversy, as under:-

"what is the effect of Section 22 of the Act, 1961 as amended by Act 29 of 2014. w.e.f. 08.12.2014 and the SRO No. 185 of 1994, dated 01.11.1994."

6. The Tribunal considered the controversy and held in paragraph no.11, as under :-

"11. This order was adjudicated before the Hon'ble High Court of Delhi in the case of Puneet And Anr. Vs. U.O.I. and Ors in W.P. (C) No.26/2009, dated 20.07.2010 in paragraph 10, 20 and 21 of the judgment the bench observes that a harmony has to be achieved of who have successfully undergone apprenticeship training are to be treated as senior to the persons trained earlier and of those who found suitable as other things being equal, a trained apprentice should be given preference over direct recruits and thereafter the placement should be in accordance with their seniority in the years of completion of Apprenticeship course and explaining the interpretation of the Hon'ble Apex Court Judgment in the case of U.P. State Road Transport Corporation's. In paragraph 25 of the judgment the Hon'ble High Court have explained that even in granting preference it shall be on the basis of seniority. Therefore, in the light of the judicial interpretation we have also examined this issue. It appears to us also that the SRO 185 will reign supreme and the amendment of Section 22 must be understood in the light of SRO 1994 and not in spite of it. Therefore, all the

notifications dated 20.06.2015 to 26.06.2015 which are issued contrary to the words of SRO 1994 are hereby quashed. The respondents shall offer appointment in accordance with the seniority list and merit to the Apprentice and only if there is a vacancy, following this then only they will be eligible to entitle for call for a direct recruitment. "

7. Aggrieved with the impugned common order, the petitioners i.e. Union of India has filed the present writ petitions.

8. Since, with the consent of the learned Counsel for the parties, the writ petition being Writ A No.11776 of 2017 is treated as the leading writ petition, therefore, **the relief sought** therein, **is reproduced below:-**

"(i) Issue a writ order, a direction in the nature of certiorari quashing the impugned order dated 06.10.2016, passed by the Hon'ble Central Administrative Tribunal, Allahabad in OA No.330/00801 of 2016, Aditya Kumar vs Union of India and others (Annexure No.1 to this writ petition).

(ii) Issue a writ order, direction in the nature of mandamus to not to interfere in process of selection under the advertisement.

(iii) Issue any suitable writ order or direction with this Hon'ble Court may deem fit and proper under the circumstances of the present case.

(iv) Award Cost."

SUBMISSIONS

9. Learned **Central Government Standing Counsel** for the petitioners **submits as under :-**

(i) The respondent / candidates having passed apprenticeship under the Act, 1961 do not have any right to get employment automatically, unless they go through the recruitment process for direct recruitment as per SRO No. 185 of 1994. Therefore, the Tribunal has committed a manifest error of law to quash the advertisement and to direct the petitioners herein to offer appointment to the respondents in accordance with seniority list and merit to the apprentice and if still there is a vacancy, then only appointment can be made by direct recruitment.

(ii) The Tribunal although admitted that recruitment by direct recruitment process may be made and yet illegally and without reference to any statutory provisions directed to give necessarily employment to the respondents / candidates who completed apprenticeship under the Act, 1961. Thus, tribunal has directed for automatic appointment to each candidates having completed apprenticeship under the Act, 1961, which is wholly illegal and contrary to the provisions of Section 18 and 22 of the Act, 1961 as well as the SRO 1994.

(iii) After the judgement in the case of **M. Sabarinathan vs. The General Ordnance Factory and others** in Writ Appeal (MD) No. 316 of 2007 decided by Madras High Court (Madurai Bench) on 14.12.2007 which was affirmed by Hon'ble Supreme Court in Special Leave to Appeal (Civil) No.21454 of 2008 (Union of India and others vs. M. Sabarinathan and others) decided on 15.11.2010 dismissing the SLP, a decision was taken by the Central Government to make appointments by direct recruitment and candidates who have completed apprenticeship under the Act, 1961, shall be given preference. Therefore, the advertisements in question were withheld and the selection process was not

proceeded with and a new policy decision was taken on 09.05.2016.

(iv) Thus, the appointments are now to be made by direct recruitment in which those candidates who have completed apprenticeship under the Act 1961 would be granted weightage of five extra marks. Because of the pendency of writ petitions, the recruitment process could not be carried further and the entire recruitment process is withheld.

(v) The SRO 185 of 1994, dated 01.11.1994 provides for recruitment for non-selection post, by three modes, **firstly** by promotion, **secondly** by transfer and **thirdly** by direct recruitment. It does not provide for automatic appointment of candidates who have completed apprenticeship under the Act, 1961. The posts advertised are such which could not be filled either by promotion or by transfer and therefore, the advertisement for appointment by direct recruitment was made.

(vi) Column 12 of Clause 5 of the SRO 185 of 1994 provides for person in unskilled trade to pass trade test. Note 6 of the SRO provides the term trade test will include written, oral, practical examination, aptitude test, interview and also statutory qualification test. Thus, as per SRO 185 of 1994 the trade test is mandatory.

(vii) The real grievance of the respondents / candidates is that they completed training in the ordnance factory and were awarded National Apprenticeship Certificate by the National Council of Trade Vocational Training. Therefore, they must be given employment in exclusion to others who have completed training in other factories. This, claim of the respondents/candidates amounts to breach of Article 14 and 16 of the Constitution of India on one hand and on the other hand requires automatic employment on mere completion of apprenticeship in conflict with the provisions of Sub-Section (2) of Section 22 of the Act, 1961.

10. **Learned Counsel for the respondents / candidates submits as under :-**

(i) **Recruitment Rules is the SRO 185 of 1994**. The respondents issued several circulars being circular dated 07.10.2013 and 09.05.2016 etc. which is in conflict the aforesaid recruitment Rules. **The respondents / candidates filed O.A. mainly for the relief that the recruitment should be made on the advertised posts, strictly in accordance with SRO 185 of 1994. It is not the case of the respondents / candidates that they should be appointed as a matter of right on account of possessing apprenticeship certificate issued by NCVT.** By the impugned order, the Tribunal has merely granted the relief by quashing the advertisements published between 20.06.2015 to 26.06.2015 being contrary to the SRO 185 of 1994 and directed the respondents to enforce SRO 185 of 1994.

(ii) The only attack in the present writ petitions which can be made by the petitioners is the findings of the tribunal that "the respondents shall offer appointment in accordance with the seniority list and merit to the apprentice and only if there is a vacancy, following this than only they will be eligible to entitle for call for a direct recruitment."

(iii) The aforesaid direction of the tribunal in the impugned order is valid for the following reasons :-

(a) Clause 5 of the Rules, 1994 provides for recruitment of semi skilled workmen (List of trades at Annexure-A and B). It is a non-selection post. In Column 11 method of recruitment has been provided to

be 80% by transfer failing which by direct recruitment and 20% by promotion. Since the recruitment Rules i.e. SRO 185 of 1994 provides for recruitment on the post in question as a non-selection post, therefore, even if some posts are left after transfer, it has to be filled in the manner as provided under the Rules and not by way of open competition.

(b) Since the Rules, 1994 i.e. SRO 185 of 1994 does not provide for recruitment on semi skilled posts by open competition, therefore, the petitioners possessing apprenticeship certificate issued by NCVT are not required to face open competition in the absence of any provisions in recruitment rules. Therefore, to fill the posts by open competition shall be in contradiction to the nature of posts i.e. non-selection posts. Therefore, the respondents / candidates are entitled to be appointed as per seniority list of apprentices who hold apprenticeship certificate after completion of training in a particular ordnance factory in accordance with seniority list maintained by training factories.

(c) Column 8 (5) provides for academic qualification limited to NCVT certificate in the relevant trade failing which ITI or equivalent diploma/certificate as well as degree. Therefore, no further qualification or test or competition is required under the rules for recruitment of semi skilled workmen.

(iv) Reliance is placed upon the judgement of Delhi High Court dated 20.07.2010 in Writ Petition (C) No. 26 of 2009, Puneet and others vs. Union of India and others, (Paragraphs 15 and 18 to 25).

(v) The judgement relied upon by the petitioners are totally distinguishable on facts of the present case inasmuch as in those cases, the recruitment rules itself provide for open competition whereas the present set of rules i.e. SRO 185 of 1994 does not provide for any open competition for recruitment on the post of semi skilled workmen. Therefore, the rules which hold the field cannot be overridden by circular issued by the authorities.

(vi) Reliance is placed upon the judgement of Hon'ble Supreme Court in the case of Ajay Kumar Das vs. State of Orrisa, (Civil Appeal No.4977 of 2009), decided on 31.07.2009 (Paragraph 10), which laid down the law that statutory rules framed in exercise of powers conferred under Article 309(1) of the Constitution of India can be amended only by the rule making body exercising the powers under the constitution and not otherwise. Similar principles have been laid down by full Bench decision of this Court in Vijay Singh vs. State of U.P. and others, 2004 (3) UPLBEC 2789 (Paragraphs 6, 7, 8, 9, 10, 11).

(vii) If a thing is required to be done in a particular manner that can be done in that manner alone and in no other manner. Therefore, the Government has the power to amend the recruitment rules, 1994 but the authorities cannot override it by issuing circulars. Therefore, since the recruitment Rules, 1994 is amended, it shall continue to hold the field. Therefore, the OFB circular dated 17.10.2013 and the Ministry of Defence letter dated 09.05.2016 (Annexure-8 and 9 respectively) being in conflict with the recruitment Rules, 1994 deserves to be ignored.

11. Having heard learned Counsel for the parties, **the following questions are framed** with their consent for determination :-

(a) Whether the recruitment on the post in question i.e. "Semi-Skilled Workman" is governed by the provisions of

the Ordnance Factories Group C & D Industrial Posts Recruitment Rules, 1994 notified by S.R.O. 185 of 1994 dated 01.11.1994 in exercise of powers conferred by proviso of Article 309 of the Constitution of India?

(b) Whether posts termed as "Non-Selection Post" in Clause (5) of the Ordnance Factories Group C & D Industrial Posts Recruitment Rules, 1994 includes vacancies to be filled by direct recruitment and whether for direct recruitment, Trade Test is mandatory?

(c) Whether under the facts and circumstances of the case, the respondent-candidates have any statutory right to be recuited on "Semi-Skilled Posts" merely on the basis of NCVT (Natoinal Council for Vocational Training) Certificate, without any competetive test?

(d) Whether under the facts and circumstances of the case, the impugned order of the Tribunal is valid?

Discussion and Findings:-

12. We have carefully considered the submissions of learned counsels for the parties and perused the record of the writ petitions.

13. Undisputedly the respondent-candidates possess NCVT certificates acquired by them under the Apprentices Act, 1961 (hereinafter referred to as 'the Act, 1961"). To obtain the aforesaid certificates, they have completed their training in the Ordnance factories in question. They are prospective candidates for the post of "Semi-Skilled Workman" of the trades specified in Annexure-A of the Ordnance Factories Group C & D Industrial Posts Recruitment Rules, 1994 (hereinafter referred to as "the Recruitmet Rules, 1994"). It is admitted case of the respondent-candidates that recruitment on **Group "C" Posts of** Semi Skilled Workman in trades of Annexure "A' is governed by Clause (5) of the Schedule to The Recruitment Rules, 1994 read with the Notes appended thereto. **The Schedule appended to the Rules, 1994 contains six clauses. Clause (1)** relates to recruitment on the post of Master Craftman. **Clause (2)** relates to recruitment on the post of highly Skilled Grade Workman (List of trades at Annexure A & B). Clause (3) relates to recruitment on the post of highly skilled Grade II Workman (List of trades at Annexure A & B). Clause (4) relates to Skilled Workman (list of trades at Annexure A and B). **Clause (5) relates to recruitment of Semi-Skilled Workman ((List of trades at Annexure A & B). Clause (6)** relates to recruitment on the post of unskilled workman.

14. To appreciate the rival submissions of parties, it would be appropriate to reproduce the relevant portion of the aforesaid Rules, 1994, Clause (5) of the Schedule and "Notes' appended to the Rules, as under:-

"S.R.O. 185.-In exercise of the powers conferred by the proviso to article 309 of the Constitution and in supersession of the Ordnance Factories Group C and Group D Industrial posts Recruitment Rules, 1989, except as respects things done or omitted to be done before such supersession, the President hereby makes the following rules regulating the method of recruitment to the posts of industrial employees in Group C and Group D in Ordnance Factories and Ordnance Equipment and Clothing Factories and other offices establishments under the Ordnance Factories Organisation, namely:-

Short title and commencement.-(1) These rules may be called the Ordnance Factories Group C and Group D Industrial Posts Recruitment Rules, 1994.

(2) They shall come into force on the date of their publication in the Official Gazette.

Application*-These rules shall apply to the posts specified in column 1 of the Schedule annexed to these rules. The trades and grade of these posts shall be as per the Aunnexures A and B of the said Schedule.*

Number, classification and scale of pay*.-The number of the said posts, their classification and the Scales of pay attached thereto shall be as specified in columns 2, 3 and 4 respectively of the said Schedule.*

Method of Recruitment, age limit, qualifications etc.*- The method of recruitment to the said posts, age limit, qualifications and other matters connected herewith shall be as specified in the columns 5 to 14 of the aforesaid Schedule.*

Disqualification*:*

.....

Power to relax*.-Where the Central Government is of the opinion that it is necessary or expedient to do so, it may by order, for reasons to be recorded in writing, relax any of the provision of these rules with respect to any class or category of persons.*

Saving*.-Nothing in these rules shall affect reservations, relaxation of age limit and other concessions required to be provided for the Schedule Caste, the Schedule Tribes, Ex-Serviceman and other special categories of persons in accordance with the orders issued by the Central Government from time to time in this regard.*

Clause (5) of the Schedule:

1 Name of post	*2 No. of post*	*3 Classification*	*4 Scale of pay*	*5 Whether Selection or Non-selection post*	*6 Whether benefit of added years of service admissible under rule 30 of the Central Civil Services (pension) Rules, 1972*
Semi-skilled workman (list of trades at Annexure A and B)	*16005* (1994) *Subject to variation dependent on workload*	*Civilian in Defence Service, Group 'D' Industrial*	*Rs. 800-15-1010-EB-20-1150*	*Non-selection post*	*Not applicable*
7 Age limit for direct recruits	***8 Educational and other qualifications required for direct recruits***	***9 Whether age and other educational qualifications prescribed for direct recruits will apply in the case of promotees***	***10 Period of probation if any***	***11 Method of recruitment whether by direct rectt. or by promotion or by deputation/ transfer and percentage of the vacancies to be filled by various methods***	
30 years	*(a. (i)* ***For the Trades***	*No*	*For Prom*	*(i) For trades listed at* ***Annexure A-80% by transfer***	

	at Annexure A National Council of Trades for Vocational Training Certificate in the relevant trade failing which by ITI or equivalent Diploma/ Certificate holder		*otes: Nil* ***For direct recruits:*** *2 years*	***failing which by direct recruitment.*** *20% by promotion for each trade including allied trades after adjustment of surplus (ii) For trades listed at* ***Annexure B-*** *100% by promotion for each trade including allied trades after adjustment of surplus and transfers. In any trade (such as new trade on failure of recruitment by promotion by transfer failing which* ***by direct recruitment***
12 In case of rectt. by promotion/ deputation/transfer, grades from which promotion/ deputation/ transfer to be made		***13 If a DPC exists, what is its composition***		***14 Circumstances in which UPSC is to be consulted in making recruitment***
Promotion*: From persons in the un-skilled grade in the pay scale of Rs. 750-12-870-EB-14-940 having a minimum regular service of 3 years* ***and on passing trade test and on acquiring statutory qualifications where required.*** ***Transfer****: On* ***passing the trade test and on acquiring statutory qualifications*** *where required*		*Not applicable*		*Not applicable*

.....

Note 1 *:The number of posts indicated in Column 2 in the Schedule are subject to variation dependent on workload.*

Note 2*: The age limits indicated under Column 7 are relaxable for Government servants, upto 35 in accordance with the instructions or order issued by the Government of India.*

Note 3 *: Wherever the words "adjustment of surplus" occur in Column 11 of this Schedule it shall mean appointment in public interest by the Management of persons already holding posts same or identical or nearly equivalent scale of pay in any factory or office or anywhere in the Ordnance Factories Organisation whom it is necessary to adjust in the posts in the exigencies of service consequent on the persons or the posts held by them being found surplus by the Management.*

Note 4 *: Wherever the word "**Transfer**" occurs in Column 11 or 12 of this Schedule it shall include* ***transfer in public interest by the Management of persons (already holding posts in the same or identical or nearly equivalent scale of pay) to posts in the same factory or office in the Ordnance Factories Organisation and also Transfer within the same factory*** *or office at the request of the person concerned where agreed to by the Management. The Transfers in public interest will include Transfers from one grade, interse promotions from another grade where from two different grades. The transfer in public interest will also include filling of posts by transfer of persons holding post from which there is no promotion to any other posts or grade whether or not such posts are declared equivalent posts and such appointments by transfer may be made prior to filling of posts by promotion from other grades or by direct recruitment. The transfer in public interest will also include Transfer of*

persons in the Trades to be abolished or merged with other trades on administrative grounds.

***Note 5** : The term "Deputation" shall mean deputation for specified period in accordance with orders of the Government in-force from time to time and in the exigencies of service, the Ordnance Factory Board or the General Manager of the factory may, in the public interest, take suitable persons from outside the Ordnance Factories Organisation on deputation to any of the posts specified in this Schedule.*

Note 6**: Wherever "**trade test**" is laid down in Column 12 of this Schedule such trade test shall be **prescribed by the General Manager of the factory or the Ordnance Factory Board. The term "Trade test" will include written, oral and practical examination and aptitude test and interview and also statutory qualification test where applicable.

***Note 7** : Wherever the words "Penal prepared by relevant Departmental Promotion Committee" occur in Column 11 and recruitment is to be made by selection the words shall mean preparation of panel purely on the basis of merit by reference to confidential reports/ performance reports, if no confidential reports are prescribed and/ or by reference to results of a trade test.*

***Note 8** : **Promotion** indicated in Columns 11 and 12 of this Schedule will **normally be from feeder grade indicated as Column 12** but where two or more Factories Organisation "allied trades" or "allied grades" by the General Manager of the factory or Ordnance Factory Board selection for promotion will he made from common seniority list of eligible persons in the allied grades or allied trades.*

***Note 9** : The words "equivalent posts" and its variants in these rules will mean any posts in some or identical scale of pay as another posts in the same or another category and which posts the Ordnance Factory Board or General Manager of factory may declare as equivalent posts and they will be considered to be interchangeable or stroke (/) appointments.*

***Note 10**: In relation to **prescribed qualifications** under Column 8 of this Schedule the question whether a qualification is equivalent to the prescribed qualification for any post shall be decided by the Ordnance Factory Board.*

***Note 11**: For the purpose of these rules, the Ordnance Factory Board may authorise any Member of the Board or an Additional Director General Ordnance Factories to exercise any or all its powers on its behalf and it shall he deemed to have been exercised by the said Board.*

***Note 12** : In these rules the term "General Manager of the Factory" and its variations shall include Senior General Manager, Additional General Manager, Officer-in-Charge, Officer in temporary charge of the factory and Director of Staff College and heads of other establishments declared by Ordnance Factory Board to be equivalent to General Manager of Factory.*

***Note 13**: Wherever any age limit is laid down in Column 7 of this Schedule the crucial date for determining the age limit shall be the closing date for receipt of applications from candidate in India (from Andaman and Nicobar Islands and Lakshadweep). In respect of posts the apointment to which are made through the Employment Exchanges the crucial date for determining the age limit, in each case, will be the last date upto which the Employment Exchanges are asked to submit the names.*

***Note 14** : Wherever any condition of a minimum service is laid down in Column 12 of this Schedule and a junior employee is considered for selection by*

virtue of his satisfying the said minimum serivce condition all persons senior to him who have completed probationary period shall also become eligible for consideration for selection notwithstanding that they may not satisfy the said minimum service condition.

***Note 15** : In the exigencies of the service within the total number of posts in the same scale of pay (Grade) the Ordnance Factory Board may add to the number of trades or sub-divide, abolish or merge any trade mentioned in Annexure A and B to this Schedule or add to and reduce number of posts in different trades on same scale of pay from time to time on the basis of changes in functional requirements.*

***Note 16** : The incumbents of posts in this Schedule are normally liable for service in the same factory or office in the Ordnance Factories Organisation but without prejudice to the right of the Management, in the public interest, to transfer them to equivalent posts in any other factory or office in the Ordnance Factories Organisation."*

15. Sections 18 and 22 of the Apprentices Act, 1961 would be relevant to be considered, which are reproduced below:

*"**Section 18: Apprentices are trainees and not workers.-** Save as otherwise provided in this Act,-*

*(a) every apprentice undergoing apprenticeship training in a designated trade in an establishment **shall be a trainee and not a worker**; and*

(b) the provisions of any law with respect to labour shall not apply to or in relation to such apprentice.

***Section 22: Offer and acceptance of employment - (1) Every employer shall formulate its own policy for recruiting any apprentice** who has completed the period of apprenticeship training in his establishment.*

*(2) Notwithstanding anything in sub-section (1**), where there is a condition in a contract of apprenticeship that the apprentice shall, after the successful completion of the apprenticeship training, serve the employer, the employer shall, on such completion, be bound to offer suitable employment to the apprentice, and the apprentice shall be bound to serve the employer in that capacity for such period and on such remuneration as may be specified in the contract:***

Provided that where such period or remuneration is not, in the opinion of the Apprenticeship Adviser, reasonable, he may revise such period or remuneration so as to make it reasonable, and the period or remuneration so revised shall be deemed to be the period of remuneration agreed to between the apprentice and the employer.

***Note**: The aforequoted Section 22 was substituted by Act 29 of 2014 w.e.f. 22.12.2014."*

Question No. (a) Whether the recruitment on the post in question i.e. "Semi-Skilled Workman" is governed by the provisions of the Ordnance Factories Group C & D Industrial Posts Recruitment Rules, 1994 notified by S.R.O. 185 of 1994 dated 01.11.1994 in exercise of powers conferred by proviso of Article 309 of the Constitution of India?

16. It is admitted case of the parties that recruitment on the post of "Semi-Skilled Workman" is governed by the Recruitment Rules, 1994. Therefore, this question is answered in affirmative and it is held that the vacancies of "Semi-Skilled Workman" is liable to be filled in

accordance with the Recruitment Rules, 1994 readwith Section 22 of the Act, 1961.

Question No.(b) Whether posts termed as "Non-Selection Post" in Clause (5) of the Ordnance Factories Group C & D Industrial Posts Recruitment Rules, 1994 includes vacancies to be filled by direct recruitment and whether for direct recruitment, Trade Test is mandatory?

17. Rule 2 of the Recruitment Rules, 1994 under the heading "Application" provides that the Rule shall apply to the post mentioned in Column 1 of the **Schedule annexed to the Rules.** The method of recruitment has been specified in Columns 4 to 14 of the Schedule. In the present cases, we are concerned with recruitment on the post of "Semi-Skilled Workman." Column 5 of Clause 5 of the Schedule specifies the post of "Semi-Skilled Workman" as "Non-Selection Post." However, mere mentioning of Non-Selection Post in Column 5 doe not make it absolutely a promotional post inasmuch as Column 7 itself provides age limit for direct recruits, Column 10 provides period of probation of two years for direct recruits and Column 11 provides for direct recruitment on vacancies left out from 80% quota by transfer. Thus, specification of the post in Column 5 as "Non-Selection Post" is only with respect to the vacancies to be filled by transfer and promotion as specified in Column 11 itself. Accordingly, we hold that the term "Non-Selection Post" used in Column 5 of Clause 5 of the Schedule annexed to the Rules means vacancies to be filled by promotion/ transfer. **The left out vacancies of transfer category shall be filled by direct recruitment.**

18. The educational and other qualifications required for direct recruits have been prescribed in Column 8 of Clause 5. The educational qualification prescribed for direct recruits in Column 8 for trades at Annexure A is NCVT certificate in the relevant trade failing which ITI or equivalent diploma/ certificate. In matters of filling up vacancies on the post of "Semi-Skilled Workman" by promotion or transfer, **a necessary condition "on passing the trade test and on acquiring statutory qualifications where required" has been prescribed in Column 12.** Therefore, all those candidates who intend to get employment on the post of "Semi-Skilled Workman" under the categories "promotion" or "transfer", are required to pass trade test and on acquiring the required statutory qualifications. The words "Trade Test" as specified in Column 12 of the Schedule read with the Note 6, means such **trade test as may be prescribed by the General Manager of the Factory or Ordnance Factory Board and the term "Trade Test" will include written, oral and practical examination and aptitude test and interview and also statutory qualification test where applicable.**

19. The **Ordnance Factory Board**, Ministry of Defence, Government of India has **issued policy decisions/ guidlines prescribing procedure for direct recruitment** from time to time to be followed **for recruitment of Ex-Trade Apprentices in Ordnance Factories,** vide circulars dated 06.01.2011, 21.10.2011, 17.10.2013 and 09.05.2016, which are reproduced below:-

Policy decision dated 06.01.2011:

"No. 570/A/I(PT)/54/Vol. IV/294
Date 06-01-2011
To
The Sr. General Manager/ General Manager,

All Ordnance & Ordnance Equipment Factories.

Sub.:- Recruitment of Ex-Trade Apprentices in OFs

Ref.:- OFB letter No. 570/A/I(PT)/54/Vol. IV/294 dated 24.11.2010.

Vide letter under reference, the Factories were requested to keep in abeyance all the recruitment actions/processes to the post of Industrial Employees (Semi-Skilled Tradesmen) where ex-trade apprentices of Ordnance Factories have been considered or which may be otherwise at variance from the direction contained in SLP C) No. 21454 of 2008 of the Hon'ble Supreme Court of India and WA(MD) No. 316 of 2007 of the Hon'ble Madurai Bench of Madras High Court.

has since been decided that :-

(a) Recruitment action involving only outside candidates through open advertisement/ Employment Exchange may be processed and finalized by carrying out selection strictly on relative merit.

(b) Cases in which recruitment action is yet to be initiated or selection is yet to be completed will be processed in accordance with revised procedure pursuant to Hon'ble Supreme Court Judgement on the subject annexed herewith.

(c) In case of recruitment process for which selection has been completed before the date of Hon'ble Supreme Court Judgement, further necessary action may be taken.

This issues with the approval of the DGOF & Chairman/OFB

Enclo. As above
(S.K. Singh)
Director/IR
For D.G.O.F.

ANNEXURE TO OFB LETTER No. 570/A/I(PT)/54/Vol. IV/294 dated 06-01-2011

In Ordnance Factories the direct recruitment for the post of semi-skilled grade workers against skilled posts in the Industrial Establishment was regulated in terms of the OFB letter No. 570/A/I/II) dated 15/20 October, 1999.

2. In Writ Appeal No. WA(MD) No. 316 of 2007, the above said recruitment procedure came under Judicial scrutiny before the Madurai Bench of the Hon'ble High Court, Madras, wherein the applicant specifically prayed for a direction to the General Manager, Ordnance Factory, Trichy to make appointments to the semi-skilled post in accordance to the DOPT OM No 14024/1/2004 /Estt. (D) dated December, 2004.

3. The Madurai Bench of the Hon'ble High Court, Madras, in the above mentioned WA passed judgement on 14.12.2007 directing to follow the principle laid down in UPSRTC -vs- UP parivahan Nigam Shishukh Berazgar Sangh & Ors., 1995(2)SCC 1, and Excise Superintendent. Malkapatnam, v K.BN. Visweswara Rao, 1996(6) Supreme Court Cases 216, and held that the requisitioning department should call for the list of eligible candidates from Employment Exchange and the apprentice department or undertaking or establishment shall invite candidates by publication in newspapers and other media, and then consider the cases of all the candidates. who have applied, and, in the selection process, other things being equal, trained apprentices shall be given preference.

4. The judgement of the Madurai Bench of the Hon'ble High Court, Madras in WA(MD) 316 of 2007 was challenged before the Hon'ble Supreme Court of India by the Union of India & Ors. in Special Leave to Appeal (C) No. (S) 21454/2008. The Hon'ble Supreme Court vide judgement

dt 15 11.2010 in the said SLP did not interfere with the impugned judgement in WA(MD) 316 of 2007 and dismissed the SLP.

5 In view of the above developments and directions of the Hon'ble Supreme Court & Hon'ble High Court of Madras (Madurai Bench) it has become imperative to revise the guidelines for direct recruitment of ex-Trade Apprentices in Ordnance Factories issued vide OFB letter No. 570/ (III) dated 15/20th October, 1999.

The Factories should follow the following procedure for processing direct recruitment to Semi-skilled Tradesman in the Industrial Cadre.

(A) The vacancies will be notified to the Employment Exchange for forwarding the list of eligible candidates. Simultaneously, the vacancies will be published in newspapers, Employment News & other media through DAVP. In addition, the recruitment notices should also be displayed the Factory's Notice Board for wide publicity. The ex-trede apprentices of the Ordnance Factories would not be required to get their names sponsored by Employment Exchange. However, the Ex-trade apprentices of the concerned recruiting Ordnance Factory would not be required to apply against the recruitment notice and they will be considered along with others. Ex trade apprentices of the Ordnance Factory may be given relaxation in age to the extent of the period for which they had undergone training.

(B) The ***educational qualification for direct recruitment to the post of semi-skilled tradesmen listed in Annexure 'A' of the existing SRO is NCTVT in the relevent trade failing which by ITI or equivalent Diploma/Certificate.*** *Hence, an applicant will be eligible as a candidate for a particular semi-skilled trade provided he/she possesses the above said qualification in that trade only i.e. no inter-changing of trade is permissible.* ***The syllabus for written test for a trade will be broadly as that of the NCTVT examination syllabus for that trade. The syllabes for trade test (Practical) will be as per Trade Test Specification of the semi-skilled grade of the relevant trade.***

(C) ***The selection will be made strictly on the basis of merit. The selection process will comprise of written test of 100 marks and Trade Test (Practical) of 100 marks. All eligible candidates will be called for an objective type written test. On the basis of merit of written test marks, candidates will be called for Trade Test (practical test) of 100 marks in the ratio of 1:3 to the number of vacancies. Final merit will be decided on the basis of combined marks in the written and practical test.***

In the selection process, other things being equal i.e. marks being equal, trained ex- Trade apprentices of the recruiting Ordnance Factory and sister Ordnance Factories shall be given preference in the order in which they are stated.

(i) ***In between the trained ex-Trade Apprentices of the recruiting Ordnance Factory, preference shall be given to those who are senior*** *i.e. if two or more ex- Trade apprentices secure the same marks then preference shall be given on the basis of seniority. Seniority of ex-Trade apprentices of the recruiting Ordnance Factory shall be decided on the basis of OFB's letter No. 13/08/03-A/HRD dated 15/17-12-2003 and the relevant portion is reproduced below:-*

"The NCTVT examination batch numbers (month/year) will be the criteria for maintaining the seniority of Ex-TA.

The merit list of particular NCTVT examination will be the criteria of seniority for Ex-TA for that batch.

Factory should maintain batch wise, trade-wise Ex-TA seniority Strictly as per the NCTVT examinations irrespective of whether the candidate is Ex-ITI or a fresh apprentice. In other words, Ex-TA who has passed NCTVT examination in an earlier batch (NCTVT) senior to the Ex-TA passed in the subsequent batch irrespective of the year of joining Trade Apprentices Scheme."

(ii) Simply in between the trained ex- Trade Apprentices of the sister Ordnance Factories preference shall be given to those who are seniors as mentioned above.

The above instructions will be followed by all factories in a uniform manner."

Policy decision dated 21.10.2011:-

"Bharat Sarkar
Rakshaa Mantralaya
Ayudh Nirmani Board
10-A Shahid Khudiram Bose Road,
Kolkata-700001
No.800/SRO/AI/245 21.10.2011

To
The Sr. General Manager/General Manager
All Ordnance & Ordnance Equipment Factories

Sub. :- Clarification regarding Educational & others qualification for direct recruits in Semi-skilled grade.

Ref. :- OFB letter No. 570/A/I(PT)/54/Vol. IV/294 dated 06.01.11

Consequent upon the issue of revised guidelines for recruitment of Ex-trade Apprentices in OFs. vide OFB letter at reference, several factories have sought clarification regarding the educational qualifications for direct recruitment for the Annexure-A trades in SRO 185 of 1994.

02. SRO 185 of 1994 stipulates that the educational qualification for direct recruits for the trades at Annexure 'A', is National Council of Trades for Vocational Training certificates in the relevant trade failing which by ITI or equivalent Diploma/ Certificate holder.

03. In view of the above said SRO provisions, the National Apprentice Certificate and National Trade Certificate issued by NCVT in the relevant trade can be accepted as the qualification required for direct recruitment to semi-skilled posts at Annexure 'A to the said SRO. Further Degree and Diploma in Engineering cannot be accepted as qualification for Direct Recruitment to the semi-skilled posts. It is also clarified, that only when applicants with NCVT certificates as mentioned above are not available, then only applicants with ITI or equivalent Diploma/Certificate holders will be considered.

(S. K Singgh)
DIRECTOR/IR
For D.G.O.F."

Policy decision dated 17.10.2013:-

"Government of India
Ministry of Defence
Ordnance Factory Board,
10A, S.K. Bose Road, Kolkata - 700 001

No.800/SRO/A/1/245
Dated 17-10-2013

To
The All Sr.General Manager/General Managers,
Ordnance & Ordnance Equipment Group of Factories,

Sub: Clarification regarding Educational qualification for Direct Recruitment in Semi Skilled Grade.

Ref: (i) OFB letter No.570/A/I(PT)/54 Vol.IV/294 dated 06 01.2011

(ii) OFB circular. No, 800/SRO/A/1/215 dated 21.10.2011.

In continuation of OFB circular No.800/SRO/A/1/245 dt.21.10.2011. it is hereby intimated that in the advertisement for Direct Recruitment to Semi Skilled Posts of Annexure- A Trades, the requisite educational qualification should be mentioned as "Matriculation + NAC/NTC issued by NCVT" without mentioning the failing which clause in the existing SRO.

2. It is once again clarified that NAC and NTC are to be treated at par for all recruitment purposes, and that Diploma in Engineering without possessing NAC/NTC can not be accepted as qualification for direct recruitment.

3. In partial modification to puru 6(A) of OFB circular: No.570/A/I(PT)/54/Vol.IV/294 dated 06.01.2011, it is intimated that wherever applications for direct recruitment are being invited online, even the trade apprentices of Ordnance Factories would be required to apply online, It should be made amply clear in the text of the advertisement notice.

4. This issues with the approval of DGOF & Chairman

(A.K. Nayak)
Dy. Director General/ IR
For Director General, Ordnance Factories

Policy decision dated 09.05.2016:-

Ministry of Defence
Department of Defence Production
D(Estt./NG)

Subject: Recruitment of Industrial Employees from Ex-Trade Apprentice of Ofs.

In line with the amendment to Section 22 of Trade Apprentices Act, it has been decided to amend the existing policy of recruitment of industrial employees from Ex-Trade Apprentice of OFs to the extent as under:-

Provision of granting five extra marks to Ex-Trade Apprentices in the final merit list of the written examination conducted for a total of 100 marks may be included.

2. OFB is requested to include the above provision in the existing policy for all future recruitments in the cadres involving Ex-Trade Apprentices.

3. This issues with the approval of Hon'ble RM.

Sd/-
(Amlan Das)
Under Secretary
DDG/IR
OFB,
Kolkata.
MoD ID No.50(41)/2016-D(Estt./NG) dated 09.05.2016."

20. Thus, methodlogy for selection by direct recruitment on the post of "Semi-Skilled Workman" stood prescribed by Policy of Odnance Factories Board by Annexure to OFB Letter No.570 dated 06.01.2011 and other Policy decisions aforequoted which are in tune with Section 22(1) of the Act, 1961 and the Recruitment Rules, 1994.

21. Pursuant to the aforesaid Recruitment Rules, 1994, and adopting the Policy decision/ guidelines of **Ordnance Factory Board**, Ministry of Defence, Government of India; Ordnance Factories

issued advertisements inviting applications **for direct recruitment on Group "C' posts of its industrial establishment.** Thus, each Ordnance Factory has recruitment policy ensuring transpearancy in recruitment and equality of opportunity in employment to all eligible candidates of Group "C' posts in Ordnance Factories, i.e. government employment which meets the basic requirement of fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India.

22. We also find that the advertisements dated 20.06.2015 to 26.06.2015 which were challenged by the respondent-candidates before Tribunal, specifically provides for inviting application for recruitment to the specified Group "C' Posts in terms of the Recruitment Rules, 1994 and the policy decision of the Ordnance Factory Board. The employer is master to prescribe the procedure for direct recruitment. The aforequoted policy decision dated 06.01.2011 and its Annexure dated 21.10.2011, 17.10.2013 and 09.05.2016 are neither in conflict with the Recruitment Rules, 1994 nor in conflict with Section 22 of the Apprentices Act, 1961 nor it infringes any of the fundamental rights of the petitioners granted under Articles 14 and 16 of the Constitution. The respondent - candidates have completely failed to draw our attention to any statutory provisions which confers any right upon them for appointment as "Semi-Skilled Workman" in Ordnance Factories of Government of India, Ministry of Defence, without any competetive examination and merely because they possess NCVT certificates.

23. Column (11) of clause (5) of the Schedule to the Recruitment Rules, 1994 provides for recruitment by "transfer" and by "promotion". Posts which could not be filled by transfer or promotion are to be filled by direct recruitment. Column 12 prescribes "trade test" of candidates who possess statutory qualification. This "trade test" is mandatory part of recruitment on the post of semi skilled workman. "Trade Test" has been defined in Note 6 to the Recruitment Rules, 1994, aforequoted. The words "Transfer" and "Promotion" have been defined in Note 4 and 8 respectively. All the candidates who apply for direct recruitment on the left out posts under the category "Transfer" and "Promotion" have to pass "trade test" defined in Note 6, as may be prescribed by the General Manager of the factory OR the Ordnance Factory Board. The Ordnance Factory Board has prescribed it by aforequoted OFB No. 570 dated 06.01.2011 read with Annexure appended to it, followed by policy decision dated 21.10.2011, 17.10.2013 and 09.05.2016. The policy so formulated is also backed by Section 22(1) of the Act, 1961.

24. Thus, **the question No.(b) is answered in affirmative** and it is held that the term "Non-Selection Post" used in Column 5 of Clause 5 of the Schedule of the Recruitment Rules, 1994 read with Column 11 clearly establishes that the term "Non-Selection Post" has been used in Column 5 for posts to be filled by promotion/ transfer and also by direct recruitment. The term "Non-Selection Post" used in Column 5 has not been used in a strict sense to indicate only for posts to be filled by promotion/ transfer. Therefore, posts to be filled by direct recruitments as mentioned in Column 11 has to be filled following the procedure provided in the Recruitment Rules, 1994 read with the

aforequoted policy decisions and particularly Annexure to the policy decision dated 06.01.2011. In direct recruitment for the post of "Semi Skilled Workman" trade test as prescribed is mandatory.

Question No. (c) Whether under the facts and circumstances of the case, the respondent-candidates have any statutory right to be recuited on "Semi-Skilled Posts" merely on the basis of NCVT, without any competetive test?

25. It has been well settled that an apprentice does not have a statutory right to claim an appointment and the employer is not under any statutory obligation to give him employment. However, if the terms of the contract of apprenticeship lay down a condition that on successful completion of apprenticeship an employer would offer him an employment, then it is obligatory on his part to do so. In the absence of such a condition, there is no obligation. The aforesaid principles are supported by the law laid down by Hon'ble Supreme Court in the case of **Haryana Power Generation Corporation Limited and others Vs. Harkesh Chand and others, (2013) 2 SCC 29**, (Paragraph 27), as under :-

"27. We have referred to the aforesaid pronouncements solely for the purpose that ***an apprentice does not have a statutory right to claim an appointment and the employer is not under any statutory obligation to give him employment. However, if the terms of the contract of apprenticeship lay down a condition that on successful completion of apprenticeship an employer would offer him an employment, then it is obligatory on his part to do so. In the absence of such a condition, there is no obligation****. It depends on the terms of the contract. In the case at hand, as the letter of appointment would show, the employer had only stated that on successful completion of the training, the apprentice may be appointed as Plant Attendant/Technician Grade-II. Thus, it was not a mandatory term incorporated in the agreement casting an obligation on the employer to appoint him."*

26. The question "whether an apprentice, who has successfully completed apprenticeship training under the Apprentices Act, 1961, gets a right to be appointed on a post straight away without appearing in any competitive examination or test through which selection is made for making appointment on the said post under the relevant service rules or Government Order" came up for consideration before a full bench of this Court in the case of **Arvind Gautam** and also before a Division Bench in the case of **Nanhey Singh and others vs. State of U.P. and others, (Special Appeal (Defective) No. 110 of 2015, decided on 06.02.2015).** Following the aforenoted law laid down by the full bench in **Arvind Gautam's** case (supra), the Divison Bench in **Nanhey Singh and others** (supra) held that competitive examination has not been exempted by the Supreme Court judgment in U.P. State Road Transport Corporation (supra)'s case. The relevant portion of the judgment in the case of **Nanhey Singh and others** (supra) is reproduced below:-

"7. The Division Bench of this Court in Manoj Kumar Mishra versus State of U.P. And others, rejected a similar claim. The issue before the Court was enunciated in para 3:-

"3. The principal question which requires consideration is, whether an apprentice, who has successfully completed

apprenticeship training under the Apprentices Act, gets a right to be appointed on a post straight away without appearing in any competitive examination or test through which selection is made for making appointment on the said post under the relevant service rules or Government Order."

8. On considering the provisions of the Act as well as the judgments including U.P. State Road Transport Corporation (supra), the Division Bench clarified that there was no settled direction that the apprentice would by-pass the selection process including a written examination. Paragraph 6 of judgment is extracted below:-

"6. The claim of the petitioners that they are not required to appear in any competitive examination or test which is held for making selection on the post on which they want to be appointed, cannot be sustained as no such direction has been given by Supreme Court. If the relevant service rules or Government orders issued in this regard provide for holding of a competitive examination or test, the petitioners have to appear in the said examination or test and compete with other candidates..... In fact the very first direction which provides that other things being equal, a trained apprentice should be given preference to other direct recruits, shows that he has to appear in the competitive examination or test otherwise his comparative merit cannot be judged."

9. The ***Full Bench decision of this Court in Arvind Gautam (supra), considered as to whether an apprentice is not required to take a competitive test. Rejecting the case of the apprentice, the Full Bench was of the view that competitive examination has not been exempted by the Supreme Court's judgment in U.P. State Road Transport Corporation (supra). Paragraph 6 and 9 of Arvind Gautam's case (supra)*** *is extracted:-*

"6. In our view, the expression "other things being equal" in paragraph 12 and absence of exemption from competitive test in the said paragraph, leads to the conclusion that all persons (including the apprentices) have to appear in the competitive test, as may be prescribed in respect of the particular selection, and if after the competitive test, any apprentice trainee gets equal marks than a non-apprentice candidate, then only preference is to be given to the said apprentice trainee."

9. Hence, the answer to question No.1 is that the directives of the aforesaid judgment of the Supreme Court as contained in paragraph 12 of the said judgment in the case of U. P. State Road Transport Corporation Vs. U.P. Parivahan Nigam Shishuksha Berozgar Sangh (supra) is not confined to U.P.S.R.T.C. alone but they are applicable to all departments and corporations, but the directives in paragraph 13 of the said judgment apply strictly to the persons whose cases came up for consideration before the Apex Court in the said matter, and not to others."

10. In paragraph 11, the Full Bench held that: "apprentice trainees are also required to participate in competitive examination or test as may be provided by the rules of the concerned employers in respect of recruitments and when any of them is found equal to a non-apprentice candidate after the selection test then only preference is to be given in such a case to the apprentice trainee. This protects the possibility of meritorious non-appearance candidates from being discriminated vis-a-vis apprentice trainee".

11. The learned Single Judge in our opinion was justified in rejecting the

claim of the petitioners seeking parity based on the judgments rendered in Manoj Kumar Mishra (supra), Vijay Shankar Sharma (supra), Sherpal (supra) and Nanhey Singh (supra) being per-incuriam, as the Full Bench decision in Arvind Gautam (supra) was not noticed in those decisions."

27. In the case of **Abdul Hamid and others vs. Union of India and others, (2017) 11 SCALE 627 : 2017 (16) SCC 346** (Paragraphs 10 and 11), Hon'ble Supreme Court considered the question of equal opportunity to those who have undergone their apprenticeship training with the Railways and non-railway trained apprentices and interpreting the word "preference' held that **preference does not mean that the Railways trained apprentice will have an exclusive right to the exclusion of all others to be considered for appointment** otherwise it would patently violate Article 14 and 16 of the Constitution of India depriving an equal opportunity, those who have not undergone apprenticeship training with the Railways to applying for these posts. Paragraphs-10 and 11 of the judgment in the case of **Abdul Hamid and others (supra)** are reproduced below:-

"10. It is apparent that there is a policy of the Railways to grant regularization to these fresh face substitutes. We need not refer to all the circulars issued in this behalf, but a perusal of the documents especially those filed as additional documents clearly show that the Railways has a policy of regularizing these fresh face substitutes. ***This, in our opinion, is a clear indicator that while making appointment of fresh face substitutes, the field of choice should be wide and all citizens who are qualified and eligible should be given a chance to take part in the selection process.*** *Though these appointments may be termed as short term appointments, the facts placed on record reveal that thousands of fresh face substitutes have been regularized and have become employees of the Railways because of the policy of the Railways. It is, therefore, imperative that while appointing fresh face substitutes, a transparent system of appointment is followed.* ***It would be much better if the Railways follows the regular system of appointment rather than making appointments on ad hoc basis of fresh face substitutes.*** *However, as and when exigencies of service require that fresh face substitutes have to be appointed,* ***then also the field of choice cannot be limited only to those who have undergone their apprenticeship training with the Railways since that would patently violate Article 14 and 16 of the Constitution of India depriving those who have not undergone apprenticeship training with the Railways of an equal opportunity for applying for these posts.***

11. Reliance has been placed by learned counsel appearing for the Railways trained apprentices on the judgment of this Court passed in the case of U.P. State Road Transport Corporation and Another v. U.P. Parivahan Nigam Shishukhs Berozgar Sangh and Others. In Para 12 of the judgement it has been held that all other things being equal, the trained apprentices should be given preference upon direct apprentices. ***This judgment does not help the appellants at all. What has been held is that if the non-Railway trained apprentice is equal to the Railways trained apprentice on merit, then preference can be given to the Railways trained apprentice. The word "preference" does not mean that the Railways trained apprentice will have an exclusive right to***

the exclusion of all others to be considered for appointment. *Both the Tribunal and the High Court were justified in deciding this issue against the Railways and in favour of the original applicants."*

28. The State is the model employer. The obligation casts on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. Therefore, appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before us. The Directive Principles of State Policy have to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens or class who in the present set of facts are respondents asserting for automatic employment in the Ordnance Factory where they completed their apprenticeship, in exclusion to other eligible candidates for recruitment on the post of Semi-Skilled Workman (Group "C' posts), is against the basic principles applicable for public employment as aforenoted. The aforesaid principles are also supported by the law laid down by the Constitution bench judgment of Hon'ble Supreme Court in the case of **State of Karnatka vs. Umadevi (3), (2006) 4 SCC 1 (Paras-5, 6 and 51).**

29. For all the reasons aforestated, **the question No.(c) is answered in negative** and it is held that under the facts and circumstances of the case, the respondent-candidates do not have any statutory right for compulsory or automatic recruitment on the post of "Semi-Skilled Workman" in the Ordnance Factory where they have undergone apprentice training under the Act, 1961 and merely because they possess NCVT certificate. They have a right to participate in the recruitment process in terms of the Recruitment Rules, 1994 and the aforequoted policy decisions provided they fullfil the educational and other qualifications required for direct recruitment as prescribed in Column 8 of Clause 5 of Annexure to the Recruitment Rules, 1994.

(d) Whether under the facts and circumstances of the case, the impugned order of the Tribunal is valid?

30. The inference drawn by the Tribunal in paragraphs 8, 9, 10 and 11 that on being selected by National Concil for Vocational Training to award certificate under the Act, 1961, candidates have legitimate expection and thus have preference in employment over the direct recruits, in the Ordnance Factory where they undergone apprenticeship. This finding of the Tribunal is not referable to any of the provisions of the Recruitment Rules, 1994. Use of the word "preference' in clause 5(C) of the Annexure to the policy decision dated 06.01.2011 does not mean that such trained apprentices will have an exclusive right to the exclusion of all others to be considered for appointment. It provides that in the selection process, other things being equal, i.e. marks being equal, trained ex- Trade apprentices of the recruiting Ordnance Factory and sister Ordnance Factories shall be given preference in the order in which they are stated. In other words, if two or more ex

Trade apprentices secure the same marks then preference shall be given on the basis of seniority and for this purpose the Ex-TA who has passed NCTVT examination in earlier batch (NCTVT) shall be senior to the Ex-TA passed in subsequent batch. Thus, the impugned order of the Tribunal drawing inference of preference and treating it as a right of the respondent-candidates to get employment as "Semi-Skilled Workman" without facing selection process to the exclusion of all others, is incorrect, unsustainable and contrary to the law laid down by Hon'ble Supreme Court in the case of **State of Karnatka vs. Umadevi (supra).** That apart, the Central Government has now amended policy in this regard by policy decision dated 09.05.2016 in line with Section 22 of the Act, 1961 making *"Provision of granting five extra marks to Ex-Trade Apprentices in the final merit list of the written examination conducted for a total of 100 marks"*. The advertisement being notifications dated 20.06.2015 to 26.06.2015 are not in conflict with the Recruitment Rules, 1994 and the aforequoted policy decision of the Ordnance Factory Board and, therefore, the Tribunal has committed a manifest error of law and fact to quash it.

31. For all the reasons aforestated, **the impugned common order of the Tribunal dated 06.10.2016** in O.A. No.330/00881 of 2015 (Alok Kumar and others vs. Union of India and others) (subject matter of Writ-A No.4315 of 2017), O.A. No.330/00532 of 2015 (Vicky Bhalla and others vs. Union of India and others) (subject matter of Writ-A No.11792 of 2017), O.A. No.330/01203 of 2015 (Deepak Maurya vs. Union of India and others) (subject matter of Writ-A No.10250 of 2017), O.A. No.330/01204 of 2015 (Sumit Verma and others vs. Union of India and others) (subject matter of Writ-A No.17851 of 2017), O.A. No.330/00801 of 2016 (Aditya Kumar vs. Union of India and others) (subject matter of Writ-A No.11776 of 2017), O.A. No.330/01044 of 2015 (Aditya Kumar vs. Union of India and others) (subject matter of Writ-A No.9563 of 2017), cannot be sustained and is hereby **quashed. All the writ petitions are allowed.**

(2022) 12 ILRA 348
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 68627 of 2015

Shakil Ahmad ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitoner:
Sri Siddharth Khare

Counsel for the Respondents:
A.S.G.I., Sri Bal Mukund, Sri Gyan Prakash

A. Service Law – ReinSt.ment - Salary and Consequential Benefits – Scope of Judicial Review - CISF Rules, 2001: Rule 36; Industrial Disputes Act: Section 11A - Judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate authority. The High Court's jurisdiction was circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. **A disciplinary proceeding is not a criminal trial. The standard of proof required is that of preponderance of probability and not proof beyond reasonable doubt.** If the enquiry has been properly held the question of adequacy or reliability of evidence cannot be canvassed before the High Court. A finding cannot be characterised as perverse or unsupported by any relevant material, if it was a

reasonable inference from proved facts. (Para 24)

B. Principle of proportionality - Only when the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. The Court should take into account that the punishment is not vindictive or unduly harsh. It should not be so disproportionate to the offence so as to shock the conscience and is to be treated so arbitrary, as to term it as violative of Article 14 of the Constitution and amount in itself to a conclusive evidence of bias. **Irrationality and perversity are recognized grounds of judicial review.** (Para 33, 35)

In exercising judicial review in disciplinary matters, there are two ends of the spectrum. The first embodies a rule of restraint. The second defines when interference is permissible. The rule of restraint constructs the ambit of judicial review. This is for a valid reason. The determination of whether a misconduct has been committed lies primarily within the domain of the disciplinary authority. The judge does not assume the mantle of the disciplinary authority. Nor does the judge wear the hat of an employer. **The first end of the spectrum is founded on deference and autonomy** - deference to the position of the disciplinary authority as a fact-finding authority and autonomy of employer in maintaining discipline and efficiency of the service. **At the other end of the spectrum is the principle that the Court has the jurisdiction to interfere when the findings in the enquiry are based on no evidence or when they suffer from Perversity.** (Para 41)

Failure to consider vital evidence is an incident of what the law regards as a perverse determination of fact. Proportionality is an entrenched feature of our jurisprudence. Service jurisprudence has recognised it for long years in allowing for the authority of the court to interfere when the finding or the penalty are disproportionate to the weight of evidenced misconduct. Judicial craft lies in maintaining a steady sail between the banks of these two shores which have to be termed as the two ends of the spectrum. (Para 41)

C. It is now well settled principle of law that the principles of Evidence Act have no application in the domestic enquiry. Disciplinary enquiries have to abide by the Rules of natural justice. But they are not governed by strict rules of evidence which apply to judicial proceedings. (Para 28, 41)

D. Difference between standard of proof in disciplinary proceedings and criminal trials - The standard of proof in disciplinary proceedings is different from that in a criminal case. While the standard of proof in a criminal case is proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. The court in a civil trial applies the standard of proof of a preponderance of probabilities. (Para 40)

E. Doctrine of the balance of preponderance of probabilities: It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. If evidence is so strong against the man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice. (Para 40)

F. Courts should not be guided by misplaced sympathy and should not interfere merely on compassionate grounds. In all cases dealing with penalty of removal, dismissal or compulsory retirement, hardship would result. That would not mean that in a given case punishment of removal can be discarded by the court. That cannot be a ground for the court to interfere with the penalty. While considering the proportionality of punishment, the Court should also take into consideration, the mental set up of the delinquent, the type of duty to be performed by him and similar relevant circumstances which go into the decision making process. (Para 35, 36, 38, 39)

In the case of the petitioner he belonged to a Central Paramilitary Force and discipline and devotion to duty assigned to personnel is the key to maintenance of order. The petitioner admittedly was assigned duty at Watchtower No. 3. He was to remain on duty till 01:00 PM and would have had to take permission from a Superior Officer or atleast inform a Superior Officer before leaving his Sentry Post unattended. He did no such thing. He went to Gate No. 2 and St.d an altercation with his colleagues posted there which resulted in fisticuffs. The petitioner did not inform any Competent Officer of the incident either immediately or soon after debriefing. The lodging of criminal complaint and of FIR at the intervention of the CJM Kanpur Nagar only substantiate the stand of the Respondents that the petitioner is a willful and indisciplined employee. (Para 43)

This Court having considered all the circumstances which led to the passing of the impugned order does not find it appropriate to interfere in the punishment of compulsory retirement. He would be entitled to all service benefits of a duly retired employee. (Para 44)

Writ petition dismissed. (E-4)

Precedent followed:

1. S.B.I. & ors. Vs Ramesh Dinkar Punde, (2006) 7 SCC 212 (Para 13)

2. Deputy Commissioner Kendriya Vidyalaya Sangathan & ors. Vs J. Husain, (2013) 10 SCC 106 (Para 13)

3. Government of Andhra Pradesh Vs Mohammed Nasrullah Khan, 2006 (2) SCC 373 (Para 24)

4. U.O.I. Vs Sardar Bahadur, 1974 (2) SCC 618 (Para 24)

5. U.O.I. Vs Paramananda, 1989 (2) SCC 177 (Para 25)

6. Cholan Roadways Ltd. Vs G Thirugnanasambandam, 2005 (3) SCC 241 (Para 28)

7. Hombegowda Educational Trust Vs St. of Karnataka, (2006) 1 SCC 430 (Para 35)

8. Ranveer Singh Vs U.O.I., 2009 (3) SCC 97 (Para 36)

9. Charanjit Lamba Vs Army Southern Command, 2010 (11) SCC 314 (Para 37)

10. St. of Meghalaya Vs Mecken Singh N. Marak, 2008 (7) SCC 580 (Para 38)

11. S.R. Tewari Vs U.O.I., 2013 (6) SCC 602 (Para 39)

12. St. of Raj. Vs Heem Singh, 2020 SCC online SC 886 (Para 40)

13. Suresh Pathrella Vs The Oriental Bank of Commerce, (2006) 10 SCC 572 (Para 40)

14. M. Siddiq Vs Suresh Das, (2020) 1 SCC 1 (Para 40)

Precedent distinguished:

1. Mavji C Lakum Vs C.B.I., (2008) 12 SCC 726 (Para 14)

2. Messers Firestone Tyre and Rubber Company of India (Private) Limited Vs The Management, AIR 1973 SC 1227 (Para 21)

3. Union Bank of India Vs Vishwamohan, 1998 (4) SCC 310 (Para 26)

4. Chairman & MD United Commercial Bank Vs PC Kakkar, 2003 (4) SCC 364 (Para 26)

Present petition challenges order dated 04.09.2014, passed by Commandant, Central Industrial Security Force Unit, Panki Thermal Power Station, Panki, District Kanpur Nagar and also order dated 04.02.2015, passed by the Deputy Inspector General, CISF North Sector Headquarters, Allahabad, and the order dated 07.09.2015 passed by Inspector General, North Sector, CISF Campus, Malviya Nagar, New Delhi.

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

1. This writ petition challenges the order dated 4.9.2014 passed by the Respondent No.5 the Commandant Central Industrial Security Force Unit, Thermal Power Station Panki, Kanpur Nagar, and also the Order dated 04.02.2015 passed by the Deputy Inspector General, CISF North Sector Headquarters, Allahabad, and the order dated 07.09.2015 passed by the Respondent No.3, Inspector General, North Sector, CISF Campus, Malviya Nagar, New Delhi. The petition further prays that the respondents be directed to reinstate the petitioner as Constable and to pay him his regular monthly salary and consequential benefits.

2. It is the case of the petitioner as argued by Sri Siddhartha Khare, that he was appointed as constable in CISF on 25.09.1990, and he remained in service up to 08.02.2006 when he was removed for alleged misconduct of leaving his place of duty at the Watchtower No.3 on 07.08.2005, at around 10:40AM and going to Gate No.2, and misbehaving with his colleagues and making allegations against the senior officers and that he approached the local Police Station straightaway for lodging First Information Report against his three colleagues that they had threatened him with dire consequences instead of informing his superior officers first with regard to the incident which took place at Gate No.02. It has been submitted that on 25.08.2005 the Assistant Commandant CISF Unit GAIL, Patna, was appointed as enquiry officer who proceeded to conduct an ex- parte enquiry against the petitioner in between 15.12.2005 to 19.12.2005 , wherein statements of several witnesses were recorded without giving any opportunity to the petitioner to cross-examine them. The petitioner was under medical treatment and in no position to participate in the enquiry. An enquiry report was submitted on 10.01.2006 indicating the petitioner with regard to all three charges levelled against him. A copy of the enquiry report was sent to the petitioner on 15.01.2006 granting him time to submit his reply to the show cause notice. The petitioner submitted his reply on 20.01.2006 before the Senior Commandant that the petitioner had in fact been assaulted by three members of the Unit and had received serious injuries for which he was undergoing treatment. The petitioner however was removed from service on 08.02.2006 by the Respondent No.5 with a further direction that he would not be entitled to any additional emoluments for the period of suspension with effect from 07.08.2005 to 08.02.2006. The petitioner filed an Appeal which was rejected by the respondent no. 04. His Revision was also rejected by the Respondent No.3. Aggrieved, the petitioner preferred a Writ Petition No. 53433 of 2008 which was partly allowed by means of an Order dated 27.09.2012, on the ground that principles of natural justice had not been followed in the disciplinary proceedings held against the petitioner. The Court by its order dated 27.09.2012 directed that enquiry shall proceed from the stage it stood vitiated i.e. with effect from 15.12.2005. The reinstatement and consequential benefits to the petitioner shall be subject to orders passed in the fresh enquiry.

3. However, after a lapse of nearly two years the respondents by the order dated 19.05.2014 nominated one Inspector and one Assistant Commander as enquiry officers. Dates were fixed for hearing and the petitioner appeared and participated in the enquiry which continued up to 11.07.2014. Thereafter an enquiry report

dated 02.08.2014, was filed by enquiry officer and the petitioner was issued a show cause notice to which he replied on 11.08.2014. The Respondent No.5 passed a punishment order on 04.09.2014 compulsorily retiring the petitioner. Aggrieved against such order of punishment the petitioner filed an Appeal which has been rejected by the Respondent NO.4 by its order dated 04.02.2015. The petitioner filed a Revision thereafter which has also been rejected by the Respondent No.3.

4. It has been argued by the petitioner's counsel that on 07.08.2005 the petitioner's duty was at Watchtower No.3 from 05:00 AM to 01:00 PM. Verbal duty was also assigned to the petitioner to remain at Watchtower No.3 and also to periodically do patrolling from Watchtower No.3 to Gate No.2. The duty of the petitioner was cross checked by Shift-in-Charge at 07:25 AM and also at 10:15 AM. The petitioner was found alert and on duty at Watchtower No.3. As instructed, the petitioner started patrolling and at about 10:25 AM he reached Gate No.2 and noticed that the Company Office of the petitioner's Unit at Gate No.2 was open although it was a Sunday, where Head Constable Bhanwaru Ram, Company Head Moharrir Ajaib Singh and Company Writer OPS Yadav were sitting. Out of curiosity the petitioner went inside and asked them as to whether they had forwarded the name of the petitioner for Refresher Course and they replied in the affirmative. The petitioner expressed his annoyance as he was residing in family accommodation along with his wife and children and it would be difficult for him to go for the Refresher Course at such short notice. The petitioner said that had they told him about the Refresher Course earlier it would have been better. However Bhanwaru Ram, Ajaib Singh and OPS Yadav reacted very violently and abused the petitioner. The petitioner resisted but he was caught hold of and beaten up and threatened with dire consequences. The petitioner sustained severe injuries but since it was his duty hour the petitioner came back to his post at Watchtower No.3. The three persons who had beaten him up however poisoned the ears of the Assistant Commandant who further told the Company Commandant on telephone and upon the one-sided version of the three persons who were guilty of beating up the petitioner, the authorities made up their mind that the petitioner was guilty.

5. It has been argued that during the enquiry nine witnesses were examined by the enquiry officer of which two witnesses said that no such incident as was alleged in the chargesheet had taken place on 07.08.2005. Three witnesses stated that they were informed of such incident happening at the office at Gate No.2 but had not actually seen it. The Company Commandant also stated that he was only informed about the altercation and had not actually witnessed it. In their earlier statements recorded in 2005, some of the witnesses had implicated the petitioner but on fresh statements being given by them before the new enquiry officer they denied that any altercation took place and stated that they had earlier given a false statement against the petitioner under the pressure of the superior officers.

6. It has been argued that the enquiry officer had relied upon the statement of PW-01, PW-03 and PW-06 who were the persons directly involved in the alleged altercation with the petitioner. The learned counsel for the petitioner has also read out

the statements of other witnesses to say that several of such witnesses had given neutral statements or a statement in favour of the petitioner that no such incident of altercation or use of abusive language had occurred on 07.08.2005. The learned counsel for the petitioner after reading out the relevant portions of the statements of all the nine witnesses has referred to the conclusion drawn by the enquiry officer saying that the enquiry officer has deliberately not considered the statements made in favour of the petitioner and has taken into account the statements made against him. The learned counsel for the petitioner has also read out the statement of the petitioner before the enquiry officer and has argued that the version of the petitioner was that he was assaulted by Sarva Shri Bhanwaru Ram, Ajaib Singh and O. P. S. Yadav, pursuant to which he lodged a First Information Report against them and with regard to which criminal proceedings are pending against the three was ignored. He also stated that his injury had been treated by doctors of Government Medical College who should have been examined during the course of enquiry which was not done. It has been argued that there has been no findings recorded by the enquiry officer with regard to the version of the petitioner that he was assaulted and abused by Bhanwaru Ram, Ajaib Singh and O. P. S. Yadav, pursuant to which he had approached the Police and succeeded in lodging the FIR against them on 16.01.2006 only after the intervention of Chief Judicial Magistrate, Kanpur. Criminal Case No. 801 of 2011 is pending against the accused at District Kanpur Nagar. An application under section 482 CrPC had been filed by the accused which was rejected by this Court by an order dated 17.04.2015. Despite such criminal case being pending against his three colleagues, no departmental action has been taken against them for physically assaulting the petitioner. Departmental proceedings were initiated only against the petitioner in pursuance to which the order impugned has been passed.

7. It has been argued that the enquiry report shows that the petitioner had provided several documents regarding the treatment undertaken by him at the hospital subsequent to being assaulted by the three constables Bhanwaru Ram, Ajaib Singh and O. P. S. Yadav, however no finding has been recorded with regard to such documents by the enquiry officer. No finding has also been recorded as to why the submission made by two prosecution witnesses , Raksh Pal and K.D. Singh has been ignored. It has been argued that the impugned order of punishment has been passed ignoring the reply filed by the petitioner to the show cause notice. The Appeal and Revision has also been rejected in a mechanical manner without noticing and dealing with the grounds taken therein.

8. It has been argued that the penalty imposed upon the petitioner is disproportionate to the charges levelled against him. It has been argued by the petitioners counsel that the petitioner was hardly absent for 10 minutes or so from his duty at Watchtower number three and such a charge could only result in a minor penalty.

9. The learned counsel for the Respondents Sri Bal Mukund, on the other hand, has pointed out that the petitioner was an indisciplined employee and discipline is the mainstay of the Respondent Force. He has referred to several paragraphs of the counteraffidavit filed on behalf of the Respondent No.5.

According to such counter affidavit the petitioner was appointed in 1990 as Constable (General Duty) and after completion of training he was posted to various CISF units. Lastly, he was posted at CISF Unit at Panki, Kanpur in 2004. As per the service record of the petitioner during his tenure he was awarded as many as three minor penalties for various which misconducts/indiscipline. These included over stay of leave, dereliction of duty and misbehaving with Shift-in-Charge and making a false complaint against Unit Administration. While serving at CISF Unit at Panki, the petitioner was found involved in grave misconduct/indiscipline , and therefore he was dealt with under Rule 36 Of the CISF Rules 2001 and a Charge Sheet containing three charges was served upon him. According to the First Charge the petitioner was detailed for Shift duty from 05:00AM to 01:00 PM at Watchtower No.3 on 07.08.2005. At about 10:40 AM he left his duty post without any prior intimation or permission of the Competent Officer and went to the Company Office located at Gate No.2 on his own. The petitioner committed a serious and indisciplined act of negligence towards his duty. As per Charge No.2, the petitioner on visiting the Company Office at Gate No.2 on his own, created nuisance over there and argued with the Company Writer, and the Head Constable for putting his name for Refresher Course. He threatened Constable Ajaib Singh and two other personnel that he would see them outside the Gate and also made allegations and threatened the Assistant Commandant and a Senior Commandant of dire consequences. He also alleged that because Constable Ajaib Singh is a Sardar (Sikh) and the Assistant Commandant and the Commandant are also Sardars (Sikhs) they were partial to him. The petitioner had thus committed serious misconduct involving himself in breach of communal harmony, and unity of the country and of the Force. Such conduct displayed utter disregard of his superiors and amounted to serious indiscipline. The Third Charge related to the petitioner making a written complaint directly to the Panki Police Station alleging assault by Head Constable Bhanwaru Ram, Constable Ajaib Singh and Constable O.P.S. Yadav, and also that they had threatened to kill him. If there was any complaint, petitioner Shakeel Ahmed should have first informed the matter to the senior officers of the Unit instead of lodging complaint in Panki Police Station directly. This act of the Constable Shakeel Ahmed as a member of a disciplined paramilitary force, amounted to gross indiscipline, irresponsible behaviour and an attempt to tarnish the image of the Force.

10. In the enquiry that was held thereafter punishment order was passed removing him from service on 8 February 2006. His Appeal and Revision having been rejected the petitioner filed Writ Petition which was allowed partly by this Court by its Order dated 27.09.2012, directing the Respondents to conduct a fresh enquiry to enable the petitioner to participate in the proceedings. The Court ordered that the consequent reinstatement and consequential benefits to the petitioner would be subject to the orders which would be passed after completion of the fresh enquiry that is to say , that he would neither be reinstated nor any benefit extended to him till he was exonerated in the enquiry. It has been submitted that the Denovo enquiry was conducted as per the procedure laid down, on a day to day basis. The Prosecution Witnesses and the Court witnesses were examined in the presence of the petitioner , he was also extended

sufficient opportunity to cross examine the Prosecution Witnesses. He was given sufficient opportunity to defend the charges framed against him and because of his failure to prove his version , the enquiry officer submitted a report finding him guilty of all charges. There was no procedural irregularity in the conduct of the enquiry. The petitioner was issued show cause notice and Respondent No.5 after considering all evidence on record and also the reply of the petitioner to the show cause notice, imposed the penalty of Compulsory Retirement from service with full pensionary benefits. The Appellate authority did not find any procedural infirmity in the conduct of the discipline proceedings and also did not find the penalty disproportionate to his proven misconduct. The Appeal having been rejected, the petitioner filed a Revision which has also been carefully examined by the Respondent No. 3 and all relevant documents were taken into account and the Respondent No. 3 has rejected the Revision thereafter.

11. It has been argued that the petitioner was detailed to do his duty only on Watchtower No. 3. Instead of remaining on duty at Watchtower No. 3 he reached Gate No.2 of his own volition without being instructed to do so, and without prior permission. There was no need to go to Gate No.2 which was being manned by other three armed personnel. The Watchtower is a static point from where a sentry has to observe the surrounding areas to ensure that there is no unauthorised entry/trespass or scaling over, or intrusion from the perimeter wall. Since the petitioner left his duty post Watchtower No. 3 unattended it was a grave act of indiscipline on his part. The petitioner was detailed for the Refresher Course commencing with effect from 16.08.2005 by the order passed by the Assistant Commandant of the Unit on 05.08.2005. He had been informed well in advance. There was no need for the petitioner to approach the Company Writer so that his name would be deleted from the nomination. When the Company Writer did not agree to change his name the petitioner created a nuisance and started making wild allegations against the Company Writer and also the Head Constable for putting his name for a Refresher Course. The petitioner had started quarrelling, abusing and threatening the three personnel. It was at that point of time that the Assistant Commandant and Senior Commandant had come out of their Office and went near Gate No.2 where they found Head Constable C.B. Chaudhary trying to counsel and placate the petitioner to go to his duty post. The petitioner's version that he was beaten up by the three personnel was unsupported by any evidence. The three personnel had reported the matter to the Assistant Commandant of the Senior Commandant and accordingly report of the same was entered in the General Diary. After completion of Shift Duty at 01:00PM the petitioner reported at the main Gate and attended the Debriefing but he did not report anything to the Shift-in-Charge about any injury caused to him by the Company Writer or the Head Constable. It has been stated repeatedly that it is clear from his conduct right after the incident on 07.08.2005 that the petitioner was neither threatened nor beaten up by the three personnel against whom he complained to the Senior Commandant only on 11.08.2005 and sought permission for lodging FIR at Police Station, Panki. Moreover, no information regarding the petitioner approaching the Court of the CJM and thereafter lodging FIR on his

intervention has been given to the Unit Commander at Panki, Kanpur.

12. In the counter affidavit filed by the Respondents they have seriously disputed the allegation of the petitioner being injured and being treated at hospital. After the incident on 07.08.2005, the petitioner did not approach any member of the Unit for First Aid and did not apply or seek help for medical treatment on the same day. He also did not inform of any injury to him to the Shift-in-Charge/Company Commander during Shift Debriefing. The medical certificates filed by the petitioner related to medical treatment undertaken by him with effect from 27.09.2005 to 05.10.2005. In this regard the Senior Commandant, CISF had written a letter on 24.11.2005 to the CMS, GSVM Medical College, Kanpur and sought information regarding treatment of the petitioner and also requested a second opinion. In reply, the CMS of GSVM Medical College, Kanpur, through his letter dated 30.11.2005 informed that the petitioner was admitted in hospital on 24.09.2005 for treatment of weakness in his legs and was discharged on 05.10.2005. Further the CMS informed that after investigation neither symptom of any disease nor any injury was noticed on the body of the petitioner. The petitioner had failed to give any valid evidence regarding reported assault on him by Head Constable Bhanwaru Ram and by Constables Ajaib Singh and O.P.S. Yadav.

13. Sri Balmukund, Learned counsel for the respondents has also read out the intemperate language used by the petitioner in his representation/ application to his Commandant and has also read out paragraph 19 onwards from the counter affidavit. He has pointed out the certificate of the treating doctor at Hallet Hospital, Kanpur, saying that such doctor had certified that when the petitioner reported for treatment on 24.09.2005, he had no marks of any injury on examination and he complained of weakness in his legs only. The learned counsel for the respondent has also read out the concluding portion of the enquiry report to say that the petitioner not only misbehaved with his colleagues but also with his Commandant and Assistant Commandant and left his post at the Watchtower No. 3 without permission. He had also filed FIR against his colleagues without proper sanction from the commandant. He referred to 2 judgements of the Supreme Court in the case of ***State Bank of India and Others versus Ramesh Dinkar Punde (2006) 7 SCC 212;*** and in the case of ***Deputy Commissioner Kendriya Vidyalaya Sangathan and Others versus J. Husain (2013) 10 SCC 106.***

14. The learned counsel for the petitioner in his reply has referred to the medical certificate issued by the treating doctor of the government hospital to say that the petitioner had gone for treatment of weakness in his legs after more than one month from the date of the incident dated 7 August 2005. Injury, if any which he had sustained in his abdomen due to being beaten up mercilessly by his colleagues would have healed up by then. Moreover, enquiry officer has referred to the petitioner's conduct in getting a false Medical Certificate and lodging FIR against his colleagues without proper approval of the competent officer, but these charges were not mentioned in the chargesheet. Ld counsel for the petitioner has placed reliance upon judgement rendered by the Supreme Court in the case

of ***Mavji C Lakum versus Central Bank Of India (2008) 12 SCC 726.***

15. Learned counsel for the petitioner has submitted that a rejoinder affidavit has been filed by the petitioner in October, 2019 in which he has reiterated the contents of the writ petition while denying the contents of the counter affidavit.

16. The learned counsel for the Respondent has pointed out that a supplementary counter affidavit has been filed thereafter by the respondents wherein it has been stated that the petitioner was detailed for duty on Watchtower No.3. There were no instructions that the Sentry of Watchtower No.3 would patrol the area from Watchtower No.3 to Gate No.2. It was neither instructed by the Shift-in-Charge nor by the Company Commandant nor by Assistant Commandant. The story of patrolling from Watchtower No.03 to Gate No.2 was fabricated by the petitioner to save himself otherwise there was no need to patrol up to Gate No. 2 which was being manned by three armed personnel. From the evidence that was collected during the enquiry it was found that the petitioner had left his duty post that is Watchtower No.3 without any permission of any Competent Authority and had approached the Company Office located at Gate No.2 and started quarrelling with the Company Writer in vain. The petitioner had been detailed for Refresher Course commencing from 16.08.2005 by the Assistant Commandant by his order dated 05.08.2005 for which he was informed well in advance. On 07.08.2005 while performing duty at the Watchtower No.3 the petitioner left his duty post and approached the Company Office at Gate No.2 and started quarrelling and blaming the Company Writer Constable, O.P.S. Yadav, Constable Ajaib Singh and Head Constable Bhanwaru Ram for putting his name in the refresher course. While blaming them he also started quarrelling and abusing them and threatened the Assistant Commandant and Senior Commandant with dire consequences. When he came out of the Company Office at Gate No.02 Head Constable C.B. Chaudhary tried to console him and requested him to go to his duty post. At the time of attending the Debriefing in the afternoon, the petitioner had not reported anything to the Shift-in-Charge about the quarrel that had taken place at Company Office at Gate No.2 or any injury caused to him by any of his colleagues. Had he been injured he would definitely have informed the Shift-in-Charge immediately on completion of the Shift .

17. Having heard the learned counsel for the parties, this court has carefully examined the papers submitted by the petitioner during the time of enquiry relating to his date of admission in GSVM Medical College, Kanpur, on 24.09.2005. The doctor writing the clinical history had stated that the petitioner had complained of pain over mid and lower back for the past one and a half months and gradual progressive weakness in lower limbs for past twenty days. The patient had stated himself that he was apparently alright one and a half months ago when following slipping of his foot, he fell. At that time he was able to stand up without any discomfort but 25 days later patient started feeling pain in his mid and lower back and weakness in both lower limbs. Since then the weakness in both lower limbs was gradually progressing and he complained also of tingling in both lower limbs although there was no loss of sensation and other symptoms related with any injury.

There was no history of any other chronic illness or pain in the past. In X-Ray that was done of Dorsal and Lumbar Spine there was no sign of injury. Common painkillers like Diclofenac along with NSAID, Multivitamins, Calcium, and Iron was prescribed.

18. This Court has also gone through the enquiry report submitted by the enquiry officer which became the basis for the passing of the punishment order. There were nine prosecution witnesses including Head Constable Bhanwaru Ram, Constable Ajaib Singh and Constable O.P.S. Yadav, Sub-Inspector C.B. Chaudhary, Assistant Commandant S.P. Tripathi, Assistant Sub-Inspector R.K. Kaushal, Sub-Inspector and Shift-in-Charge and Constables K.D. Singh and Rashpal Singh (PW-04 and PW-05). All the witnesses were given copies of earlier statements made by them on 15.12.2005 and 16.12.2005 before the enquiry officer which inquiry was found vitiated by the High Court and set aside that with a direction for conducting a fresh enquiry. In the enquiry report mention has also been made of documentary evidence. Besides other evidence produced by the prosecution there is a copy of Report filed at 12:10 hours on 07.08.2005 in the General Diary kept at Gate No.02 regarding misbehaviour of the petitioner. In the documentary evidence submitted by the petitioner there was a copy of FIR tried to be lodged on 07.08.2005 by Shakeel Ahmed. And copy of application to the Senior Commandant dated 11.08.2005 praying for permission to lodge a report at Police Station, Panki against the three accused. The petitioner had also relied upon copy of Miscellaneous Criminal Case No. 807/2011, pending before CJM, Kanpur Nagar. In the enquiry held it had come out that Watchtower No.3 was around 50 - 100 metres away from Gate No.2 and these were two different duty posts. The Sentry at Watchtower No.3 is assigned duty only to keep a watch on an area which he could normally see. Sentry at Watchtower No.3 had to compulsorily stay at his watch post and even for attending nature's call he had to take permission from the competent officer before leaving the Watchtower. Gate No.2 on the other hand has one Junior Commissioned Officer also on duty and if any need arises the Sentry at Watchtower No.3 can take permission of the subordinate officer at Gate No.2 and leave his post at Watchtower No.3. It has also come out in the enquiry report that the petitioner had initially tried to lodge FIR at Police Station, Panki on 07.08.2005 and when the same was refused to be lodged by the Police Station he had sought permission from the Senior Commandant only on 11.08.2005 for getting the FIR lodged against his colleagues. Thereafter, the petitioner had approached the Court of the CJM, in January 2006, and on his intervention the Report was lodged.

19. The enquiry has been conducted in a very meticulous manner. The Charges have been mentioned, the Prosecution Witnesses and Documentary Evidence have been mentioned. the Defence Witnesses and Documents have also been mentioned and then the statements of all the Prosecution Witnesses have been mentioned and also the cross-examination done by the petitioner. Thereafter the petitioner's defence statement has been mentioned. The Presenting Officers Brief Note has also been mentioned. The petitioner's reply to the Presenting Officer's Brief Note has also been mentioned. Thereafter, the admitted facts have been mentioned and also the facts which were disputed. In the facts that could not be

disputed by the petitioner in his statement at page no. 184 of the Paper Book was the fact that he had been detailed to do his duty at Sentry Post on Watchtower No. 3 only. It was also not disputed by him that the petitioner had not taken prior permission of any competent officer to leave his post at Watchtower No.3 or to approach the Company Office at Gate No.2. It could not be disputed by him that Gate No.2 office was not in his watch duty. It was also not disputed by the petitioner that he left Watchtower No.3 unattended at around 10:40 AM. It was also not disputed by the petitioner that he did not inform any superior officer/duty in charge that he had gone to the Office at Gate No.2 and he had entered into an altercation with his three colleagues posted there. It was however stated by him that he had been beaten up severely and that they had tried to strangle him and caused severe back injury to him but he admitted that he informed non one in the Unit immediately after his duty or during or soon after Debriefing. He also could not dispute that he had knowledge of order passed by the Assistant Commandant on 05.08.2005 of his being detailed for Refresher Course. He said he only wanted to find out from the Company Writer as to why he had been given such short notice to join the Refresher Course. When he was threatened and beaten up, he did not report the matter even at the Unit Dispensary immediately or soon thereafter. The enquiry officer had found on the basis of evidence led by the prosecution and by the petitioner in his defence that dereliction of duty, altercation with colleagues, attempt to malign the CISF by making false allegations against superior officers that they had a communal bias and over reaching his superiors and directly reporting the incident to Police Station, Panki had been proved.

20. The learned counsel for the petitioner has cited the judgement rendered by the Supreme Court in *Mavji C. Lakum versus Central Bank of India(Supra).* This Court has gone through the judgement and finds that the appellant therein was a peon in a bank since 1951 he was promoted in the year 1963, and thereafter was served two chargesheets to which he replied. Upon enquiry being held he was discharged from service in May 1984. The petitioner challenged the order before the Court of Civil Judge. The Suit was dismissed but in the Appeal the District Court directed reinstatement but denied back wages. It permitted the bank to hold a fresh enquiry. The High Court in Second Appeal awarded 75% back wages from the date of filing of Suit. As the order of reinstatement had become final, the appellant was reinstated. The bank started fresh enquiry and found the petitioner guilty of two charges while for rest of the charges he was not found guilty. After considering his reply he was inflicted a composite punishment of discharge alongwith censure entry which he challenged before the Industrial Tribunal. The Tribunal came to the conclusion that there was no evidence supporting major charges. There was however some evidence of misconduct on the part of the appellant. The Tribunal partly allowed the claim and the order of Discharge was set aside. The Tribunal imposed the punishment of withholding one increment with future effect. The appellant was retired in 1994 thereafter. The bank challenged Award before the High Court. The Writ Court set aside the award. The Appellant challenged the Single Judge order in Appeal which Appeal was dismissed on grounds of maintainability.

21. The Supreme Court first considered the question of maintainability

and held that since the appellant had asked for a Writ of *certiorari* and had filed a Writ Petition both under Article 226 and 227 of the Constitution the Writ Appeal was maintainable and should not have been dismissed by the Division Bench. However the Court instead of remanding the matter to the Division Bench took into account the fact that the controversy started in 1984 and twenty four years had so far been lost. The Appellant was discharged in the year 1984 and since then he was fighting for his rights. He had been paid his back wages in part but the Tribunal's order setting aside his order of punishment of Discharge had been set aside by the Writ Court. The Supreme Court held that the order of punishment was examined by the Tribunal in exercise of its power under Section 11 A of the Industrial Disputes Act, and the Tribunal had come to the conclusion that the enquiry was fair and proper but of the seven charges levelled against the petitioner only two could be proved. The Tribunal came to the conclusion that the charges that could be proved only warranted minor punishment of censure or stoppage of increments the Tribunal had considered that for thirty years long service rendered by the appellant there was not a single allegation against him. He had also got promotion to the post of head peon during the period. The Tribunal also noted the fact that there was no past record of habitual misconduct on the part of the appellant. The Tribunal had observed that it appeared that due to some sort of bitterness between the workman and the staff members, the workman had committed some misconduct like remaining absent from duty on various occasions and being rude and rough in his behaviour with his superiors. The Supreme Court observed that the Writ Court had wrongly come to the conclusion that under Section 11 A of the Industrial Disputes Act the Tribunal could not have interfered with the punishment when it had found on evidence that the enquiry held against the appellant was fair and proper. The Supreme Court observed that under Section 11 A of the Industrial Disputes Act the Tribunal was quite justified in using its discretion. The Tribunal had first recorded a finding that misbehaviour was not wholly proved and whatever misconduct was proved, did not deserve the extreme punishment of discharge. The Writ Court was of the opinion that if the enquiry was held to be fair and proper then the Industrial Tribunal could not go into the question of evidence or the quantum of punishment. The Supreme Court held that it was not a correct appreciation of the law. Even if the enquiry was found to be fair that would be only a finding certifying that all possible opportunity was given to the delinquent and the principles of natural justice and fair play were observed. That did not mean that the findings arrived at were essentially correct findings. If the Industrial Tribunal came to the conclusion that the findings could not be supported on the basis of evidence given or that the punishment given was shockingly disproportionate, the Tribunal would be justified in interfering with the quantum of punishment. The Tribunal no doubt has to give reasons as to why it was not satisfied either with the findings or with the quantum of punishment and that such reasoning should not be fanciful or whimsical but there should be good reasons. The Tribunal had not committed any error in observing that for good long thirty years there was no complaint against the work of the Appellant and that such a complaint suddenly surfaced only in the year 1982 and what was complained of was his absence on some days and his

argumentative nature. The Supreme Court relied upon observations made in ***Messers Firestone Tyre and Rubber Company of India (Private) Limited versus the Management AIR 1973 Supreme Court 1227***, to observe that upon finding that -

"...if the decision of the authority was illegal or that it was based on material not relevant ,or relevant material was not taken into consideration ,or that it was so unreasonable that no prudent man could have reached to such a decision ,or that it was disproportionate to the nature of the guilt held established so as to shock the judicial conscience,The Tribunal could have substituted the penalty..."

22. The case of the petitioner herein is clearly distinguishable.

23. The Learned counsel for the respondent has placed reliance upon *State Bank of India and Others versus Ramesh Dinkar Punde (supra)* wherein the Supreme Court was considering a judgement of the High Court of Bombay by which imposition of penalty of removal inflicted upon the respondent, a bank officer, preceded by a regular disciplinary enquiry, was set aside with the direction to the Appellant to reinstate the respondent with all consequential benefits including that of back wages. The respondent being a Manager had convinced the Branch Manager of another Branch of the same Bank to open a Current Account in the name of a client who was introduced by him by giving his old address at Bombay as the address of the client. Certain cheques were issued in the name of a Trust. the respondent ensured that such cheques were deposited in the Current Account of the client he had introduced, and was also instrumental in sanctioning of overdraft facility against such cheques. He had emphatically stated that it would be his responsibility if anything went wrong. The Trust lodged a complaint alleging fraud. The Bank initiated disciplinary proceedings against him. Regular enquiry was held, thereafter the respondent was dismissed. Appeal filed by the respondent had been rejected by the Appellate Authority. The respondent challenged the order in the Writ Petition where it appears that pursuant to observations made by the High Court, the Bank reduced the punishment of dismissal to removal. The High Court on the reappreciation of evidence, reversed the finding of the enquiry officer and set aside the order of the Disciplinary Authority and the Appellate authority.

24. The Supreme Court observed that it was unfortunate that the High Court had acted as an Appellate authority. The High Court's jurisdiction was circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. Judicial review is not akin to adjudication on merit by reappreciating the evidence as an Appellate authority. The Supreme Court quoted earlier binding precedents of (i) *Government of Andhra Pradesh versus Mohammed Nasrullah Khan 2006 (2) SCC 373*; and (ii) *Union of India versus Sardar Bahadur 1974 (2) SCC 618*;where the Supreme Court had observed that -

"...a disciplinary proceeding is not a criminal trial. The standard of proof required is that of preponderance of probability and not proof beyond reasonable doubt. .....If the enquiry has been properly held the question of adequacy or reliability of evidence cannot be convassed before the High Court. A

finding cannot be characterised as perverse or unsupported by any relevant material, if it was a reasonable inference from proved facts.."

25. In *Union of India versus Paramananda 1989(2) SCC 177*; the Supreme Court had observed --

"we must unequivocally state that the jurisdiction of the Tribunal to interfere with the disciplinary proceedings or punishment cannot be equated with an Appellate jurisdiction. The Tribunal cannot interfere with the findings of the enquiry officer or competent authority where they are not arbitrary or utterly perverse. It is appropriate to remember that power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of legislature or Rules made under the Proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the Rules and in accordance with the principles of natural justice, what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty unless it is malafide is certainly not a matter for the Tribunal To concern itself with. the Tribunal also cannot interfere with the penalty if the conclusion of the enquiry officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter."

26. In *Union Bank of India versus Vishwamohan 1998 (4) SCC 310*, the Supreme Court had observed that it needs to be emphasised that in banking business, absolute devotion, diligence, integrity and honesty needs to be preserved by every Bank employee and in particular the Bank Officer.

27. Similar observations were made by the Supreme Court in the case of *Chairman and MD United Commercial Bank versus PC Kakkar 2003 (4) SCC 364*; where it was observed that

"every officer/employee of the Bank is required to take all possible steps to protect the interest of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer - - -."

28. In *Cholan Roadways Limited versus G Thirugnanasambandam 2005 (3) SCC 241*; the Supreme Court had reiterated that-

"It is now well settled principle of law that the principles of Evidence Act have no application in the domestic enquiry."

29. The Supreme Court allowed the Bank's Appeal by referring to its earlier judgements in cases of delinquent Bank employees and by observing that

"....the scope of judicial review is very limited. Sympathy or generosity as a factor is impermissible. In our view loss of confidence, is the primary factor and not the amount of money misappropriated...."

30. The aforesaid case cited by the learned counsel for the Respondents cannot be said to be fully applicable as it relates to a Bank Employee on whom allegations of fraud were levelled. This Court finds that

whenever Banking Compnies are concerned the Supreme Court has been averse to show interference as for a Bank employee utmost integrity and devotion to duty is required as it is a position of trust.

31. In *Deputy Commissioner Kendriya Vidyalaya Sangathan versus J. Hussain (supra),* the Supreme Court was considering the case of an employee/peon in a Central School who had been charged of forcibly entering the office of the Principal in a fully drunken state. The respondent in his reply had admitted that he entered the office of the Principal in that condition however he claimed that he did not enter the office of the Principal forcibly. Immediately after the incident the police had been called and the respondent had been medically examined as well. The medical examination had confirmed that the respondent was under the influence of liquor.The respondent also offered his unconditional apology for consumption of alcohol and requested the disciplinary authority to take a sympathetic view of the matter and pardon him. Since the respondent had admitted the charge, no regular enquiry was held and on the basis of admission the order of removal was passed. The Central Administrative Tribunal dismissed the Original Application. The respondent filed a writ petition.

32. The High Court found the penalty of removal from service to be disproportionate to the nature and gravity of his misconduct. Thus, invoking the doctrine of proportionality, the High Court had directed reinstatement of the respondent into service with continuity only for the purpose of pensionary benefits with no back wages for the period of his absence. The appellant School challenged the reasoning and rationale of the direction in Appeal.

33. The Supreme Court observed that the only question to be examined was as to whether the penalty of removal from service offended the principle of proportionality that is , whether the penalty is disproportionate to the gravity of the misconduct to the extent that it shocks the conscience of the court and is to be treated so arbitrary, as to term it as violative of Article 14 of the Constitution.

34. The Supreme Court observed in paragraph 7 and 8 of the judgement as follows -

"7. When the charge is proved, as happened in the instant case, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed. Of course, this discretion has to be examined objectively keeping in mind the nature and gravity of the charge. The disciplinary authority has to decide a particular penalty specified in the relevant Rules. A host of factors go into the decision making while exercising such discretion which include, apart from the nature and gravity of the misconduct, past conduct, nature of duties assigned to the delinquent, responsibility of duties assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department or establishment where he works, as well as extenuating circumstances, if any exist.

"8. The order of the Appellate Authority while having a relook at the case would, obviously, examine as to whether the punishment imposed by the disciplinary authority is reasonable or not. If the Appellate authority is of the opinion that the case warrants lesser penalty, it can

reduce the penalty imposed by the disciplinary authority. Such a power which weighs with the Appellate authority departmentally originally is not available to the Court or a Tribunal. The Court while undertaking judicial review of the matter is not supposed to substitute its own opinion on there appraisal of facts. ***(see UT of Dadra and Nagar Haveli versus Gulabhia M Lad 2010 (5) SCC 775)****; In exercise of power of judicial review, however, the court can interfere with the punishment imposed when it is found to be totally irrational or is in outrageous defiance of logic. This limited scope of judicial review is permissible and interference is available only when the punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the court lesser punishment could have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities."*

35. The Supreme Court observed that only when the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. The Court should take into account that the punishment is not vindictive or unduly harsh. It should not be so disproportionate to the offence so as to shock the conscience and amount in itself to a conclusive evidence of bias. Irrationality and perversity are recognised grounds of judicial review. The Supreme Court also took into account the fact that the respondent was working as a peon in a school and he had barged into the office of the Principal in an inebriated state. It observed that such penalty was not so disproportionate to the extent that it shocked the conscience of the court. The High Court had observed that the respondent was a married man with a family consisting of a number of defendants and was suffering hardship, however, the Supreme Court observed that in all cases dealing with penalty of removal, dismissal or compulsory retirement, hardship would result. That would not mean that in a given case punishment of removal can be discarded by the court. That cannot be a ground for the court to interfere with the penalty. The Supreme Court placed reliance upon *Hombegowda Educational Trust versus State of Karnataka (2006) 1 SCC 430*; where it was observed as follows: -

"20. A person when dismissed from service is put to a great hardship but that would not mean that a grave Misconduct should go unpunished. Although the doctrine of proportionality may be applicable in such matters, but a punishment of dismissal from service for such a misconduct cannot be said to be unheard of. Maintenance of discipline of an institution is equally important. - - -."

36. The Supreme Court has repeatedly emphasised that Courts should not be guided by misplaced sympathy or compassionate ground, as a factor in judicial review while examining the quantum of punishment. The Supreme Court referred to judgement rendered by it in *Ranveer Singh versus Union of India 2009 (3) SCC 97*, as well. The appellant in that case was working as a constable in Border Security Force. Penalty of removal from service was imposed upon him on account of his failure to return to the place of duty despite instructions given to him and refusal to take food in protest when he was punished ,and refusal to do pack drill while undergoing rigourous imprisonment. The Supreme Court had held that the punishment imposed upon him was not disproportionate.

37. Similarly , in the case of *Charanjit Lamba versus Army Southern*

Command 2010 (11) SCC 314; the Supreme Court had upheld punishment of dismissal of the appellant who was holding the rank of Major in the Indian Army and had exhibited dishonesty in making a false claim of transport charges of household luggage.

38. The Supreme Court in the case of *State of Meghalaya Vs. Mecken Singh N. Marak 2008 (7) SCC 580* has observed that while considering the proportionality of punishment, the Court should also take into consideration, the mental set up of the delinquent, the type of duty to be performed by him and similar relevant circumstances which go into the decision making process.

39. In *S. R. Tewari Vs. Union of India 2013 (6) SCC 602* while discussing scope of judicial review the Supreme Court observed that Courts can interfere with quantum of punishment only where the punishment awarded is found to be shockingly disproportionate to the gravity of the misconduct. It is only in extreme case which on the facts shows perversity or irrationality that there can be a judicial review of punishment and Courts should not interfere merely on compassionate grounds.

40. Most recently, the Supreme Court in the case of ***State of Rajasthan and Others versus Heem Singh 2020 SCC online Supreme Court 886*** ; has observed in paragraph 15 that the standard of proof in disciplinary proceedings is different from that in a criminal case. Placing reliance upon its observation in *Suresh Pathrella versus the Oriental Bank of Commerce (2006) 10 SCC 572* ; the Supreme Court differentiated between the standard of proof in disciplinary proceedings and criminal trials by observing that while the standard of proof in a criminal case is proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. On preponderance of probabilities the Supreme Court relied upon Constitution Bench decision of *M.Siddiq versus Suresh Das (2020) 1 SCC 1*; Where the Supreme Court observed in paragraphs 720 and 721 that the court in a civil trial applies the standard of proof of a preponderance of probabilities.

"This standard is also described sometimes as a balance of probability or a preponderance of the evidence. "Phipson on evidence",formulates the standard succinctly : If therefore, the evidence is such that the court can say "we think it more probable than not", the burden is discharged; but if the probabilities are equal, it is not. In Miller versus Minister of Pensions 1947) 2 All England Report 372, Lord Denning J. defined the doctrine of the balance of preponderance of probabilities in the following terms:- "(i) - - It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against the man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

41. The Supreme Court in Heem Singh (Supra) thereafter observed in paragraph 39 as follows: -

" in exercising judicial review in disciplinary matters, there are two ends of the spectrum. The first embodies a rule of

restraint. The second defines when interference is permissible. The rule of restraint constructs the ambit of judicial review. This is for a valid reason. The determination of whether a misconduct has been committed lies primarily within the domain of the disciplinary authority. The judge does not assume the mantle of the disciplinary authority. Nor does the judge wear the hat of an employer. Deference to finding of fact by the disciplinary authority is recognition of the idea that it is the employer who is responsible for the efficientConduct of their service. Disciplinary enquiries have to abide by the Rules of natural justice. But they are not governed by strict rules of evidence which apply to judicial proceedings. The standard of proof is hence not the strict standard which governs a criminal trial, of proof beyond reasonable doubt, but a civil standard governed by a preponderance of probabilities. Within the rule of preponderance, there are varying approaches based on context and subject. The first end of the spectrum is founded on deference and autonomy - deference to the position of the disciplinary authority as a fact-finding authority and autonomy of employer in maintaining discipline and efficiency of the service. At the other end of the spectrum is the principle that the Court has the jurisdiction to interfere when the findings in the enquiry are based on no evidence or when they suffer fromPerversity. Failure to consider vital evidence is an incident of what the law regards as a perverse determination of fact. Proportionality is an entrenched feature of our jurisprudence . Service jurisprudence has recognised it for long years in allowing for the authority of the court to interfere when the finding or the penalty are disproportionate to the weight of evidenced misconduct . Judicial craft lies in maintaining a steady sail between the banks of these two shores which have to be termed as the two ends of the spectrum. Judges do not rest with a mere rectification of the hands off Mantra when they exercise judicial review. To determine whether the finding in a disciplinary enquiry is based on some evidence an Initial or threshold level scrutiny is undertaken. This is to satisfy the conscience of the Court that there is some evidence to support the charge of misconduct and to guard against perversity. But this does not allow the Court to re-appreciate evidentiary findings in the disciplinary enquiry or to substitute a view which appears to The judge to be more appropriate. To do so would offend the first principle which has been outlined above. The ultimate guide is the exercise of robust common sense without which the judges craft is in vain. - -."

42. The court in the aforesaid case held that removal from service of the respondent was an appropriate and proportionate punishment as acquittal in the criminal case did not conclude the disciplinary proceedings. The disciplinary enquiry was not governed by proof beyond reasonable doubt or by the rules of evidence which govern the criminal trial. There were circumstances emerging from the record of the disciplinary proceedings which brought legitimacy to the contention of the State that to reinstate such an employee back in service will erode the credibility of State and public confidence in the image of the police force.

43. In the case of the petitioner he belonged to a Central Paramilitary Force and discipline and devotion to duty assigned to personnel is the key to maintenance of order. The petitioner admittedly was assigned duty at Watchtower No.3. He was to remain on duty till 01:00 PM and would have had to take permission from a Superior Officer or atleast inform a Superior Officer before

leaving his Sentry Post unattended. He did no such thing. He went to Gate No.2 and stated an altercation with his colleagues posted there which resulted in fisticuffs. The petitioner did not inform any Competent Officer of the incident either immediately or soon after debriefing. The lodging of criminal complaint and of FIR at the intervention of the CJM Kanpur Nagar only substantiate the stand of the Respondents that the petitioner is a wilful and indisciplined employee.

44. This Court having considered all the circumstances which led to the passing of the impugned order does not find it appropriate to interfere in the punishment of compulsory retirement. He would be entitled to all service benefits of a duly retired employee.

45. The Writ Petition lacks merit and is ***dismissed***.

46. No order as to costs.

(2022) 12 ILRA 367
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 6658 of 2022
Connected With
Other Cases

Rishipal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailendra Singh

Counsel for the Opposite Parties:
C.S.C., Sri Arun Kumar Pandey

A. Civil Law - UP Revenue Code, 20106 – Sections 26, 67, 67-A & 68 – Construction over the public land – Long Standing Possession of the villagers – Order to dislodge such villagers, how far permissible – Exparte report was prepared by the Lekhpal, how far relevant – Held, many people in the village areas are replacing old mud made walls and earthen tiles roof by permanent cemented linter structure and this transformation from old to new, at times becomes matter of complaint of unauthorized possession – If innocent villager is dislodged from the long standing possession only on the ground that he has raised new cemented construction, it would defeat the very purpose and objective behind the incorporation of such a provision under the Act – Further held, upon bare reading of sub-section 1 of Section 67-A, it transpires that legislature intended not to disturb old standing residential structures of certain categories of villagers – High Court issued guidelines to ensure transparency in the procedure relating to dislodge a long standing possession. (Para 46, 60 and 74)

B. Civil Law - UP Revenue Code, 20106 – Section 67(5) – Duty of Appellate authority – Application for stay filed in the Appeal – Time limit for disposing the application and appeal – Held, the appeals are creation of statute and, therefore, while entertaining the appeal, the appellate authority must dispose of pending stay applications against the order of Assistant Collector within two weeks or so and until such disposal, therefore, revenue authorities should restrain themselves from taking any coercive measure – Endeavour of the appellate authority should always be to dispose of appeals filed under Section 67(5) quite expeditiously and if there is no other legal impediment, within a maximum period of three months (Para 72)

Writ petition allowed. (E-1)

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

Heard Sri Shailendra Singh, Ajay Tripathi, Surya Prakash Pandey, M.J.Akhtar, Rajesh Kumar, Dhirendra Prasad, Santosh Kumar Srivastava, Rahul Kumar Tyagi, Harish Chandra Dubey, Sheikh Moazzam Inam, Adarsh Tripathi, Sri S.K.Chaubey, Sri V.K.Upadhyay, Sri K.N.Singh, Kharag Singh, Abhay Raj Yadav, Vidya Kant Tripathi, Dwijendra Prasad, Pravesh Kumar, Shailendra Yadav, Rahul Kumar Tyagi, Pramod Kumar Pandey, Birendra Pratap Yadav, Vinod Kumar Yadav, Naveen Kumar, K.K.Yadav and H.C.Yadav, learned Advocates appearing for the respective petitioners and Sri Sudhir Bharti, Sunil Kumar Singh, Pankaj Kumar Gupta, Achal Singh, Deepak Gaur, Pradeep Singh, Sher Bahadur Singh, Bhupendra Kumar Tripathi, Hari Narayan Singh, learned counsel for their respective Gaon/ Gram Sabhas and Sri Abhishek Shukla, learned Additional Chief Standing Counsel, assisted by Sri R.S.Umrao, learned Standing Counsel, Sri Rahul Malviya, Sri Anand Bhaskar Srivastava, Sri Ashok Kumar Khushwaha, Sri S.K.Pandey, P.K.Kaushik, Sri Amit Singh, Sri Dhananjay Singh, Sri Chandrasekhar Vaisya, Sri Amit Dubey, Sri Rakesh Kumar, learned Standing Counsel appearing for the State respondents.

1. All these petitions connected together raise common question of law and hence have been heard together and are being decided by this common judgment.

2. The common question of law that arises for consideration relates to the procedure to be adopted by the revenue authorities in exercise of their power under Section 67 of the U.P. Revenue Code, 2006 (hereinafter referred to as "Revenue Code") and Section 26 thereof.

3. The grievances raised by petitioners in their respective writ petitions more or less relate to the manner and method in which spot inspection is conducted, report prepared and at times without giving opportunity to the aggrieved party to contest the report, the orders are passed. There are cases where straight away, the Assistant Collector 1st Class/ Tehsildar concerned has proceeded to pass final order under Section 67 of the Revenue Code.

4. Yet another legal point that has been argued by learned counsel appearing for the respective parties, is relating to settlement of old construction sites with occupier of the building under Section 67-A of the Revenue Code. Fact position in cases though may very but the challenge to orders impugned raise common legal issues as have been referred to hereinabove.

5. I am taking writ petition no. 6658 of 2022 to be the leading writ petition. The original records of the proceedings instituted under Section 67 of the Revenue Code against the petitioner in the leading petition have also been placed before the Court by learned Additional Chief Standing Counsel, in order to appreciate the procedure adopted in the instant case.

6. Briefly stated facts of the case are that a case under Section 67 of the U.P. Revenue Code has been instituted against the petitioner on the basis of some report submitted by the local area Lekhpal on RC form-19, in which petitioner has been held to be illegally occupying 21 square meters of land of plot no. 285, a miljumla number, situated in Village Ladawali, Tehsil Kanth, District Moradabad, by building a house upon the same whereas the land belonged to Gaon Sabha and so a public land. The

petitioner in response to the notice, issued on RC Form 20, submitted his objection on 25th July, 2018 disputing the claim of the Gram Panchayat qua the land in question and the plea taken was that the land stood settled with petitioner some 60 years ago. The houses of the petitioner and his brothers Balram Singh and Latoor Singh were built upon the land some 60 years ago falling in plot no. 285, in Khata No. 411 of the concerned revenue village. The petitioner also claimed to have converted the old mud house into a linter based cemented house and he even had instituted a suit in civil court seeking permanent prohibitory injunction being O.S. No. 462 of 2018, which was pending.

7. It transpires from the record that the Lekhapal had submitted some report on the basis of which proceedings were drawn. During pendency of proceeding before the Tehsildar, the local area Lekhpal Yogendra Singh was got examined and cross-examined and Khatauni and village map were also filed. The court on the basis of the report of the Lekhpal, khatuani, photo copy of the village map, returned a finding of fact that land falling in the disputed area was navinparti land, which belonged to Gaon Sabha and upon which illegal possession of the petitioner was found to the extent of 81 square meters. Lekhpal recorded his statement that petitioner was in unauthorized possession and so the Tehsildar believed that statements of the Lekhpal have proved the unauthorized possession of the petitioner. The petitioner's claim of having his house for the last 50-60 years, was repelled on the ground that the petitioner had not been able to lead any evidence to prove in support of the said claim. The Tehsildar further recorded that there was no injunction order passed by the civil court in a pending suit and such suit would be binding only upon the parties to the lis. The Authority concluded that since Lekhpal had proved unauthorized possession of the petitioner upon the land that belonged to Gaon Sabha, the petitioner deserved ejectment forthwith. Thus, the Authority passed a final order under Section 67 of the U.P. Revenue Code directing not only ejectment of the petitioner from the land in question but even imposed damages of Rs. @ 23,065/- per month taking valuation of the property to be Rs. 7,461,700/-. The Assistant Collector 1st Class/Tehsildar further imposed Rs. 4,000/- as a cost for execution of the order.

8. Against the order passed by the Authority under Section 67 of the Revenue Code, petitioner preferred appeal under Section 67(5) of the U.P. Revenue Code, 2006. The appellate authority/Collector/District Magistrate, Moradabad perused the records and concluded finally that there was sufficient evidence available on record to prove that petitioner had raised constructions upon a navinparti land, which resulted in unauthorized possession. The Appellate Authority believed that Naksa Nazri (hand sketched spot map) prepared for the said purpose proved unauthorized possession and thus upheld the order passed by the Assistant Collector 1st Class.

9. The argument advanced by learned counsel for the petitioner and other Advocates who have appeared for respective petitioners are:

a. no proper survey was conducted to demarcate the exact area of the land that belonged to Gaon Sabha as navinparti so as to trace out area of alleged unauthorized possession;

b. Spot survey should have been conducted in presence of the party who was alleged to have encroached upon Gaon Sabha land so as to ascertain unauthorized possession. So there was no transparency in the procedure adopted in preparation of spot report inasmuch as the report even was not technically sound;

c. A mere sketch of map with visual observations would not suffice the need of survey and inspection as contemplated under Rule 67 of the U.P. Revenue Rules,2016 (hereinafter referred to as "Rules, 2016");

d. There was clear violation of principles of natural justice because *ex parte* reports prepared were never supplied to the petitioners, nor were they given any opportunity to file objection to the respective reports; and

e. The Tehsildar failed to discuss the report so as to appreciate the same and alleged corroboration thereof through statement made by the revenue officials inasmuch as reports were not even proved as such.

10. In order to appreciate the contentions, so advanced within the legal framework of the relevant provisions of the Revenue Code and the Rules, 2016 the Court had summoned the original records and now, therefore, it is necessary to go through the records to find out as to whether arguments qua spot inspection and appreciation thereof and violation of principles of natural justice were rightfully made or not.

11. The record of the proceedings conducted under Section 67 of the U.P. Revenue Code, 2006 before Tehsildar, Kanth, shows that initially RC form 19 was issued under the signature of Chairman of the Land Management Committee reporting therein that petitioner had made unauthorized possession upon plot no. 285, a miljumla number, to the extent of 81 square meters and as per circle rate the total value of the property comes to 4,67,700/- and therefore, action be initiated against encroacher of the land. RC form- 19 issued on 11.05.2018 is stated to have accompanied a report of Lekhpal of the same date. The report of the Lekhpal states that upon plot no. 285, an area of 0.069 hectares, out of 811 square meters of land, has been taken in possession by Rishipal Singh (petitioner).

12. Similarly in respect of plot no. 288 with total area 0.109 hectares, Balram Singh was claimed to in unauthorized possession upon 81 square meters of the land. This report shows that there was some dispute between private individuals that led to filing of the first information report on 10.05.2018. The report is accompanied by a village map and the khatauni. The khatauni shows that plot no. 285 and 288 are Navinparti land and recorded in the name of Gaon Sabha.

13. It is on the basis of this above reports that the Tehsildar registered a case on 11.05.2018 itself as case no. 01542 of 2018 issued notices directing for case to be put up on 25.05.2018. Copy of the notice on RC Form 20 dated 11.05.2018 is also available on record and so also objection filed by the petitioner.

14. From the perusal of ordersheet of the Tehsildar relating to case no. 01542 of 2018 shows that matter was adjourned for one reason or the other for a very long time and it continued to be pending evidence of Gram Panchayat until 26.06.2019 when the statement of local area Lekhpal got recorded. Thereafter, further dates were

fixed for petitioner's evidence and ultimately on 6.8.2019 the statements of the petitioner and his brothers were recorded. Again, dates were fixed thereafter repeatedly. Finally, order was passed on 20.07.2022 directing for payment of damages and ejectment of the petitioner from the land in question.

15. In his statement, the local area of Lekhpal Yogendra Singh before Tehsil recorded on 29.06.2019 stated that the land was recorded as Gram Sabha land and since he found unauthorized possession of Rishipal Singh S/o Umrao Singh because he was raising construction of a pukka house, a cemented linterbase house. It was when he did not remove his construction that police registered a case on 10.05.2018 and then he got the case instituted under Section 67 of the U.P. Revenue Code. He further stated that in the revenue map of the village he had shown with red ink an area of unauthorized possession of the petitioner. He admitted that civil suit for injunction had been filed by the petitioner, which was pending in civil court. On being cross examined by the petitioner's counsel he stated that he had measured the disputed area by visiting the spot and had found the petitioners to be in unauthorized possession to the extent of 81 square meters. He also admitted to have levelled damages as per valuation of the land to the tune of Rs. 4,61,700/- according to circle rate. He further stated that construction appeared to him one year old and denied to have prepared the report on the dictates of Gram Pradan. No statement of Gram Pradhan was recorded even though the land belonged to the Gram Panchayat and further I find from the record that the statement of petitioner Rishipal Singh was recorded on 6.8.2019.

16. In his statement Rishipal, namely the petitioner claimed that the allegation that he was in unauthorized possession of 81 square meters falling in plot no. 285, was absolutely a false statement of fact. He claimed to have ancestral house which was earlier a mud house and later on he made a linter based cemented house and further claimed that it was only because of the complaint of the employees of the Tehsil department that present case had been instituted. The allegation was also made that these employees wanted to have possession of the land from the petitioner. He claimed that his house was 50 year old and there was also abadi of other villagers in the area. During his cross examination, he claimed also that the entire land was full of abadi of the village people and there was no public land as such of the Gaon Sabha to be taken as a vacant Navinparti land. He asserted that and Lekhpal was demanding consideration which he had refused. The original record after these statements, contains the order passed by the authority.

17. From the perusal of the entire record of the case, it clearly transpires that Lekhpal had prepapred *ex parte* report as a matter of fact because neither report discloses as to who was present on the spot when the report was prepared and as to who carried out measurement. There is no separate map prepared of the land showing unauthorized construction and instead, a photocopy of the revenue village map was annexed alongwith the report with hand written marking of possession upon such revenue map. In his statement also Lekhpal has not disclosed any fact as to when and under what under circumstances and on the basis of which particular complaint, he occasioned an opportunity to conduct survey. He has not disclosed as to whether aggrieved party was served with a notice before any survey was conducted or that he apprised the concerned party that he was in

unauthorized possession of the land that necessitated survey suddenly. He only stated that there was some dispute which led to lodging of a first information report. Lekhpal Yogendra Singh could not explain away in his statement as to what was the circle rate and upon which calculation, he has assessed Rs. 4,61,700/- as valuation of the property that led to levelling of the penalty in terms of damages.

18. The question, therefore, in the light of the argument so advanced by learned Advocates appearing for the respective parties that arise for consideration is as to what was the procedure for getting the case registered under Section 67 of the Revenue Code read with Rules framed therein, and as to whether those procedures have been properly followed in the case in hand or not. The sanctity of the report after spot inspection is also an issue.

19. In the above background of facts that emerged upon perusal of the original record, it becomes necessary now to first examine the relevant provisions to test the procedure laid and the one followed in the case.

20. Section 67 of the Revenue Code, 2006 for ready reference and appreciation is reproduced hereunder:

(1) Power to prevent [damage], misappropriation and wrongful occupation of [Gram Panchayat] [Property]- *Where any property entrusted or deemed to be entrusted under the provisions of this Code to a [Gram Panchayat] or other local authority is damaged or misappropriated, or where any [Gram Panchayat] or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the [Assistant Collector] concerned in the manner prescribed.*

[(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.]

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the [Assistant Collector] may allow in this behalf, or if the cause shown is found to be insufficient, the [Assistant Collector] may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation as the case may be, be recovered from such person as arrears of land revenue.

(4) If the [Assistant Collector] is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the [Assistant Collector] under Sub-section (3) or Sub-Section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provisions of this Code, and subject to the provisions of this section every order of the Sub-Divisional Officer under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation.- For the purposes of this section, the word "land" shall include the trees and buildings standing thereon."

21. A bare reading of aforesaid provisions as detailed out in various sub sections of Section 67 show that in the first instance the property in issue must be the one entrusted to or deemed to be entrusted to Gram Panchayat or Local Authority; then there should be damage caused to such property; or such property must have been misappropriated; whether Gram Panchayat would have been rightfully in possession of the property under the provisions of this Code but for the land occupied by a person. It is in these above circumstances that either the Land Management Committee or the Authority or the Lekhpal concerned shall have duty to inform the Assistant Collector concerned about the same but in the manner prescribed.

22. Sub Section 2 of Section 67 provides that Assistant Collector must be satisfied regarding such damage, misappropriation or unauthorized occupation of the land by a party in contravention of the provisions of this Code, to issue notice to the person concerned to show cause for the proposed action for such damage or misappropriation and illegal occupation. The power may be exercised suo motu subject to the satisfaction of the authority.

23. Sub Section 3 of 67 provides for reply to be submitted by the concerned person to the show cause notice and in the event reply to the notice is found insufficient , the Assistant Collector shall direct for eviction of such person from the land and further imposition of penalty of damages as compensation to the State for such damage/ misappropriation of the property.

24. Sub section 4 empowers the Assistant Collector to discharge notice if the charge is not established.

25. Sub Section 5 of Section 67 provides for appeal against the order passed by Assistant Collector before the Collector.

26. Subsection 6 of Section 67 makes the order passed by Assistant Collector to be final subject to the order to be passed in appeal.

27. Subsection 7 of Section 67 provides for framing of procedure to be followed.

28. Explanation to Section 67 provides that the land for the purpose of this Section would include trees and building standing thereon.

29. Section 233 of Revenue Code empowers the State Government to make Rules by notification for carrying purpose of the Code. Sub section 2 (xvii) of Section 233 provides for framing of rules qua duties of any officer or the authority having jurisdiction under the Code and the procedure to be followed by him.

Exercising such power, the State Government framed U.P Revenue Code Rules, 2016 (Rules, 2016).

30. Rules 66 and 67 of the Rules, 2016 provide detail procedure to be exercised and followed under Section 67 of the Revenue Code, as hereunder:

*"**66. Information to Assistant Collector (Section 67).** The information to Assistant Collector required by section 67(1) shall be submitted **by the Chairman or any member or the Secretary of the Land Management Committee, or any officer of the Local Authority concerned in R.C. Form-19.***

***67. Further inquiry by Assistant Collector (Section 67)** (1) On receipt of the information under rule 66, or **on facts otherwise coming to his knowledge, the Assistant Collector may make such inquiry as he deems proper** and may obtain further information regarding the following points:-*

(a) full description of damage or misappropriation caused or the wrongful occupation made with details of village, plot number, area, boundary, property damaged or misappropriated and market value thereof;

(b) full address along with parentage of the person responsible for such damage, misappropriation or wrongful occupation;

(c) period of wrongful occupation, damage or misappropriation and class of soil of the plots involved;

(d) value of the property damaged or misappropriated calculated at the circle rate fixed by the Collector and the amount sought to be recovered as damages.

(2) The Assistant Collector shall thereafter proceed to take action under section 67(2) and for that purpose issue a notice to the person concerned in R.C. Form-20 to show cause as to why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the notice referred to in section 67(2) remains uncomplied with or if the cause shown by the person concerned is found to be insufficient, the Assistant Collector may direct by order that-

(a) such person be evicted by using such force as may be necessary; or

(b) the amount of compensation for damage or wrongful occupation ordered by the Assistant Collector, if not paid in specified time, may be recovered as arrears of land revenue, including the amount of expenses referred to in sub-rule (3).

(4) The amount of damages sought to be recovered and the expenses of execution of the order shall be specified in such notice, which shall be determined in the following manner:-

(a) In the case of damage or misappropriation, the amount of damages shall be assessed at the prevailing market rate.

(b) In the case of unauthorized occupation of any land, the amount of damages shall be the amount equal to the five percent of the market value of the land calculated at the circle rate fixed by the Collector for each year of unauthorized occupation.

(c) The expenses of execution of the order shall be assessed on the basis of one day's pay and allowances payable to the staff deputed.

(5) If the person wrongfully occupying the land has done cultivation therein, he may be allowed to retain

possession thereof until he has harvested the crops subject to the payment by him of the amount equal to the five percent of the market value of the land calculated as per the circle rate which shall be credited to the Consolidated Gaon Fund or the Fund of the local authority other than the Gram Panchayat as the case may be. If the person concerned does not make the payment of the aforesaid amount within the period specified in the notice in R.C. 40 Form-20, the possession of the land shall be delivered to the Land Management Committee or the local authority, as the case may be, together with the crop:

Provided that where such person again wrongfully occupies the same land or any other land within the jurisdiction of the Gram Panchayat or the local authority as the case may be, he shall be evicted therefrom forthwith and possession of the land vacant or together with the crop thereon shall be delivered to the Land Management Committee or the local authority as the case may be.

(6) The Assistant Collector shall make an endeavour to conclude the proceeding under section 67 of the Code within the period of ninety days from the date of issuance of the show cause notice and if the proceeding is not concluded within such period the reasons for the same shall be recorded.

(7) Nothing in sub-rule (5) shall debar the Land Management Committee or the local authority as the case may be from prosecuting the person who encroaches upon the same land second time in spite of having been evicted under the Code or the rules, under section 447 of the Indian Penal Code, 1860.

(8) There shall be maintained in the office of each Collector a register in R.C. Form-21 showing details of the amount ordered to be realized on account of damages and compensation awarded in proceedings under section 67.

(9) A similar register shall also be maintained by each tahsildar showing realization of damages and compensation awarded in such proceeding. The entries made in the register maintained at tahsil shall be compared with the register maintained by the Collector to ensure accuracy of the entries made therein. 41

(10) A progress report showing realization of damages and compensation awarded in proceedings under section 67 shall be sent to Board of Revenue, U.P., Lucknow by the fifteenth day of April and October every year. The Board after consolidating the report so received from the districts shall send it to the Government.

(11) Nothing in rules 66 and 67 shall debar any person from establishment of his right, title or interest in a court of competent jurisdiction in accordance with the law for the time being in force in respect of any matter for which any order has been made under section 67 of the Code."

(emphasis added)

31. Rule 66 as quoted above provides for an information to the Assistant Collector either by Chairman or any Member or the Secretary of the Land Management Committee or any officer of the Revenue Authority concerned in RC Form 19. RC Form 19 is a printed format appended to the Rules, 2016 which is to be filled in by Chairman/ Member of the Secretary of the Land Management Committee or any other Member of the Gram Panchayat or any Officer of the Local Authority concerned.

32. What is interesting to note is that Rule provides for an information either by

the Chairman or Member or the Secretary of the Land Management Committee or any officer of the Local Authority, so also RC Form 19 provides for a form to be filled in by that very person who informs.

33. The question is whether RC Form 19 can be filled in by local area Lekhpal to institute the proceeding under Section 67 of the U.P. Revenue Code, 2006 shall be dealt with a little later in the judgment. A reading of Subrules of Rule 67 further discloses that besides the information to be furnished under Rule 66, if otherwise it comes to the knowledge of the Assistant Collector that there is misappropriation, damage or unauthorized occupation of the public land or property, the Assistant Collector may make such enquiry as he deems proper and may further ask for report regarding points innumerated in clauses a,b,c, d. So while action is taken suo motu vide Section 67(2), the information that has to be gathered for purposes of RC Form 19, must be to obtained by the Authority before issuing a show cause notice.

34. Subrule (1) of Rule 67 vide its various clauses require certain informations in detail. Clause (a) requires description of damage, misappropriation or wrongful occupation, details of village, plot number, area, boundary of property damaged or misappropriated and market value thereof. Clause- (b) requires in detail address and details of the person who is guilty of wrongful occupation/ damage/ misappropriation. Clause- (c) requires information regarding period wrongful occupation/damage and class of soil of the plot in question and Clause-(d) requires information regarding rate of the property damaged or misappropriated that needed to be calculated at the circle rate fixed by the Collector/ District Magistrate concerned and the amount that is to be recovered.

35. Thus, the above clauses of rule 67(1) provide for the Assistant Collector/ Tehsildar to hold a comprehensive detailed enquiry for the purposes of having a *prima facie* satisfaction to issue show cause to the person concerned in RC Form 20 under subrule (2) of Rule 67.

36. Subrule (3) of Rule, 67 provides for consequential action in the event show cause remained unreplied or reply was found to be unsatisfactorily. Subrule (4) of Rule 67 provides for determination of damage to be recovered and expanses for execution of the order. Subrule 4(a) provides that damage or misappropriation amount shall be assessed at the prevailing market rate. Subrule 4(b) provides that amount of damage shall be an amount equal to five per cent of the market value of the land, calculated at the circle rate fixed by the Collector for each year of the unauthorized occupation and Subrule 4 (c) provides for assessment of expanses on the basis one day's pay and allowances payable to staff deputed. Subrule-(5) provides for retention of possession by unauthorized occupant, if there was some crop standing until it is harvested. However, such unauthorized occupant was required to pay damages at the rate of five per cent of the market value of the land, calculated as per circle rate and in the event amount is not deposited within specified time as per notice on RC Form 20, the possession of the land together with the crop would be taken forcibly and be handed over to the Land Management Committee or the Local Authority as the case may be.

37. Proviso to Subrule (5) further authorizes the authority to take possession back of the vacant land/ any other land and/ or together with the crop if reoccupied after possession of such land was taken under

subsection 67 and the rules, forcibly. Subrule (6) of Rule 67 provides that Assistant Collector must endeavour to conclude proceedings within 90 days from the date of issuance of show cause notice. Subrule 7 of Section 67 further provides for role of the Land Management Committee to prosecute such encroachers of the land if second time inspite of earlier being evicted have re-entered the land, by initiating proceedings under Section 447 of the Indian Penal Code, 1860. Subrule (8) of Rule 67 provides for the Collector to maintain a register regarding amount of damages and compensation awarded. Subrrule (9) of 67 provides also for Tehsildar to maintain such register so that from time to time entries made in the register maintained at Tehsil and that at the District Head- quarter may be compared with and matched to ensure accuracy. Subrule (10) of Rule 67 provides for progress report to be sent to Board of Revenue U.P. Lucknow about damages and compensation awarded and realization made thereof under Section 67 of the Revenue Code and the Board has further been fastened with an obligation to send such report to the State Government. Subrule (11) of Rule 67 further provides that inspite of a proceeding is drawn under Section 67 of the U.P. Revenue Code and orders are passed finally, the aggrieved party can claim and get settled his right, title or interest in respect of the property in question in a Court of competent jurisdiction in accordance with law.

38. Thus while various claims of Rule 67(1) provide for a detailed procedure to be followed before issuance of show cause notice under Section 67(2), the other subrules rlate to conduct of proceedings and conclusion thereof within a reasonable time i.e. 90 days. Subrules also confer ample power upon the Authority to dislodge a person forcibly if he dishonours the command and even after being removed, reoccupies the public land.

39. Looking to the object of provision and measures meant to be adopted and safeguards provided by means of strict rule of investigation into the charges first before action, the participation of the person charged cannot be ruled out even at the stage of spot memo being prepared during preliminary investigation.

40. Rule 67 is preceded by Rule 66 that provides for an information to be furnished by certain authorities of the Gram Panchayat or the Local Authority on a printed format prescribed as RC Form 19. The question now is as to RC Form 19 is to be filled in merely sitting in office by looking to the revenue records or has to be preceded by a spot enquiry by such officer. No one would doubt, since land belong to the Gram Panchyat or the Local Authority, it is a primary duty of the Gram Pradhan concerned or the the local authority to ensure that nobody occupies land or property unauthorizedly.

41. Section 67 saves those possessions that are in accordance with provisions of the code and further provides that Lekhpal concerned may inform the Assistant Collector about such damage, misappropriation or unauthorized possession of respective land or property to the Assistant Collector 1st Class in the manner prescribed.

42. RC Form-19 is a part of Rule 66 being appendix to Rules 2016 and though it is a printed format, but it prescribes vide column 5 about damage, misappropriation or unauthorized occupation; vide column 6,

the period of unauthorized occupation; vide column 7, it provides for calculation of damages to be made at the circle rate; and then ultimate calculated damages, vide column 8. All this shows that informant has to hold a preliminary enquiry so as to make out a prima facie case for intervention and consequential action by the authority under Section 67 of the U.P. Rule and Revenue Code, 2006 read with Rule 2016. To the question how the informant would form a prima facie view, the answer would be that he would be visiting spot at a date with a prior notice to the person concerned to enquire from him about unauthorized occupancy to ensure such occupation is identifiable and then to assess damage caused or misappropriation of the property in question. It is he who would prepare a visual sketch map/naksa nazri on being satisfied prima *faice qua* unauthorized occupation/damage/ misappropriation of the Gram Panchayat/ Local Authority property, of course, after comparing with the original revenue records. He would get report of the circle rate then will calculate it accordingly as per his assessment considering extent of damage and misappropriation. Thus, this is how a preliminary report on form RC 19 is to be filled up. All this exercise must be reduced in a form of preliminary report to be appended with RC Form 19 so as to corroborate the entries made on the printed format. This would be necessary to form a view for the Assistant Collector that report submitted as per Rule- 66 *prima facie* holds merit to issue a show cause notice on RC Form-20 per Rule 1(a)(b)(c)(d) of Rule, 67.

43. The words expression *"where from information received under subsection (1) or otherwise, Assistant Collector is satisfied that any property referred to in subsection (1) has been damaged or misappropriated or any person is in occupation of any land referred to in that sub section in contravention of the provisions of this Code"* vide sub section 2 of Section 67 means a satisfaction to be recorded by the Assistant Collector in his order before he issues notice under subrule 2 of Rule 67. Natural corollary would be that subrule 1 of Rule 67 that precedes subrule 2 should be first followed in its letter and spirit. This is the reason why Rule 66 talks of information which I have in forgoing paragraph referred to as preliminary report. So the procedure as may be held to be followed before issuance of notice under sub-rule 2 upon RC form 20, to be that of proper and detailed enquriy .

44. This procedure appears to be sound enough because enquiry report that is an information has to be inconsonance with the enquiry under sub-rule 2 of Rule 67 before issuance of notice, as a condition precedent for issuance of notice. Now in order to assess the damage / misappropriation / wrongful occupation, complained of in the report must be a detailed report regarding boundary of the area of the unauthorized occupation, damage or misappropriation even boundary thereof and thereafter a calculation of compensation for wrongful occupation, damage or misappropriation, the damages and cost.

45. Here, I would hold that this detail enquiry which is meant for under Sub-rule 1 should not be a sheer formality. The Assistant Collector must ensure, therefore, that proper team is constituted to conduct a detailed enquiry on the spot, to test the report submitted, if there be any doubt of its correctness in the mind of the authority and that too in presence of any official of Gram

Panchayat and the person who is charged with the offence of damage/ misappropriation /wrongful occupation of the land of the Gram Panchayat / Local Authority. This team that is constituted should be of the revenue officials as may be nominated by the Tehsildar and the member or an official of the Gram Panchayat to be nominated by the Gram Pradhan. Entire area of the Gram Panchayat land, a part of which may be in unauthorized encroachment, should be properly measured and thereafter area of illegal occupancy should be properly measured on a prescribed scale. This is how area of unauthorized occupation should be shown on a map prepared on scale. The area of the land of the Gram Panchayat / Local authority should be measured from a fixed point, the spot memo of inspection should be prepared on the spot itself with signature of the member nominated by Gram Pradhan or any officer of Gram Sabha, the signature of the person who is charged with unauthorized occupation, misappropriation or damages and also signature of members of the technical team which conducted survey on the spot. The manner and method provided for conducting sport survey and preparing spot map should be same as prescribed for under the U.P. Land Revenue (Survey and Record Operation) Rules, 1978. Since it is virtually a demarcation of land, so the procedure of Section 24 and the rule framed for the said purpose must be taken aid of. The State Government, therefore, must ensure that every tehsil in the district is having well equipped team to conduct survey. It should have technical experts in preparing map on the basis of scale to identify exact location of unauthorized possession of a public land, roadside land of chak road and other pathways in village areas or in the areas where local authorities have territorial jurisdiction.

46. The State Government should keep in mind that in village areas, villagers have got settled for a number of years and the aims and objects with which a provision to settle the houses in respect of land belonging to Gaon Sabha or local authority as late as 29th November, 2012 has been incorporated, the proper assessment of the building or structure has to be made. Many people in the village areas are replacing old mud made walls and earthen tiles roof by permanent cemented linter structure and this transformation from old to new, at times becomes matter of complaint of unauthorized possession. If innocent villager is dislodged from the long standing possession only on the ground that he has raised new cemented construction, it would defeat the very purpose and objective behind the incorporation of such a provision under the Act and this in my considered view is not the intendment of the legislature at all.

47. In the event of only misappropriation or damage of the property is complained of for there being wrongful occupation, then a team that is to be constituted must include a technical expert who is able to assess the damage and misappropriation to the public property. Since Rules do not provide for procedure in detail how to conduct the spot inspection, in my view the procedure prescribed for Rule 8, 9 and 10 of Rule 2016 in principle be followed.

48. A combined reading of Rule 66 and Rule 67 and perusal of RC Form 19 it comes out to be very explicit the RC Form 19 report, may be a preliminary report but will of-course be a ground to issue show cause provided it is sufficient enough meeting the parameters of enquiry given in various clauses of Rule 67(1). Legislature did not conceive repetitive reports, nor did it intend RC Form 19 to be waste paper basket material. Thus, in my considered

view while RC. Form 19 is being prepared as a preliminary report it should be taken as having the same status as report prepared under Rule 67(1) under the direction of the Authority before issuing show cause on RC Form 20. Accordingly, RC Form 19 report must meet the parameters of various clauses of subrule (1) of Rule 67 and participation of person against whom action is proposed at the time of spot inspection, conduct of survey on the spot and must sign the spot memo. The Authority then will record its *prima facie* satisfaction to issue show cause and in case of *suo motu* action, he will direct for such report with spot inspection memo.

49. After receiving report as discussed above, the Assistant Collector, if finds that action is warranted under Section 67, he would issue show cause upon RC Form 20 to the person concerned. After show cause notice is served, if the party aggrieved files his/her objection to the report and show cause notice, Assistant Collector 1st Class should get examined at least two members of the team and out of those two persons the Assistant Collector should ensure as far as possible one should be person nominated by the Pradhan of the Gram Sabha. Still furhter in the event Assistant Collector is of the view that report submitted is defective for certain reasons to be assigned in writing, he should call for a fresh report.

50. After examination and cross - examination of witnesses of the State side and the aggrieved person and his witness, if any, Assistant Collector 1st Class should discuss the report to reach to a conclusion as to whether there has been any damage, misappropriation of the property of the Gram Pradhan/Local Authority or that noticee was in unauthorized occupation of such public property. Similar procedure should be followed in case of any encroachment if made upon a public passage or road by raising construction claiming it to be a bhumidhari land.

51. If the above detailed procedure is followed in the first instance as per sub rule 1 of Rule 67 then there would be a proper satisfaction of the Assistant Collector 1st Class for justification of notice under RC Form 20 and, if thereafter, proper procedure is followed by appreciating report in the light of examination of witnesses and the cross examination and proper appreciation of the evidence that may be led by the respective parties vis-a-vis spot inspection report, the order passed by Assistant Collector 1st Class under sub Rule 6 of Rule 67 read with Section 67, would be an order where one can say that justice not only has been done but has been seen to have been done.

52. Since the issue as involved in Section 67 of the U.P. Revenue Code, 2006 at time relates to road or roadside land that may belong to Gram Panchayat or the local authority, power to take action is prescribed under Section 26 of the Revenue Code, 2006 and it would be expedient at the same time to go through the said provision and appreciate the same.

Section 26 of the Revenue Code, 2006 runs as under:

"26 Removal of obstacle. - *If the Tahsildar finds that any obstacle impedes the free use of a public road, path or common land of a village or obstructs the road or water course or source of water, he may direct the removal of such obstacle and may, for that purpose, use or cause to be used such force as may be necessary and may recover the cost of such removal from the person concerned in the manner prescribed."*

53. Upon bare reading of the provision, it becomes clear that any obstacle if has been placed upon a public road or public path which impedes free use of public road and equally if free use of common land of a village is obstructed or even in case of water-course, source of water, then Tehsildar is empowerd to direct for removal of such obstacle and may for that purpose use such force as may be necessary. However, recovery of cost and removal of person who has placed obstacle as such upon a public path, public way, public road, public passage or public water-course meant for use for public at large or the water source meant for public purpose, then such action has to be taken in the manner prescribed.

54. Now, it is again necessary to revert to the rules that provide for procedure to be followed for an action under Section 26 of the Revenue Code, 2006. Under the Rules, 2016 the only provision that relates to exercise of power under Section 26 is Rule 23, which is produced hereunder:

*"**23. Recovery of the cost for removal of obstacle**- The cost for removal of obstacles under section 25 or section 26 of the Code may be recovered as arrears of land revenue."*

55. A bare reading of the aforesaid rule indicates that State Government only provided for recovery of cost as arrears of land revenue. So now question is how power is to be exercised and whether the procedure prescribed for under Rule 67 would also be a procedure to be followed while exercising power under Section 26 of the U.P. Revenue Code, 2006 in the absence of any specific provision under the Rules.

56. The above discussed rules lead to one important conclusion that Tehsildar is an authority who has to record its satisfaction in the event of a complaint made against private individual for alleged misappropriation, damage or unauthorized occupation of a land or the property that belongs to the Gram Panchayat or a Local Authority. The question, therefore, arises as to how Tehsildar would reach to record its satisfaction and what should be the material substantial enough for the said purpose and then in order to arrive at a conclusion by recording satisfaction what should be the procedure to be followed for getting the necessary information.

57. It is true that revenue authorities are hide bound in law to perform their statutory duty to ensure that common villagers do not face hardships in enjoyment of the public land or public utility land because of the unauthorized encroachment or damage or misappropriation caused by an individual, the authorities are equally hide bound in law to ensure that proper procedure is followed. In such matters one should rule out any possibility of arbitrariness so that action taken passes the test of Article 14 of the Constitution.

58. Applying the above principles in matters of procedure as I have observed hereinabove in this judgment in forgoing paragraphs, to the facts of the present case, I find that not only report of the Lekhpal was *ex parte* but that was the only report available with Assistant Collector, 1st Class who proceeded to believe the same treating it to be fully proved by the testimony of the Lekhpal concerned. How the Lekhpal conducted survey, how he prepared report and in what manner he reached to a *prima facie* satisfaction of the

alleged encroachment by the petitioner is all not disclosed. A detailed enquiry as referred to in sub-rule 1 of Rule 67, is also missing in the present case and, therefore, the order passed by the Assistant Collector deserves to be set aside. The appellate authority as such is also not justified in affirming the order of the Assistant Collector and so the order passed by the appellate authority also deserve to be set aside.

59. Here at this stage, it would also be necessary to refer to Section 67-A of Revenue Code, and Rule 68 that prescribes procedure for exercise of power under Section 67-A. For ready reference Section 67-A as exists on the statute book is reproduced hereunder:

67-A Certain house sites to be settled with existing owners thereof.- *(1) If any person referred to in sub-section (1) of section 64 has built a house on any land referred to in section 63 of this Code, not being land reserved for any public purpose, and such house exits on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.*

(2) Where any person referred to in sub-section (1) of section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exits on November 29, 2000, the site of such house, notwithstanding anything contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed. Explanation. - For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the 35 contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family.

Explanation*. - For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the 35 contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family.*

60. Upon bare reading of subsection- 1 of Section 67-A, it transpires that legislature intended not to disturb old standing residential structures of certain categories of villagers. A person in the category of agricultural labourer or the village artisan who is resident of Gram Panchayat and belongs to SC/ST or OBC or general category living below poverty line or any agricultural labourer, or the village artisan of the Gram Panchayat, are the persons whose built up houses upon the land not in the category of land reserved for public purpose, if have stood on 29th November, 2012, site of such houses are to be settled with such persons of course, subject to conditions prescribed under the Rules. Such sites also even if they belong to individual tenure holder, if one is having settlement in terms of a built house as referred to hereinabove, as on 29th November, 2012, such house would also stand settled with such person. As per explanation appended to the section a presumption is raised in respect of the occupant of such built up house and so the burden would lie upon the revenue authority to prove otherwise.

61. Now it is necessary to refer to the relevant rules prescribed to carry out the purpose of this above provision. Rule 68 of Rules, 2016 reads as under:-

*"68****. Settlement of house sites with existing owners thereof*** *(1) Where*

any person referred to in sub-section (1) of section 64 has built a house on any land referred to in section 63 of the Code, not being land reserved for any public purpose and such house exists on twenty-ninth day of November 2012, the site of such house shall be held by the owner of the house on terms and conditions prescribed in rule 64.

***Note**:- For the removal of doubt it is hereby declared that the maximum area of the site settled under section 67-A*

(1) of the Code or the rules famed there under shall not exceed two hundred square meters.

(2) Where any person referred to in sub-section (1) of section 64 has built a house on any land held by a tenure holder (not being a government lessee) and such house exists on twenty-ninth day of November 2000, the site of such house shall be deemed to be held by the owner of the house on the following terms and conditions -

(a) the maximum area of the site settled under section 67-A (2) of the Code or the rules framed thereunder shall not exceed two hundred square meters.

(b) the owner of the house as well as his heirs shall have a heritable interest in the site and 42 shall also have unrestricted right to use the trees and wells existing on the site subject to existing rights of easements.

(c) he shall have a right to use the site for construction of a residential house, subject to existing rights of easement.

(d) the owner of the house shall not be liable to pay to the tenure holder or the State Government any future rent in respect of the site.

(e) the succession over the site shall be governed by personal law which the house owner was subject to.

(f) the owner of the house and his heirs shall not be liable to ejectment on any ground whatsoever.

(g) if the building is abandoned or if the owner thereof dies without any heir entitled to succeed, the land or site shall escheat to the State.

(h) the tenure holder shall be allowed remission of the proportionate land revenue for the portion of his holding settled under this rule with house owners. The land shall also be classified as abadi in the Khatauni maintained under the Code"

62. Sub Rule 1 of Rule 68 provides that a built house that is prescribed under Section 64 is referable to the land falling in Section 63 of the Code and not a land reserved for any public purpose and that such house must exist as on 29th day November, 2012. In order to clarify the area of settlement to achieve the purpose enshrined under Section 68-A, a note has further been appended to sub-rule 1 to Rule 68 by way of removal of doubts and so it provides that maximum area of site that will be settled under Section 67 A (1) of the Code, shall not exceed 200 square meters. Certain conditions are further prescribed as condition of settlement of such a site. Under sub rule 2 of Rule 68, in most of the cases, that are before this Court and that are flooding in view of exercise of power under Section 67 of the Revenue Code, I find the unauthorized encroachment is in the form of built up constructions as house either as a case of old built up house with mud or earthen tile material or a case as in the present case, the old mud and earthen tiles replaced by cemented linter based house.

63. In such circumstances, when the code itself provided for protection to old constructions on a public land or public land in respect of certain categories of

persons defined under Section 64, it would be not only in the fitness of things but also sound and logical if in the event of objection being raised to the show cause notice issued on RC form 20 scrutiny is simultaneously done by the Assistant Collector as to the availability of protection under Section 67 A to the extent of 200 sq. mts. land/ site. It would not only lead to multiplicity of litigation but also does not appeal to reason that in the event if objection is raised citing old standing construction, merely because specific application is not there seeking protection provided under Section 67-A, the alleged unauthorized occupant is forced to enter into another round of litigation to get the land settled under Section 67-A. When the matter in respect of old constructions or new constructions are being examined and evidence is being appreciated to reach to a conclusion as to whether, the encroachment is unauthorized upon Gram Sabha land by raising constitution of a house, it would be fair enough to hold scrutiny qua right of settlement under Section 67A at the same time in that very pending proceeding itself.

64. What is very important to remember here that notice in RC Form 19 prescribes for a column regarding year of unauthorized occupancy. If the occupancy is in the form of building as preliminary report would itself disclose or if the preliminary report does not disclose leading to further enquiry report under subrule 1 of Rule 67in case of objection by the aggrieved person requesting for a fresh report and that subsequent report if discloses that there is standing construction or there exists house or building, the Authority will have to return a finding as to since when such construction stands. Thus, in the event this point is being deliberated to conclude whether construction is new or old in order to assess the compensation and damages and objection has been taken that construction is old one, the authority should at the same time also frame point as to whether benefit of Section 67-A will be available to the aggrieved party to the extent of 200 square meteres.

65. Here, I would also refer to a fact that Section 67-A came to be inserted vide U.P. Act No. 4 of 2016 w.e.f. 16.12.2015. U.P. Revenue Code, 2006 though was enacted in 2006 but, was enforced only in 2016 by notification issued by the State Government, w.e.f. 16.12.2015. So Section 67-A was deliberately inserted to grant protection to those persons who fall in the categories as defined under Section 64 and who might have built up house on public land. Therefore, in my considered view while examining the matter of complaint under Section 67 of U.P. Revenue Code, 2006, if party has filed objection claiming old standing construction prior to 29th November, 2012 by mentioning number of years only, Assistant Collector must frame a point as to whether benefit under Section 67 A of the U.P. Revenue 2006 can be offered to the aggrieved person or not.

66. Here in my above view, I find support in the observations made by Ajay Bhanot, J in the case of Govind v. State of U.P. and others wherein his Lordship while examining provisions as contained under Section 67 and 67-A vide paragraph 13, 14 and 15, has held thus:.

"13. In many instances, as in the present case, a noticee under Section 67 of the Code may invoke the protection of Section 67(A) of the Code to resist the proceedings under Section 67 of the Code.

14. The authority/ court having jurisdiction to decide the proceedings taken

out under Section 67 of the Code or Section 67(A) of the Code is the same. When the defence of Section 67(A) of the Code is taken in proceedings of Section 67 of the Code, the same issues will be directly and substantially in issue in both the proceedings. Usually in such matters pleadings, defence, and evidence of the parties are same in both the proceedings. In case proceedings under Section 67 and 67(A) of the Code are conducted separately and in isolation to one another, it would lead to multiplicity of litigation and inconsistent judgments. There will also be an avoidable delay in decision of the controversy and may even result in miscarriage of justice.

15. The courts in proceedings under Section 67 of the Code are under obligation of law to decide the eligibility of the noticee for protection under Section 67(A) of the Code. In case defence under Section 67(A) of the Code is taken by the noticee, the said proceedings shall be registered separately. But both cases will be consolidated and heard and decided together. "

67. I fully agree with the view taken by his lordship in so far as consideration of protection under Section 67-A of the code is to be there while examining the matter under Section 67 but in my further view, I may hold that since consideration of the authority to consider unauthorized encroachment under Section 67, would be the report obtained under sub-rule 1 of Rule 67, it would equally suffice the need for the purpose of assessment of protection under Section 67-A of the Revenue Code at the same time, in the event unauthorized encroachment is in the form of a building or a house. So, it may not be necessary to register a separate case under Section 67A of the Code. The idea not to register a separate case is aimed at avoiding multiplicity of litigation and saving of time as well as making the proceeding cost effective. If the authority examining a matter under Section 67 also considers the point of protection under Section 67-A, it would be making the provisions more meaningful considering the aims and object behind the statutory protection. However, I may hasten to add that while objection is being filed by a party under notice, taking plea that standing constructions are old to wit, since prior to 2012 and in his objection has taken the plea of protection under Section 67-A such party should also make prayer that 200 sq. mts. of land be settled with him under Section 67 A considering the construction to be older construction to be existing since before the cut off date .

68. There has been much debate during court proceedings about scope of settlement upon a land which is reserved land for public purpose or the land of public utility.

69. Here it is necessary to refer to Section 63 of Revenue Code, 2006 which runs as under:

*"**63. Land which may be allotted for abadi sites**.- (1) The Sub-Divisional Officer may of his own motion or on the resolution of the Bhumi Prabandhak Samiti earmark the following classes of land for the provision of abadi sites for allotment to persons specified in section 64:-*

(a) all lands entrusted or deemed to be entrusted to a Gram Panchayat under clause (i) of sub-section (2) of section 59;

(b) all lands coming into possession of Gram Panchayat under any other

provisions of this Code.

(2) Notwithstanding anything contained in any other provision of this Code or in the U.P. Panchayat Raj Act,

1947, the Bhumi Prabandhak Samiti may, with the previous approval of the Sub-Divisional Officer, allot the following classes of land for the purposes of building houses:-

(a) any vacant land referred to in sub-section (1);

(b) any land earmarked for abadi sites under the Uttar Pradesh Consolidation of Holdings Act, 1953;

(c) any land acquired under the provisions of Land Acquisition Act, 1894 (Act No.1 of 1894) and The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act No.30 of 2013"

70. Subsection 1 Section 63 provides that certain categories of land entrusted to Gram Panchayat under Clause (i) of sub section 2 of Section 59 would be land for the purposes of allotment for abadi sites and also such land which may be coming into possession of the Gram Panchayat under any other provision of the Code. Clause (i) of subsection 2 of Section 59 refers to the lands cultivable or otherwise except the land for time being comprising in any holding or grove. The land mentioned in other clauses have been excluded from the scope of provision of Section 63(1). However, upon reading of subsection 2 of section 63, I find that any vacant land referred to under sub section (1) (b) of Section 63 can also be made subject to allotment with previous approval of the competent authority/ State Government and so it will include all the lands that come into possession of Gram Panchayat.

71. Therefore, in cases where recommendations are made for an approval, it may be an issue how to finalize the proceedings. In my considered view as I find the Gram Sabhas are not able to protect their land so the authority must no make recommendations as a rule. It is only in the rarest of the rare cases that such recommendations should be made. For instance if any recognized school or a registered hospital has come to be made, such a recommendation can be made. I mean to say when large public interest may be involved. The object is to get public land freed from unauthorized encroachment and so there should be no reward like thing to an encroacher. An encroacher must release public land. The public utility land is an exception to the general rule of settlement and must remain exception. The Gram Sabha may be asked to offer an alternative land in order to save such land instead of making recommendations for approval of authorities to seek such land with the encroacher.

72. There is one more issue, which requires to be addressed to, regarding consideration of interim application for stay in appeal. The appeals are creation of statute and, therefore, while entertaining the appeal, the appellate authority must dispose of pending stay applications against the order of Assistant Collector within two weeks or so and until such disposal, therefore, revenue authorities should restrain themselves from taking any coercive measure subject to the appellant depositing some amount of damages, if charged, as may be ordered by the appellate authority or atleast 25% of the damages imposed. Endeavour of the appellate authority should always be to dispose of appeals filed under Section 67(5) quite expeditiously and if there is no other legal impediment, within a maximum period of three months as is prescribed for deciding the case under Section 67, read with sub rule 6 of Rule 67 of the Rules, 2016.

73. Considerations that should weigh for grant of interim relief should be that aggrieved party has no other house and residing therein with family or may be alone and he has been using his dwelling house for a number of years. However, in case of obstacle on public pathway, the consideration should be more with regard to inconvenience of public or villagers. It is always open for the authority to consider interim stay application in appeal on facts of each case.

74. Thus, in my view, following guidelines be adopted as procedure to be applied to proceedings under Sections 67,67A and 26 of the U.P. Revenue Code. It is all aimed at ensuring transparency in the procedure, judiciousness in approach by the authorities and to thwart every complaint made with ulterior and oblique motive to dislodge a long settled possession and causing of unnecessary harassment to an innocent villager:

(i) In case of complaint made on RC From 19, the official making it shall ensure that proper survey is done in the light of observations made in this judgment; the land, occupation of which has stood identified to be unauthorized is in exact measurement and so also shown in the survey map prepared on scale, as per the Land Revenue Survey Regulations, 1978; the exact assessment of damages on the basis of circle rate with details of calculation made on that basis.

(ii) In a case of suo motu action, before issuing RC Form 20, the authority will ensure that proper report upon RC Form 19 is submitted as per para (i) above on parameters of subrule 1 Rule 67.

(iii) RC Form 20 must be accompanied by a copy of report and spot survey submitted alongwith RC Form 19 to the person against whom proceedings have been instituted, or even otherwise submitted in case of suo motu action vide para (ii) above.

(iv) Upon reply being filed to the notice, if authority finds that spot survey/explanation report is not satisfactory, it may order for a fresh spot report to be prepared in presence of the party aggrieved.

(v) In the event, objection includes a plea of statutory protection/ benefit under Section 67-A, the authority should invite the objection from the Gaon Sabha, and will decide the same alongwith the matter under Section 67, without requiring aggrieved party to move separate application under Section 67-A.

(vi) If the report is admitted on record, may be in case no objection is filed, the authority must ensure presence of the person preparing the report before it, to prove the report by his statement, with a right to aggrieved party to cross question him.

(vii) The authority must endeavour to decide the case within time framed provided under the relevant Act and the Rules and should desist from granting adjournment to the parties in a routine manner.

(viii) In case of appeal under Section 67(5) of the U.P. Revenue Code, 2006, preferred/ filed within the time prescribed alongwith interim relief application, the interim relief application as far as possible should be decided within two weeks' time with prior notice to other side and where plea of settlement under Section 67-A has been taken before Assistant Collector-1st Class, and damages to the tune of 25 % at-least of the total damages are paid and an affidavit of undertaking is filed for

not raising any further construction upon the land in question, the authorities including civil administration should avoid taking any coercive measure pursuant to the order appealed against until the disposal of interim relief application. The Appellate authority may also consider granting interim relief on the very first day of filing of appeal with stay application if above conditions are fulfilled by the appellant.

(ix) The appellate authority should as far as possible decide the appeal within a period of two months of its presentation.

75. India lives largely in villages and still by and large is an agregarian economy. The State of Uttar Pradesh is no exception. Accordingly, I may observe here that rules of procedure deserve to be suitably amended by the State Government incorporating above guidelines for leaving no scope for any arbitrariness that is seen largely as influencing the decision making process by the authority, may be for local village politics.

76. In view of above all these writ petitions connected together are hereby allowed. The impugned orders passed therein both by the Assistant Collector/Tehsildar concerned and the appellate authority as the case may be, are hereby set aside. Individual cases in petitions are remitted to the Assistant Collector to decide afresh in the light of the observations and guidelines made in this judgment. The liberty also rests with the petitioners to raise plea of 67-A if not taken within three weeks from today, if so advised.

77. Before parting , I must appreciate learned Additional Chief Standing Counsel Mr. Abhishek Shukla and the learned Standing Counsel Sri R.S.Umrao, Sri Rahul Malviya, Sri Anand Bhaskar Srivastava and battery of learned Standing Counsel with them and also learned Advocates appearing for the respective Gaon Sabhas of the State, as well as learned Advocates appearing for the respective petitioners for their valuable assistance in this matter of great public importance.

78. Original records are returned to the Additional Chief Standing Counsel forthwith.

(2022) 12 ILRA 388
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUSHWAR, J.

Writ-C No. 16713 of 2022

M/s ATTS Associates ...Petitioner
Versus
B.P.C.L. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udit Chandra

Counsel for the Respondents:
Sri Puneet Agarwal

A. Constitution of India – Article 226 – Writ – Alternative remedy – Petitioner's firm was blacklisted – Violation of fundamental right guaranteed under Article 19(1)(g) as well as of principle of natural justice claimed – Preliminary objection of availability of alternative remedy, how far acceptable – Whirlpool's case relied upon – Held, since the order of blacklisting the entire fleet of the petitioner firm affects the fundamental right of the petitioner guaranteed under

Article 19(1)(g) of the Constitution of India and it is claimed to have been passed in violation of the principles of natural justice, the preliminary objection as regards maintainability of the writ petition is liable to be overruled. (Para 5)

B. Constitution of India – Article 14 – Principle of natural justice – Blacklisting of the firm – Show Cause notice – Two essential requirements of show cause notices laid down – Gorkha Security Services's case relied upon – In the context of blacklisting to fulfil the requirements of principles of natural justice, the show cause notice should meet the following two requirements: (i) It must St. the material/grounds on which action is necessitated; and (ii) It must St. the particular penalty/action which is proposed to be taken – High Court found the impugned notice fails to fulfil the second requirement, hence set aside the order of blacklisting the firm. (Para 13, 17 and 19)

Writ petition allowed. (E-1)

List of Cases cited:

1. Whirlpool Corporation Vs Registrar of Trade Marks; (1998) 8 SCC 1

2. Radha Krishan Industries Vs St. of H.P.; (2021) 6 SCC 771

3. Gorkha Security Services Vs Government (NCT of Delhi); (2014) 9 SCC 105

4. UMC Technologies Pvt. Ltd. Vs F.C.I. & anr.; 2021 (2) SCC 551

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Vikas Budhwar, J.)

1. We have heard Sri Udit Chandra for the petitioner and Sri Puneet Agarwal for the respondents 1 to 5.

2. At the outset, the learned counsel for the petitioner invited our attention to paragraph no.1 of the writ petition to indicate that first petition on the present cause of action was withdrawn with liberty to file a fresh petition therefore, the second petition is maintainable. It be observed that the first petition i.e. Writ C No. 34659 of 2021 was pending when this second petition was filed, however, by the time this second petition was filed, an application had already been filed to withdraw the previous petition and this fact was disclosed in this petition. In these circumstances, we deem it appropriate to address this petition on merit as any view to the contrary may render the petitioner remediless.

3. The relevant facts of the case are as follows: The petitioner is a firm engaged in the business of transportation of petroleum products. On an invite by Bharat Petroleum Corporation Ltd (for short the Corporation) to settle a contract for transportation of its products, the petitioner submitted a bid and was declared successful. Pursuant to which, an agreement was entered into between the petitioner and the Corporation on 16.01.2018, initially, in respect of engagement of 5 vehicles, which was subsequently enhanced to 14, for a period of 5 years. During the period of engagement, on 03.10.2021 a vehicle (Tank Lorry No. UP 85 BT 6975) was seized by the police on charge of pilferage of petroleum products. An FIR was also lodged, followed by impugned notices dated 3.10.2021 (Annexure no.1 to the petition) and 6.10.2021 (Annexure no.2 to the petition), which culminated in passing the impugned order dated 9.12.2021 (Annexure 3 to the petition). The petitioner seeks quashing of the notices dated 03.10.2021 and 06.10.2021; and the order dated 09.12.2021 by which, for breach of the terms and conditions of the agreement between the petitioner and the corporation,

the petitioner has been visited with penal action as enumerated below:-

"1. Damages of Rs. 1 lac.

2. Forfeiture of Security deposit of all tank lorries amounting to Rs. 5 lacs.

3. Termination of Transport Agreement BPCL/ NR/ POL/ BULK/ 2016-21/ Mathura dated 16.01.2018, with immediate effect, including ***blacklisting the entire fleet along with crew of following 14 tank lorries on Industry basis for a period of 5 years. The period of blacklisting shall be effective from 03.10.2021 to 02.10.2026***.

SL	***TL Regn No.***	***TL Cap (KL)***	***Engine No.***	***Chasis No.***
1.	*UP85 BT5985*	*20.00*	*41K84186239*	*MAT448022EAN10391*
2.	*UP85 BT5432*	*20.00*	*591803111L84027599*	*MAT448030B7N53211*
3.	*UP85 BT5986*	*20.00*	*41K84188654*	*MAT448022E5N12567*
4.	*UP85 BT6455*	*20.00*	*41K84187223*	*MAT448022EAN10335*
5.	*UP85 BT6155*	*20.00*	*41K84187367*	*MAT448022EAN10339*
6.	*UP85 BT6975*	*20.00*	*11C63106431*	*MAT448050B0C05536*
7.	*UP85 BT8535*	*20.00*	*91F84890128*	*MAT44861K0G09311*
8.	*UP30 A8585*	*20.00*	*697TC5MSZ155320*	*444026MSZ021199*
9.	*UP86 T0831*	*20.00*	*ZFH376636*	*ZFE80601*
10.	*UP85 U9216*	*20.00*	*697TC57DRZ121618*	*444026DRZ008569*
11.	*UP14 CT2647*	*20.00*	*11D84003889*	*MAT448050BOE09293*
12.	*UP85 U9996*	*20.00*	*697C58BQZ106256*	*46910191D08923*
13.	*UP85 V9036*	*20.00*	*697TC58BQZ102603*	*46910BQZ104177*
14.	*NL01 N4181*	*24.00*	*BEFZL14675*	*MA1PFALBCF6L48523*

4. A preliminary objection has been raised by the learned counsel for the corporation with regard to maintainability of the writ petition as there exists an alternate dispute resolution mechanism (ADR mechanism) in the agreement between the parties. In response thereto, the learned counsel for the petitioner submitted that the order of blacklisting affects the fundamental right of the petitioner guaranteed under Article 19(1) (g) of the Constitution of India and is in violation of the principles of natural justice, inasmuch as, the notices that form the basis of the order do not conform to the requirement of law, both in content and form, as they fail to put the petitioner on guard that an order of blacklisting is contemplated against it. In such circumstances, it is contended, existence of an alternative remedy is no bar to the exercise of writ jurisdiction.

5. With regard to the preliminary objection, we are of the view that since the order of blacklisting the entire fleet of the

petitioner firm affects the fundamental right of the petitioner guaranteed under Article 19(1)(g) of the Constitution of India and it is claimed to have been passed in violation of the principles of natural justice, in light of the law laid down by the Supreme Court in **Whirlpool Corporation v. Registrar of Trade Marks, (1998) 8 SCC 1 (followed in Radha Krishan Industries v. State of H.P., (2021) 6 SCC 771, paragraph 27.3)**, we overrule the preliminary objection as regards maintainability of the writ petition to the extent it questions the order of blacklisting. However, in respect of other penalties, the petitioner may take recourse to the ADR mechanism available under the agreement. We, therefore, propose to address only the issue of blacklisting. For rest of the issues, the petitioner may take recourse to other alternative remedies.

6. On the issue of blacklisting, Sri Udit Chandra, learned counsel for the petitioner, invited our attention to the impugned notices dated 03.10.2021 and 06.10.2021 to demonstrate that neither of the two notices unequivocally inform the petitioner that if the explanation submitted by the petitioner on the allegations made therein is found not satisfactory, the entire fleet of vehicles of petitioner's firm shall be blacklisted on industry basis. On that basis, it is urged, the order of blacklisting is bad in law.

7. To test the aforesaid submission it would be apposite to notice the contents of the two notices. The relevant portion of the notice dated 03.10.2021 is reproduced below:-

"Sub: Tank Lorry no. UP85BT 6975 caught by police while pilfering the product.

Your tank lorry no. UP85BT 6975 which is in transport contract with BPCL Mathura. This tank lorry was despatched vide invoice no. 1100883752 dated 03.10.2021 to M/s Sunil Yogesh filling stn. with 5 kl MS & 15 KL HSD.

A phone call received from mob no. 918077105018 from police station IOCL refinery that the subject tank lorry caught by police while pilfering the product from the tank lorry.

If this information is correct then it is a violation of transport agreement and ITDG which you had signed with the corporation and company may take action against the tank lorry as well as your transport.

As per the following clauses of ITDG

ITDG Clause No	***Description***	***Penal action as per ITDG***
8.2.2.8	*Established case of pilferage/non-delivery of product*	*TT shall be blacklisted*
8.2.2.16	*Any act of the carrier/carrier's representative that may be harmful to the good name/image of the oil company, its product or its services*	*As decided by the company.*

Provide your explanation for violation of your subject tank lorry."

8. The relevant portion of the second notice dated 06.10.2021 is extracted below:-

"Subject: Show Cause Notice- Established Malpractrice in your Tank Lorry no. UP 85BT 6975"

Reference: Tender Ref: BPCL /NR /POL /BULK /2016-21/ MATHURA AND OIL INDUSTRY TRANSPORT DISCIPLINE GUIDELINES (VER 4.0)

Dear Sir/Madam

In continuation of our mail dated 03.10.2021, when it was informed to you that your tank lorry number UP 85 BT 6975 was caught by police wherein crew of the tank lorry Sri Bhagwan Singh S/o Sri Raja Ram was pilfering product at an unauthorised stoppage. Police reported that duplicate key also recovered from him.

This tank lorry was loaded from Mathura installation with 5 kl MS & 15 KL HSD on 03.10.2021 to M/s Sunil Yogesh filling station, Bajna, District Mathura (cc number 171590) vide invoice no. 1100883752.

The following clauses of Oil Industry Transport Discipline Guidelines (Ver 4.0) have been violated inter alia:-

8.2.2.2 (a) : Established unauthorized stoppage en-route

8.2.2.8 : Established case of pilferage/non-delivery of product

8.2.2.11 : Tampering with the standard fittings of TT including the sealing, security Locks, security locking system.

8.2.2.16 : Any act of the carrier/carrier's representative that may be harmful to the good Name / image of the oil company, its products or its services.

8.2. 2: : llegal/ unauthorized duplicate keys of security locks"

FIR is also lodged having the number 0386 dated 03.10.2021 under IPC 1860, section 379, 411 and 120-B. It is clearly mentioned in the FIR that tank lorry was caught near gate no. 9 of IOCL refinery and TT crew Shri Bhagwan Singh S/o Shri Raja Ram is one of the main accused in this case. A video also shared by the police about this incident.

Viewing above, it is clear that you have failed to keep your obligations under the aforesaid OITD Guidelines/Agreement entered by in between us inter alia causing breach of the same. You are required to submit your reply in writing within 7 days as to why action against you should not be taken for the violations as per Oil Industry Transport Discipline Guidelines under Clause 8.2.2.2 (a), 8.2.2.8, 8.2.2.11 and 8.2.2.16 and 8.2 (Point No.2)."

9. The contention of the learned counsel for the petitioner is that admittedly it was the first violation alleged; that according to Clause 8.2.2.2(a) of Oil Industry Transport Discipline Guidelines (OITDG) in respect of first violation, penalty prescribed is suspension of TT for three months (Note: The term "TT' stands for Tank Truck/Tank Lorry vide Clause 1.1 of OITDG). Clause 8.2.2.8 of OITDG, in case of first violation, provides for blacklisting of TT; Clause 8.2.2.11, in respect of first violation, provides for blacklisting of TT; Clause 8.2.2.16 does not specify any penalty but declares that the penalty may be as decided by the Corporation; and Clause 8.2.2 is non specific in the sense that it is a general provision describing various penalties for malpractices/irregularities. Consequently, the notices did not specifically speak of blacklisting and neither Clause 8.2.2.2 (a) nor Clause 8.2.2.8 or Clause 8.2.2.11 or Clause 8.2.2.16, recited in the notice, provides for blacklisting the entire fleet of the transporter, hence the order of blacklisting is in violation of the principles of natural justice and does not meet the

requirement of a valid notice as per the law laid down by the Apex Court in ***Gorkha Security Services v. Government (NCT of Delhi), (2014) 9 SCC 105*** followed in ***UMC Technologies Private Limited v. Food Corporation of India and another, 2021 (2) SCC 551.***

10. Per contra, Sri Puneet Agarwal, who appears for the respondent-corporation, submitted that since the relevant provisions under which penalty of blacklisting can be imposed have been recited in the notice and the malpractices mentioned in the notice are such where penalty of blacklisting the entire fleet can be imposed, the petitioner being privy to the contract and aware of applicability of the Oil Industry Transport Discipline Guidelines (OITDG), no prejudice has been caused to the petitioner for mere omission to state in the notice that if the reply of the petitioner is not satisfactory, the petitioner would be blacklisted. In support of his submission, the learned counsel for the respondent-corporation has invited our attention to Clause 8.2 of the OITDG which specifies the penalties for malpractices/irregularities. Clause 8.2 of OITDG is extracted below:-

"8.2. Penalties for malpractices/irregularities

8.2.1 Malpractices/irregularities will cover any of the following:

a. Unauthorized deviation from specified route/unauthorized delay/ unauthorized en-route stoppage/not reaching destination/over speeding/en-route switching off VMU/unauthorized removal of VMU/use of VMU on other vehicles.

b. TT crew found in intoxicated state while on duty.

c. Irregular reporting of TT at loading location without permission of the location.

d. Refusal to carry loads allocated by the location.

e. Reported case of non-wearing of retractable seat belt while driving.

f. Driving vehicle without cleaner/helper.

g. Non-functioning of Fire Extinguisher carried by TT.

h. Polluting environment due to product spillage from tilting or leaky vehicles on road, in case of accident/unsafe driving.

I. Accident involving injury or damages to the facilities at the work place.

j. Fatal accident at the work place.

k. Tampering with standard fittings of TT including the sealing, security locks, security locking system, calibration, Vehicle Mounted Unit or its fittings/fixtures.

l. Unauthorized use of TT for products other than the petroleum products for which it has been engaged.

m. Entering into contract based on forged documents/false information.

n. Entering into an agreement for the same TT with other oil companies.

o. Irregularities under W & M Act.

p. Not lodging FIR with the Police in case of accident, not informing/submitting accident report to the Oil Company about the accident.

q. Pilferage/short delivery of product.

r. Any act of the carrier/carrier's representative that may be harmful to the good name/image of the Oil Company, its' products or its services.

8.2.2 Penalties upon detection of malpractice/irregularities

The carrier shall attract penalties for the malpractice/irregularities as given below and the TT mentioned in the

following instances shall be suspended/blacklisted along with TT crew. However, an investigation, wherever required, shall be conducted and if the malpractice/irregularity is established then penal actions stipulated as under shall be taken, including blacklisting:

Clause No.	***Type of malpractice/ irregularity***	***Penalty against number of instance***		
		First	***Second***	***Third***
8.2.2.1	*(a) Reported non-wearing of retractable seat belt while driving. (b) Repetitive/ Habitual Over speeding. (c) Driving vehicle without cleaner/helper.*	*TT shall be suspended for one week.*	*TT shall be suspended for 3 months.*	*TT shall be blacklisted.*
8.2.2.2	*(a)Established repetitive un-authorized stoppage en-route. (b)Established repetitive unauthorized diversion from specified route. (c)Refusal to carry loads allocated by the location. (d)Irregular reporting of TT at loading location without permission of the location.*	*TT shall be suspended for 3 months.*	*TT shall be blacklisted.*	
8.2.2.3	*Short delivery of product for established malpractice.*	*TT shall be blacklisted.*		
8.2.2.4	*(a)Non-availability /non-functioning of TT fire extinguisher. (b)TT crew found in intoxicated state while on duty. (c)Not wearing uniform. (d) Not wearing PPEs at loading/un-loading locations.*	*TT shall be suspended for one week.*	*TT shall be suspended for 3 months.*	*TT shall be blacklisted.*
8.2.2.5	*(a)Established tampering/ damaging of VMU. (b)Established disconnection of*	*TT shall be blacklisted.*		

	power/cable of VMU enroute. (c) Removal of VMU from original mounting.			
8.2.2.6	*Accident at the location leading to injury of persons or damages to the facilities.*	*TT shall be suspended for 3 months.*	*TT shall be blacklisted.*	
8.2.2.7	*Polluting environment due to product spillage from TT.*	*TT shall be suspended for 3 months.*	*TT shall be blacklisted.*	
8.2.2.8	*Established case of pilferage/non-delivery of product.*	*TT shall be blacklisted.*		
8.2.2.9	*Fatal accident at the work place.*	*TT shall be blacklisted.*		
8.2.2.10	*Irregularities under W&M Act.*	*TT shall be blacklisted.*		
8.2.2.11	*Tampering with standard fittings of TT including the sealing, security locks, security locking system, Calibration.*	*TT shall be blacklisted.*		
8.2.2.12	*Unauthorized use of TT outside the contract.*	*TT shall be blacklisted.*		
8.2.2.13	*Entering into contract based on forged documents/ false information.*	*TT shall be blacklisted.*		
8.2.2.14	*Entering into an agreement for the same TT with other oil companies.*	*TT shall be blacklisted.*		
8.2.2.15	*Not lodging FIR with the Police in case of accident,not informing/ submitting accident report to the Oil Company about the accident.*	*TT shall be blacklisted.*		
8.2.2.16	*Any act of the carrier/carrier's representative that may be harmful to the good name/imag*	*As decided by the company.*		

	e of the Oil Company, its' products or its services.			

During the validity of transportation contract, in the first instance of blacklisting for a transporter, as per the above provisions, damage of Rs. 1 lakh will be imposed on the Transporter apart from blacklisting of the involved TT. In second instance of blacklisting, a damage of Rs. 3 lakhs will be imposed and the involved TT will be blacklisted. In third instance of blacklisting, a damage of Rs. 5 lakhs will be imposed and 25% of the remaining TTs will be blacklisted along with the involved TT. In fourth instance, a penalty of Rs. 8 lakhs will be imposed and 50% of remaining TTs will be blacklisted along with involved TT. In case of any further incident of malpractice, the entire fleet will be blacklisted and the SD will be forfeited and the transportation contract will be terminated. The percentage of TT blacklisted will be in proportion of own and attached offered and will be rounded off to the higher numerical.

Above damages imposed are in addition to the recovery of the product quantity found short or recovery due to contaminated product involving the cost of product, expenses and losses incurred as determined by the company.

However, in case, complicity of the transporter is established even in the first instance of malpractice, the entire fleet will be blacklisted, contract terminated & carrier blacklisted along with forfeiture of SD.

The blacklisting of TTs shall be on industry basis.

In the following irregularities, the complicity of the carrier shall be deemed to be existent and the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated, security deposit forfeited and the concerned carrier & their all TTs shall be blacklisted on industry basis:

1. False/ hidden compartment, unauthorised fittings or alteration in standard fittings affecting quality and quantity

2. Illegal unauthorised duplicate keys of security locks.

3. Duplicate dip rod/ calibration chart"

11. Relying on the aforesaid clauses, the learned counsel for the respondent-corporation submitted that it is clearly mentioned in the notice that penalty provided in Clause 8.2.2 can be imposed and when all the penalties specified therein are taken into account, one would notice that it includes the penalty of blacklisting of TTs on industries basis. Therefore, it cannot be said that the petitioner was not aware of the consequences that would ensue if its reply was found non-satisfactory. It has also been argued by the learned counsel for the corporation that in ***Gorkha Security Services v. Government (NCT of Delhi) (supra)*** it has been clarified by the Apex Court that even if it is not specifically mentioned in the show cause notice yet, if it can be clearly and safely discerned that such penalty could be imposed, it would be sufficient compliance of the principles of natural justice. It has, therefore, been urged that as the petitioner was aware of the penalties which could be imposed under various clauses of clause 8.2.2, there was sufficient compliance of the principles of natural justice. More so, when penalty for having a duplicate key is blacklisting of TTs on industry basis. It was therefore prayed that the petition be

dismissed with liberty to the petitioner to avail the alternative remedy available under the contract.

12. Having noticed the rival submissions, the contents of the notices and the relevant clauses of OITDG, before we proceed to examine the weight of the respective submissions, it would be pertinent to observe that it is trite law that where an order having penal consequences is passed in violation of the principles of natural justice then existence of an alternative remedy is not an impediment in exercise of the writ jurisdiction. Therefore, what we have to examine is whether the order blacklisting the entire fleet of the petitioner is in violation of the principles of natural justice. To test whether the order complies with the principles of natural justice we would have to ascertain whether the notices issued to the petitioner unequivocally informs the petitioner that an order blacklisting his entire fleet of TTs is contemplated and might be passed if petitioner's reply is found not satisfactory. In ***Gorkha Security Services v. Government (NCT of Delhi) (supra),*** the Supreme Court while expounding the law as to what are the requirements of a valid show cause notice preceding an order of blacklisting, in paragraphs 21 and 22, observed as follows:-

"21) The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22) The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

i) The material/ grounds to be stated on which according to the Department necessitates an action;

ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

13. From the observations of the Apex Court what is clear is that in the context of blacklisting to fulfil the requirements of principles of natural justice, the show cause notice should meet the following two requirements:-

(i) It must state the material/grounds on which action is necessitated; and

(ii) It must state the particular penalty/action which is proposed to be taken.

The purpose of fulfilling the first requirement is to enable the noticee to meet the grounds on which the action is proposed against him; whereas, the second part enables the noticee to point out that the proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained.

14. On a careful reading of the notices dated 03.10.2021 and 06.10.2021, what we observe is that there is no clear disclosure that if the reply of the petitioner's firm is found unsatisfactory, the order blacklisting its entire fleet may be passed. In the first notice dated 03.10.2021 what is mentioned is that if the information with regard to pilferage from the Tank Lorry is found correct then it is a violation of transport agreement and OITDG which has been signed by the petitioner with the Corporation and therefore, the Company may take action against the Tank Lorry as well as transporter as per clause mentioned therein which we have already extracted above. There is no clear indication in the notice that if the allegations against the petitioner were found substantiated then an action to blacklist the entire fleet of petitioner's firm might be taken. In view whereof, we are of the considered opinion that the notice dated 03.10.2021 cannot form the basis of the order of blacklisting the entire fleet of the petitioner.

15. In respect of the second notice dated 06.10.2021, it is mentioned in the notice that certain clauses of Oil Industry Transport Discipline Guidelines recited therein have been violated. Learned counsel for the petitioner has challenged the notice dated 06.10.2021 on the ground that it fails to meet the second requirement, which is, that it fails to state the particular penalty/action contemplated against the noticee. On the other hand, the learned counsel for the corporation contended that the notice recites those clauses under which the order of blacklisting the entire fleet of TTs on industry basis could be passed therefore, there is substantial compliance of the principles of natural justice and no prejudice has thus been caused to the petitioner.

16. At this stage, it would be useful to extract the relevant part of the notice dated 06.10.2021 by which, according to the corporation's counsel, the second requirement of a proper show cause notice has been met. The same is extracted below:-

"Viewing above, it is clear that you have failed to keep your obligations under the aforesaid OITD Guidelines/Agreement entered by in between us inter alia causing breach of the same. You are required to submit your reply in writing within 7 days as to why action against you should not be taken for the violations as per Oil Industry Transport Discipline Guidelines under Clause 8.2.2.2 (a), 8.2.2.8, 8.2.2.11 and 8.2.2.16 and 8.2 (Point No. 2)."

17. The issue that falls for our consideration is whether the disclosure in the notice extracted above could be treated as sufficient compliance of the second requirement of a valid show cause notice for imposing the penalty of blacklisting the entire fleet of TTs. Notably, the notice

speaks of action that might be taken under five specified clauses of OITDG. As to what penalty each clause provides for is thus relevant. We shall address it clause-wise. In so far as clause 8.2.2.2 (a) is concerned it relates to suspension of TT for three months on first violation. In the instant case, it is not the suspension of Tank Lorry for three months but it is a case where the entire fleet of TTs have been blacklisted for five years. Thus, the penalty awarded is not relatable to clause 8.2.2.2 (a). In so far as clause 8.2.2.8 is concerned it relates to blacklisting of TT. It also does not relate to blacklisting the entire fleet. Accordingly, clause 8.2.2.8 is also not relatable to the penalty awarded. Similarly, Clause 8.2.2.11 is not relatable to the penalty awarded as it relates to blacklisting of TT and not the entire fleet. In so far as clause 8.2.2.16 is concerned it is ambiguous as it does not specify any penalty. It only leaves it to the discretion of the corporation. Hence, mere mention of clause 8.2.16 would not satisfy the second requirement of a valid show cause notice. In so far as Clause 8.2 (Point No.2) is concerned, the same is an omnibus clause which enumerates multiple penalties upon detection of malpractices/ irregularities and not just the penalty of blacklisting the entire fleet of TTs. No doubt, under clause 8.2.2 there can be blacklisting of TTs on industries basis but since there are several other penalties specified therein mere mention of clause 8.2.2 in the notice would not satisfy the second requirement of a valid show cause notice as noticed above because, from it, it cannot be clearly and safely inferred that the action proposed is of blacklisting the entire fleet of TTs on industries basis. We are therefore of the considered view that the notice fails to fulfil the second requirement of a valid show cause notice as held by the Apex Court in **Gorkha Security Services v. Government (NCT of Delhi) (supra).**

18. The question that now arises for our consideration is whether omission to fulfil the second requirement of the notice has caused prejudice to the petitioner. In this context it would be apposite for us to notice certain observations of the Apex Court in Gorkha Security Services case (supra) in the context of the submission that the noticee suffered no prejudice even if the proposed penalty of blacklisting had not been specifically proposed in the show cause notice. The Supreme Court in paragraph 33 of its judgment, as reported, negativing the submission so made, observed :-

"Had the action of blacklisting being specifically proposed in the show-cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to black list the appellant. Therefore, it is not at all acceptable that non mentioning of proposed blacklisting in the show cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant."

19. The above quoted observations squarely apply on the facts of the instant case. Consequently, the writ petition is **allowed**. The order dated 09.12.2021 to the

extent it seeks to blacklist the entire fleet of TTs of the petitioner's firm is set aside. In so far as other penalties imposed by the order dated 09.12.2021 are concerned, we leave it open to the petitioner to take recourse to other alternative remedies including the alternate dispute resolution mechanism which exists in the contract. We, accordingly, do not express any opinion in respect of those other penalties. It is also clarified that quashing of the order dated 09.12.2021 to the extent indicated above will not come in the way of the respondent-corporation to issue a fresh show cause notice and pass a fresh order in respect thereof, in accordance with law.

(2022) 12 ILRA 400
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2022

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-C No. 31056 of 2022

Yogendra Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anand Tiwari

Counsel for the Respondents:
C.S.C., Sri Ashutosh Pandey, Sri Ashish Agrawal

A. Civil Law - UP Essential Commodities (Regulation at Sale & Distribution) Rules 2013 – R. 13 (1) – Fair price Shop licence – Subsequently allotted after cancellation – Subsequent allottee, how far entitled to be impleaded and hearing – Ram Kumar's case relied upon – Subsequent allottee should also be arrayed as a one of the party before the authorities while hearing the matter in respect of cancellation of fair price shop – Held, even if a subsequent allottee does not have a independent rights, he/she still has a right to be heard and to make submissions defending the order of cancellation. (Para 13 and 16)

Writ petition allowed. (E-1)

List of Cases cited:

1. Ram kumar Vs St. of U.P. & ors.; 2022 (11) ADJ 229 (S.C.)

2. Civil Appeal No. 3668 of 2022; Pawan Choubey Vs St. of U.P. & ors. decided on 6-5-2022

3. Special leave to Appeal (C) Nos. 37283-37284 of 2012; Sumitra Devi Vs St. of U.P. & ors. decided on 8-10-2014

4. Poonam Vs St. of U.P. & ors..; (2016) 2 SCC 779

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard, learned counsels for the parties and perused the material on records.

2. By means of present writ petition, petitioner is seeking for quashing of the order dated 26-09-2022 passed by the respondent No-2, Deputy Commissioner (Food) Basti Region, Basti in case No. 285 of 2022 under Rule 13 (1) of UP Essential Commodities (Regulation at Sale and Distribution) Rules 2013, allowing the appeal filed by respondent No. 5. Further prayer has been made by petitioner for mandamus directing the respondents not to interefere in peaceful functioning of the petitioner as Fair Price Shop Dealer in Gram Panchayat Bhotaha, Block Pauli, Tehsil Dhankata District Sant Kabir Nagar.

3. Learned counsel for the petitioner submits that after cancellation of fair price shop licence of respondent No. 5, by the respondent No.3-Sub Divisional

Magistrate, Tehsil Dhankata District Sant Kabir Nagar on 9-6-1022, the due process as prescribed under the Guidelines and Government Orders issued in this regard, was followed and the proposal for selection of petitioner as fair price shop dealer at village in question has been recommended by the Block Devlopment Officer before the respondent no.3. By order dated 6-8-2022 passed by the respondent No -3, the licence of fair price shop at village in question was granted in favour of the petitioner and at present the petitioner is functioning as fair price shop dealer without any complaint whatsoever.

4. Learned counsel for petitioner further submits that by the impugned order dated 26-9-2022, respondent no.2 has wholly illegally and in arbitrary manner, allowed the appeal filed by the respondent no.5 against the cancellation of his fair price shop licence. He further submits that before passing the order dated 26-9-2022, no opportunity of hearing has been given to the petitioner inspite of fact that petitioner was selected as fair price shop dealer after the due process. Counsel for the petitioner further submitted that the petitioner being a duly selected fair price shop dealer is the necessary party before the respondent No-2 in appellate proceedings, but without considering the same impugard order has been passed without hearing the petitioner. The counsel for the petitioner further submits that without impleading the petitioner as party before the appellate court, the decision in favour of respondent no.5 is wholly illegal and arbitrary.

5. Lastly it was contended by the counsel for petitioner that the impugned order dated 26-9-2022 was passed by violating the principles of natural justice. The respondent no.5 was very well aware regarding the allotment of fair price shop in favour of petitioner, during the pendency of the appeal, but the same has not been disclosed.

6. In support of his submissions, learned counsel for the petitioner has placed reliance on the judgements passed by the Supreme Court in the cases of ***Ram kumar Vs. State of U.P. & others*** reported in 2022 (11) ADJ 229 (S.C.), decided on 28-9-2022; ***Pawan Choubey Vs. State of U.P. & others*** in Civil Appeal No 3668 of 2022 decided on 6-5-2022 and ***Sumitra Devi Vs State of UP & others*** in Special leave to Appeal (C) Nos. 37283-37284 of 2012 decided on 8-10-2014, and submitted that the subsequent allottee is the necessary party in the proceedings, as the orders passed in favour of original allottee adversly affects the interest of subsequent allottee.

7. Per contra, the learned counsel for respondents No.5 and leearned Standing Counsel Submits that after restoration of fair price shop license in favour of respondents No.5 by the respondent No. 2, the petitioner being a subsequent allottee have no right to avail any remedy against the appellate order dated 26-9-2022 passed by the respondent no.2. Counsel for the respondent no. 5 further Submits that the petitioner being a subsequent allottee is not a necessary party and the respondent no.2 have not committed error while passing the order dated 26-9-2022.

8. In support of his submission learned counsel for respondent no.5 has relied upon the judgement of Supreme Court in the case of ***Poonam Vs State of U.P. & others.*** reported in ***(2016) 2 SCC 779*** and submitted that the present petition at the behest of subsequent alottee is not at all maintainable.

9. Another argument has been made on behalf of the private respondents that since the allotment was made in favour of the petitioner during the pendency of the appeal filed by the respondent no.5, the petitioner has no right to be heard.

10. Heard counsel for the parties and perused the record and with the consent of counsel for the parties, the writ petition is disposed of finally.

11. Since pure question of law involved in the present case is that whether a subsequent allottee has a right to be heard or not. In paragraph-49 of the judgment of ***Poonam (Supra)*** the Hon'ble Apex Court was pleased to hold that the subsequent allottee has no locus to challenge the order passed in favour of the original allottee. The subsequent allottee is a third party to the lis in this context. Paragraph-49 is reads as follows:-

"49. In the instant case, Shop No. 2 had become vacant. The appellant was allotted the shop, may be in the handicapped quota but such allotment is the resultant factor of the said shop falling vacant. The original allottee, that is, the respondent, assailed his cancellation and ultimately succeeded in appeal. We are not concerned with the fact that the appellant herein was allowed to put her stand in the appeal. She was neither a necessary nor a proper party. The appellate authority permitted her to participate but that neither changes the situation nor does it confer any legal status on her. She would have continued to hold the shop had the original allottee lost the appeal. She cannot assail the said order in a writ petition because she is not a necessary party. It is the State or its functionaries who could have challenged the same in appeal. They have maintained sphinx like silence in that regard. Be that as it may, that would not confer any locus on the subsequent allottee to challenge the order passed in d favour of the former allottee. She is a third party to the lis in this context."

12. Insofar as the law relied upon on behalf of petitioner is concerned, in the case of ***Sumitra Devi (Supra),*** the Hon'ble Apex Court was pleased to hold that after the cancellation of license to the original allottee, the license was granted in favour of some other person which is called as subsequent allottee. Once an application for impleadment has been filed by him, is liable to be heard. Order passed in the aforesaid SLP reads as follows:-

"Leave granted.

The appellant has challenged orders dated 16.02.2012 and 06.09.2012 passed by the High Court of Allahabad. By order dated 16.02.2012 the High Court has set aside the order passed by the Licencing Authority and the appellate authority and restored the Fair Price Shop licence of respondent no.6. By order dated 06.09.2012, the High Court has rejected the review application filed by the appellant. The appellant is the subsequent allottee in the sense that after the licence of respondent no.6 was cancelled on 18.01.2008, he was granted licence on 20.02.2008.

We have heard learned counsel for the appellant and learned counsel for the respondents.

Gist of the facts needs to be stated. On 18.01.2008, the Sub-Divisional Officer, Gorakhpur cancelled the Fair Price Shop licence of respondent no.6 on the ground that he did not deposit the requisite amount for release of quota for the month of November 2007. The appeal

preferred by respondent no.6 was dismissed by the Deputy Commissioner, Food and Civil Supplies, Gorakhpur on 07.07.2008. These orders were challenged by respondent no.6 before the High Court of Allahabad. The High Court, by order dated 16.02.2012, set aside the orders cancelling the licence of respondent no.6 and restored his licence.

It appears that after the 6th raspondent's Licence was cancelled, the appellant was granted licence on 20.02.2008 by the 5th respondent. The appellant being the subsequent allottee filed an application for impleadment in the writ petition on 17.10.2008. That application was neither entertained nor allowed. The impugned order came to be passed without hearing the appellant, i.e., the subsequent allottee. We notice that in the order passed on the review application, the High Court has taken note of the fact that the impleadment application of the appellant was neither entertained nor allowed. Surprisingly, the High Court has gone on to say that since it was neither entertained nor allowed, it stood rejected.

Learned counsel for the appellant urged and, in our opinion, rightly that the High Court should have heard the appellant before restoring the licence of respondent no.6 as the appellant was the subsequent allottee and his rights were affected by the Restoration of License of Respondent no.6. We are entirely in agreement with learned counsel for the appellant. In our opinion, the High Court could not have restored the licence of respondent no.6 without hearing the appellant as his rights were certainly affected by such order. Besides, he had filed an impleadment application. That application was not considered. No order was passed thereon. In our opinion, the High Court is not right in observing that since the said application was neither entertained nor allowed, it stood rejected. We are not happy with the hearing given at the stage of review application and the cryptic order passed on the review application. In our opinion, the appellant should have been heard on 16.02.2012.

In the circumstances, we set aside the impugned order. We remit the matter to the High Court. We request the High Court to give a hearing to the appellant and all concerned and decide the matter afresh. We make it clear that on the merits of the case, we have expressed no opinion and the High Court will decide the matter independently. It is also made clear that till such time as the High Court passes a final order, licence of respondent no.6 shall continue to be in force. He can operate the Fair Price Shop. Needless to say that the parties shall abide by the High Court's final order. The High Court is requested to dispose of the matter as early as possible.

The appeals are disposed of accordingly."

13. After the aforesaid judgment was delivered another order was passed by the Hon'ble Apex Court in the case of ***Pawan Chaubey (Supra)*** the same thing has been held in this judgement also by the Hon'ble Apex Court. The Hon'ble Apex Court in the aforesaid case after taking into consideration of law laid down in the case of ***Poonam (Supra)*** and the judgment of ***Sumitra Devi (Supra)*** was pleased to hold that the subsequent allotee should also be added as a party in the proceedings before the authorities. Taking into consideration the aforesaid judgments namely ***Poonam (Supra), Sumitra Devi (Supra) and Pawan Chaubey (Supra)*** very recently in the case of ***Ram Kumar (Supra)*** the Hon'ble Apex Court was pleased to hold that the subsequent allottee should also be arrayed

as a one of the party before the authorities while hearing the matter in respect of cancellation of fair price shop.

14. Insofar as the arguments raised by the counsel for the respondent no.5 that since the allotment was made in favour of the petitioner during the pendency of the appeal, he has no right to be heard by the appellate authority. It is argued by Shri Anand Tiwari, learned counsel for the petitioner on the basis of paragraph-11 of the judgement of Ram Kumar (Supra) that the findings were duly recorded in paragraph-11 of the aforesaid judgement. Even during the pendency of the appeal before the appellate authority on the recommendation of the Tehsil Level Selection Committee a subsequent allotment has been ade, the subsequent allottee is also liable to be heard. Paragraph-11 of the aforesaid judgement is reproduced below:-

"11. It is to be noticed that in the present case, during the pendency of the appeal before the Appellate Authority, on a recommendation of the Tehsil Level Selection Committee dated 19th April 2018, the present appellant, through regular allotment, was appointed as Fair Price Dealer on 15th May 2018."

15. Counsel for the petitioner further placed reliance upon paragraph-12, 18 and 19 which are relevant in order to decide the the controversy in question of the judgment of Ram Kumar (Supra) is reproduced below:-

"12. Insofar as the judgment of this Court in the case of Poonam (supra), on which strong reliance is placed by Mr. Irshad Ahmad, learned counsel, is concerned, this Court in the case of Pawan Chaubey (supra) had an occasion to consider the aforesaid judgment in the case of Poonam (supra). This Court in the case of Pawan Chaubey (supra) also noticed its earlier decision in the case of Sumitra Devi vs. State of U.P. & Ors. Noticing both these judgments, this Court observed thus:

"Our attention has been drawn to the judgment of this Court in Poonam vs. State of Uttar Pradesh & Ors. reported in (2016) 2 SCC 779. Relying on the aforesaid judgment, learned counsel appearing 3 on behalf of the Respondent No.4 contended that the appellant need not be heard. She had no right or locus to be impleaded.

In Poonam (supra), the subsequent allottee had actually been heard at all stages. What the Court held was that the subsequent allottee had been trying to establish her right independently. She contended that she had an independent legal right. This Court found that it was extremely difficult to hold that she had an independent legal right. In Sumitra Devi vs. State of U.P. & Ors. (Civil Appeal Nos. 9363-9364 of 2014), a Bench of coordinate strength of this Court comprising Hon'ble Ms. Justice Ranjana Prakash Desai and Hon'ble Mr. Justice N.V. Ramana (As His Lordship then was) passed an order dated 08.10.2014, the relevant parts whereof are extracted hereinbelow:

"The appellant being the subsequent allottee filed an application for impleadment in the writ petition on 17.10.2008. That application was neither entertained nor allowed.

xxx xxx xxx

Learned counsel for the appellant urged and, in our opinion, rightly that the High Court should have heard the appellant before restoring the licence of respondent no.6 as the appellant was the subsequent allottee and his rights were affected by the restoration of licence of

respondent no.6. We are entirely in agreement with learned counsel for the appellant. In our opinion, the High Court could not have restored the licence of respondent no.6 without hearing the appellant as his rights were certainly affected by such order."

Even if a subsequent allottee does not have an independent right, he/she still has a right to be heard and to make submissions defending the order of cancellation.

It is true that the order of appointment of the appellant reads that the order is subject to the outcome of the proceedings pending in court. This does not disqualify the appellant from appearing and contesting the proceedings by trying to show that the order of cancellation had correctly been passed against the Respondent No.4."

18. It could thus be seen that respondent No. 9 was very well aware that during the pendency of the proceedings, the appellant was appointed as a Fair Price Dealer on 15th May 2018. The order of the Appellate Authority has been passed on 20th July 2018. Even this being the position, respondent No.9 has been bold enough to aver thus in the memo of the writ petition:

"33. That it is also noteworthy to mention here that during the pendency of the Fair Price Shop, no third party allotment was made and as per the direction of this Hon'ble Court, the shop of the petitioner was attached to another Fair Price Shop Holder."

19. It could thus be seen that, though respondent No.9 was very well aware that during the pendency of the proceedings before the Appellate Authority, an allotment was done in favour of the present appellant, she has averred in her writ petition that no third party allotment was made. She has further gone on to state that, as per the directions of the High Court, the fair price shop of respondent No.9 was attached to another fair price shop holder. The statement is factually incorrect to the knowledge of respondent No.9. The same has been reiterated in the Ground thus:

"N. Because during the pendency of the Fair Price Shop, no third party allotment was made as per the direction of this Hon'ble Court, the shop of the petitioner was attached to another Fair Price Shop Holder." "

16. Apart from the same, the Court is of the opinion that even if a subsequent allottee does not have a independent rights, he/she still has a right to be heard and to make submissions defending the order of cancellation.

17. In view of the aforesaid, the Court is of the opinion that the order passed by the appellate authority namely Deputy Commissioner (Food) Basti Region, Basti dated 26.09.2022 was passed without hearing to the petitioner is liable to be set aside and hereby set aside.

18. In the facts and circumstances of the case, the present petition is disposed of finally permitting the petitioner to file an impleadment application along-with his objections before the appellate authority within a period of **three weeks** from today. If it is so, the appellate authority is directed to pass a fresh order strictly in accordance with law within a period of **three months** thereafter.

19. In view of above, the writ petition is **allowed**.

(2022) 12 ILRA 406
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.12.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Special Appeal (D) No. 274 of 2022

State of U.P. ...Appellant
Versus
Rinki Yadav ...Respondent

Counsel for the Appellant:
C.S.C.

Counsel for the Respondent:
Deepak Singh

A. Service Law – Appointment/ Recruitment – Benefit of Reservation – Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 - Schedule-I; Uttar Pradesh Janhit Guarantee Adhiniyam, 2011 (U.P. Act No. 3 of 2021) - Benefit of reservation in public employment to different disadvantaged sections of Society is permissible under the Constitution of India as an affirmative action. It is not in dispute that the respondent-petitioner was given appointment while she claimed the benefit of reservation available to O.B.C. candidates in her selection to the post of Constable (Civil Police). **Merely because the certificate produced by her was not in Praroop-1, though the certificate produced by her clearly evidences that she belongs to an O.B.C., group as identified by the State of Uttar Pradesh and also that she does not get excluded as a person belonging to creamy layer in terms of the criteria laid down by the State of Uttar Pradesh for the said purpose, it should not be taken aid of by the State authorities for denying her otherwise constitutionally guaranteed right of affirmative action.** (Para 29)

The sole submission of the learned counsel appearing for the appellant-State authorities is that since the respondent-petitioner did not furnish the caste certificate as per the requirement of Note-3 appended to Clause 5.4 of the advertisement and also that since the caste certificate furnished by her was not in the format (Praroop-1) appended to the advertisement as such she disentitled herself to be given the benefit of being considered for the benefit of reservation available to O.B.C category candidates. (Para 11)

B. Certificate produced by a candidate claiming the benefit of reservation available to O.B.C. category candidate should evidence twin facts (1) that the candidate belongs to a group identified as such by the State Government and (2) that the candidate is not excluded as per the criteria for creamy layer prescribed by the State of Uttar Pradesh. (Para 27)

The certificate relied upon and submitted by the respondent-petitioner, dated 15.04.2021 which was issued by Tehsildar, Unnao sufficiently certifies and evidences that the respondent-petitioner belongs to an O.B.C., group identified and recognized by the State of Uttar Pradesh and further that she as per the criteria prescribed by the State of U.P. for exclusion under creamy layer does not fall in the creamy layer and hence she is eligible and entitle to claim reservation available to O.B.C. category candidate. (Para 28)

Special appeal dismissed. (E-4)

Precedent followed:

1. Gaurav Sharma Vs St. of U. P. & ors., 2017 (5) ADJ 494; 2017 (35) L.C.D. 1720 (Para 11)

Precedent cited:

1. Surendra Mohan Yadav Vs St. of U. P. & ors., Special Appeal No. 823 of 2018, decided on 05.09.2018 (Para 11)

Present special appeal assails judgment and order dated 09.09.2022, passed by learned Single Judge in Writ-A No. 4689 of 2022.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Saurabh Srivastava, J.)

Order on C.M. Application No. 01 of 2022(Application for Condonation of Delay)

1. Heard the learned Additional Chief Standing Counsel for the appellant- State authorities and Sri Deepak Singh, learned counsel representing the respondent-petitioner.

2. Having regard to the averments made in the application seeking condonation of delay, we are satisfied that the delay has sufficiently been explained.

3. Accordingly the application is ***allowed*** and the delay in filing the special appeal is hereby condoned.

Order on Special Appeal

1. The State authorities are in appeal under Chapter VIII Rule 5 of the Rules of the Court questioning the judgement and order dated 09th September, 2022 passed by the learned Single Judge whereby Writ-A No.4689 of 2022 filed by the respondent - petitioner was allowed and the appellants were directed to accept the OBC certificate submitted by her and further to proceed with the process of selection of the respondent-petitioner on the post in question, namely, the post of Sub Inspector (Civil Police).

2. The writ petition by the respondent- petitioner was filed with the prayer to direct the State authorities, specifically the Uttar Pradesh Police Recruitment and Promotion Board (hereinafter referred to as "the recruitment and promotion board") to declare her result treating her a candidate belonging to Other Backward Class category.

3. The recruitment and promotion board issued an advertisement in the month of February, 2021 for direct recruitment to the post of Sub Inspector (Civil Police), Platoon Commander (PAC) and Second Fire Officer. The number of vacancies advertised through the said advertisement are 9534. The respondent- petitioner is presently working as Constable in Civil Police and was recruited on the said post under the reserved category of Other Backward Classes. Pursuant to the advertisement in question, she submitted her application and along with the application she also furnished a certificate issued by the Tehsildar Unnao, on 15.04.2021, which is available at page-97 of the Special Appeal. By furnishing the said certificate, the respondent- petitioner claimed that her candidature for recruitment to the post in question be considered as a reserved category candidate belonging to Other Backward Class.

4. The respondent- petitioner participated in the written examination and also in the Physical Efficiency Test. The final marks obtained by the respondent-petitioner on the basis of written examination/ physical efficiency test are 287.03, whereas the last candidate belonging to OBC category selected had secured 285.03 marks. The last candidate in the open category i.e. Unreserved category selected, has secured 296.5 marks. These cut off marks in different categories are in respect of the female candidates.

5. At the time of verification of documents, it was discovered that the certificate submitted by the respondent-petitioner for seeking benefit of reservation in appointment in question was not in the format as per the advertisement pursuant to which selections were made.

6. Accordingly, the respondent - petitioner has been denied recruitment/ appointment on the post of Sub-Inspector or any other equivalent post by treating her to be an open category candidate and also for the reason that since the last open category candidate selected had secured 296.5 marks whereas the marks obtained by the respondent- petitioner were 287.03 hence she could not get selected in the open category on the basis of her merit. It is not denied by the appellant- State authorities that the only reason for not treating the respondent-petitioner's candidature as a reserved category candidate belonging to Other Backward Class is that she did not submit the caste certificate as per the format (Praroop-1) appended with the advertisement.

7. Learned counsel for the appellant-State Authorities has vehemently argued that as per the Notes appended to Clause 5.4 of the advertisement, the benefit of reservation to those candidates who belong to Other Backward Classes but fall in the creamy layer will not be available. Drawing out attention to Note 3 appended to clause 5.4 of the advertisement, it has been argued by learned State Counsel that the said provision in the advertisement clearly provides that the candidates belonging to Other Backward Classes as mentioned in Schedule-I of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 (hereinafter referred to as the Reservation Act 1994) will not be entitled to the benefit of reservation if they fall in the creamy layer category. He has also stated that as per the stipulation made in Note 3, the caste certificate to be submitted by the candidates claiming the benefit of reservation available to Other Backward Classes shall be in a format (Praroop -1) and should have been issued on or after 01st April, 2020 but till the last date of making the application. That is to say, the caste certificate to be submitted by the candidate concerned should have been issued between 01st April, 2020 and 30the April, 2021 for the reason that 30th April, 2021 was the last date as per the advertisement to make the application. Note 3 appended to Clause 5.4 to the advertisement is extracted hereunder :-

(3) उत्तर प्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जन जातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम-1994 (समय-समय पर यथा संशोधित) की अनुसूची-दो के अनुसार क्रीमीलेयर के अन्तर्गत आने वाले उत्तर प्रदेश के अन्य पिछड़े वर्ग के अभ्यर्थियों को आरक्षण का लाभ अनुमन्य नहीं है । अन्य पिछड़े वर्ग के लिए जाति प्रमाण-पत्र (प्रारूप-1) 01 अप्रैल, 2020 या उसके बाद का हो परन्तु अभ्यर्थी द्वारा इस भर्ती हेतु आवेदन करने की तिथि तक निर्गत होना चाहिए (अभ्यर्थी द्वारा आवेदन करने की अन्तिम तिथि 30-04-2021 को आवेदन करने की स्थिति में जाति प्रमाण- पत्र दिनांक: 30- 04-2021 तक निर्गत होना चाहिये)

8. Praroop-1 as per the advertisment is also extracted hereunder:-

प्रारूप-1

<u>उत्तर प्रदेश के अन्य पिछड़े वर्ग के लिए जाति प्रमाण-पत्र</u>

शासनादेश संख्या-13/22/16/92/टीसी-iii-का-2/2014 दिनांक 17 दिसम्बर, 2014

प्रमाणित किया जाता कि श्री/श्रीमती/कुमारी.....सुपुत्र/ सुपुत्री /श्री..... निवासी ग्राम..... तहसील.....नगर..... जिला.....उत्तर प्रदेश राज्य की ..... पिछड़ी जाति के व्यक्ति हैं। यह जाति उत्तर प्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण अधिनियम, 1994 (यथासंशोधित) की अनुसूची- एक के अन्तर्गत मान्यता प्राप्त हैं। यह भी प्रमाणित किया जाता है कि श्री/श्रीमती/कुमारी ....पूर्वोक्त अधिनियम 1994 (यथासंशोधित) की अनुसूची-दो (जैसा कि उत्तर प्रदेश लोक सेवा) (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) (संशोधन) अधिनियम 2001 द्वारा प्रतिस्थापित किया गया है एवं जो उ०प्र० लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) (संशोधन) अधिनियम 2002 द्वारा संशोधित की गयी है, से आच्छादित नहीं हैं। इनके माता पिता की निरन्तर तीन वर्ष की अवधि के लिये सकल वार्षिक आय आठ लाख रूपये या इससे अधिक नहीं है तथा इनके पास धनकर अधिनियम 1957 में यथा विहित छूट सीमा से अधिक सम्पत्ति भी नहीं है। श्री/श्रीमती/कुमारी..... तथा/अथवा उनका परिवार उत्तर प्रदेश के ग्राम.....तहसील.....नगर..
.....जिला.....में सामान्यतः रहता है।
स्थान.....
दिनांक.....
मुहर..... हस्ताक्षर..
पूरा नाम.
पदनाम...

जिलाधिकारी/अतिरिक्त जिलाधिकारी/ सिटी मजिस्ट्रेट/परगना मजिस्ट्रेट/ तहसीलदार

9. The caste certificate which was submitted by the respondent- petitioner claiming the benefit of reservation available to the candidates belonging to other backward classes which is available at page 97 of the special appeal is also extracted herein below:

उत्तर प्रदेश शासन

FORM OF
CERTIFICATE TO BE PRODUCED BY OTHER BACKWARD CLASSES
APPLYING FOR APPOINTMENT TO POSTS UNDER THE GOVERNMENT OF INDIA
जिला उन्नाव
तहसील उन्नाव
आवेदन क्र० 211560030073539 जारी दिनांक 15/04/2021
प्रमाणपत्र क्र०26321300698

This is to certify that RINKI YADAV sond/aughter of RADHELAL YADAV mother's name RAMKANTI YADAV R/o 84,KUDDU KHERA SINGROS Tehsil उन्नाव Distict उन्नाव in the Uttar Pradesh state belongs to the Ahir Community which is recognized as a backward class under the Government Of India, Ministry of Welfare Resolution No. 12011/68/93-BCC(C) dated 10th Sept. 1993, published in the Gazelle of India Extra Ordinary Part-I Section-I Dated 13th Sept, 1993 and onwards till date.

RINKI YADAV and/or his family ordinarily reside(s) in the 84,KUDDU KHERA SINGROSI of the Tehsil उन्नाव District उन्नाव of the Uttar Pradesh state

This is also to certify that he/she does not belongs to the persons/sections (Creamy Layer) mentioned in column 3 of the schedule to the Government Of India, Department of Personnel & Training O.M.No. 36012/22/93 Estt(SCT) dated 08-09-93 or the latest notification of the Government of India.which is modified vide OM No. 36033/3/2004 Estt.(Res.) dated 09/03/2004 and further modified vide OM No. 36033/3/2004-Estt. (Res.) dated 14/10/2008 or the latest notification of the Government of India.

10. The said certificate was issued on 15th April 2021 by the Tehsildar and certifies that the respondent - petitioner daughter of Radhey Lal Yadav, whose mother's name is Ram Kanti Yadav belongs to Ahir community which is recognized as a Backward Class under the Government of India Resolution dated 10th September, 1993 published in the Gazette dated 13th September, 1993. It also certifies that she does not belong to the persons/sections (creamy layer) mentioned in the Office Memorandum issued by the Government of India, Department of Personnel & Training, dated 8.9.1993 as modified by Office Memorandum dated 9.3.2004 and 14.10.2008 or the latest notification of the Government of India.

11. The sole submission of the learned counsel appearing for the appellant-State authorities is that since the respondent-petitioner did not furnish the caste certificate as per the requirement of Note-3 appended to Clause 5.4 of the advertisement and also that since the caste certificate furnished by her was not in the format (Praroop-1) appended to the advertisement as such she disentitled herself to be given the benefit of being considered for the benefit of reservation available to O.B.C category candidates. Learned counsel for the appellant-State authorities has relied upon a Division Bench of this court in the case of **Surendra Mohan Yadav vs. State of Uttar Pradesh and others** decided on 5th September, 2018 (Special Appeal No.823 of 2018), wherein, according to him, it has been held that if a candidate fails to submit O.B.C certificate as per the format prescribed in the advertisement and rather furnishes the certificate which related to the appointments to the post under the Government of India and not under the State of Uttar Pradesh, then candidature of such a candidate cannot be considered in O.B.C. category. The Division Bench judgement dated 5th September, 2018 places reliance on the Full Bench judgment of this court in the case of **Gaurav Sharma vs. State of Uttar Pradesh and others reported in 2017 (5) A.D.J. 494, equivalent citation of which is 2017 (35) L.C.D 1720.**

12. The issue which has emerged to be answered by this court in this case is as to whether by not submitting the caste certificate in the format as prescribed in the advertisement rather submitting the same in the format which has been prescribed by the State of U.P. itself for the purposes of issuing the caste certificate for claiming the benefit of reservation available to O.B.C. category candidates for appointment to the posts under the Government of India, the respondent-petitioner disentitled herself for claiming such benefit.

13. As per clause 5.4 of the advertisement a candidate claiming the benefit of reservation available to O.B.C. category candidates was required to submit the caste certificate with a certification to two facts, (1) that the candidate does not

fall foul of creamy layer and (2) that the certificate ought to have been issued by the competent authority between the period 1st April 2020 and 30th April, 2021.

14. So far as the caste certificate furnished by the respondent-petitioner is concerned it was issued by the competent authority i.e, the Tehsildar concerned on 15th April, 2021, which date falls within the period prescribed for obtaining the certificate as per the stipulation made in the advertisement itself i.e, between 1st April 2020 and 30th April, 2021. The certificate relied upon by the respondent-petitioner also clearly certifies that she does not fall foul of creamy layer as per the notification issued by the Government of India in the department of Personnel & Training by means of the office memorandum dated 8th September 1993 or/and the latest notifications including the notifications dated 9th March, 2004 and 14th October, 2008.

15. One of the issues which was considered by the Full Bench in the case of **Gaurav Sharma (Supra)** was as to whether there exists any irreconcilable difference or repugnancy between the norms fixed by the Union and State Governments with regard to certification of creamy layer? ***If not, its effect***. It is also relevant to point out that petitioner in the Gaurav Sharma case had also submitted the certificate certifying that he belonged to the O.B.C, category in the same format in which the respondent-petitioner obtained the caste certificate and submitted the same for seeking benefit of the reservation available to O.B.C category candidates. The format in which the respondent-petitioner obtained the certificate is prescribed by the State of Uttar Pradesh. This fact is not in dispute, however, as stated by the learned counsel for the appellant-State authorities, the said format is for claiming benefit of reservation available to O.B.C, category candidates in relation to employment under the Government of India and not in relation to employment under the State of Uttar Pradesh. The caste certificate relied upon by the candidate in the case of Gaurav Sharma has been extracted in para-5 of the said judgement which is the same in which the respondent-petitioner was issued the certificate by the Tehsildar. The Full Bench in the case of ***Gaurav Sharma (Supra)*** has opined that, **"while it is true that a caste certificate is only a recognition of an existing status, an O.B.C. candidate necessarily must establish the twin conditions of belonging to an O.B.C. group recognized by the State and also that he does not fall within the creamy layer.** In paragraph-26 of the judgment in the case of Gaurav Sharma, the Full Bench has further observed that, **"while it is true that an O.B.C. candidate even he produces a certificate which evidences that he does not stand excluded from the benefits of reservation in terms of office memorandum dated 14th October, 2008, that issue still remain as to whether he is an O.B.C, as specified and identified by the State of Uttar Pradesh.** The Full Bench further observes that, "although the certificate initially submitted by the O.B.C, candidates before the court did not stand excluded by virtue of standards fixed by the office memorandum dated 14th October, 2008, the certificate did not evidence them belonging to an O.B.C, as identified in the State of Uttar Pradesh". The court further goes on to observe that, "**for the purposes of seeking the benefit of reservation it is imperative for a candidate to establish that he belongs to O.B.C, as recognized and identified by the State concerned**

and further that he/she does not fall within the field of exclusion".

16. Finally answering the issue (C), it has been said by the Full Bench in para-27 of the report that:

"27. We accordingly answer Question No. 1 in the negative and hold that an OBC candidate is not exempt from the rigours of a cut off or last date prescribed in an advertisement or recruitment notice. We further declare that Arvind Kumar Yadav correctly articulates the law on the issue and overrule Pravesh Kumar and Shubham Gupta. Insofar as Question No. 3 is concerned, we hold that although there is no repugnancy in the norms fixed by the Union and State Government, the same would have no favourable impact upon the eligibility of a candidate unless he also furnishes a certificate evidencing him as belonging to the OBC category as recognised and identified by the State."

17. Thus the Full Bench in the case of **Gaurav Sharma (Supra)** has found that so far as the certification of creamy layer is concerned, there is no repugnancy in the norms fixed by the Union and the State Government. Accordingly, we have no hesitation to hold that in so far as the exclusion under the creamy layer is concerned, the respondent-petitioner could not be excluded for the reason that the certificate furnished by her clearly states that she does not stand excluded from the rigorous of creamy layer in terms of the notification issued by the Central Government. The Full Bench has already held that so far as the criteria for exclusion under the creamy layer component is concerned there does not exist any repugnancy between the criterion laid down by the State Government and the Central Government.

18. We however, also notice that the Full Bench has categorically held that even if a candidate produces a certificate evidencing that he/she does not get excluded from the rigorous of creamy layer he/she would still have to possess a certificate evidencing that he/she belongs to an O.B.C. group as identified and recognized by the State of Uttar Pradesh. For considering the aforesaid aspect, what we find is that the certificate furnished by the respondent-petitioner dated 5.4.2021 which was issued by the competent authority i.e, the Tehsildar clearly certifies that she belongs to "Ahir" community which is recognized as backward class under the Government of India Resolution dated 10.9.1993 which was published in the Gazette of India, extraordinary dated 13th September, 1993.

19. To test as to whether the said certificate would suffice to evidence that the respondent-petitioner belongs to a group identified, recognized and categorized by the State of Uttar Pradesh as well as O.B.C, we need to examine said identification, categorization and recognition made by the Government of India and State of Uttar Pradesh. If in this particular case i.e, in respect of "Ahir" community there does not exist any repugnancy between the specification made for the said purpose by the Government of India as also by the State of Uttar Pradesh, we are very clear in our mind that the certificate furnished by the respondent-petitioner clearly will suffice to certify that the respondent-petitioner belongs to a community identified by the State of Uttar Pradesh as an O.B.C group and accordingly she will be entitled to seek the benefit of reservation available to an O.B.C. category candidate even while seeking employment under the State of Uttar Pradesh.

20. The Schedule-1 appended to Reservation Act 1994 is referable to Section-2 (b) of th said Act. Section 2(b) of the Reservation Act defines other backward classes of citizens to mean the backward classes of citizens specified in Schedule-1. Schedule-1 appended to the Reservation Act 1994 is extracted herein below:-

[SCHEDULE-I]
[See Section 2(b)]

1. Ahir, Yadav, Gwala, Yaduvanshiya
41. Bhurji, Bharbhunja, Bhooj, Kashaudhan
2. Sonar, Sunar, Swarnkar
42. Bhathiara
3. Jat 43. Mali,Saini
4. Kurmi, Chanau, Patel, Patanwar, 44. Sweeper (Those not included in
Kurmi-Mall,Kurmi-Seinthwar Scheduled Caste Category),Halalkhor
5. Giri 45. Lohar, Lohar-Saifi
6. Gujar 46. Lonia, Nonia, Gole-Thakur, Lonia- Chauhan
7.Gosain 47. Rangrez, Rangwa
8. Lodh, Lodha, Lodhi, Lot, Lodhi-Rajput 48. Marchcha
9. Kamboj 49. Halwai, Modanwal
10.Arakh, Arakvanshiya 50. Hajjam, nai, Salmani, Savita, Sriwas
11.Kachchi, Kachchi-Kushwaha, Shakya 51. Rai Sikh
12.[xxx]52. Sakka-Bhisti, Bhisti-Abbasi
13.[xxx] 53. Dhobi (Those not included in the scheduled castes or scheduled tribes category
14.Kisan 54. Kasera,Thathera, Tamrakar
15.Koeri 55. Nanbai
16[xxx] 56. Mirshikar
17.Kasgar 57. Shekh Sarwari (Pirai), Peerahi
18.Kunjra or Raeen 58. Mev, Mewati
19.Gareria, Pal,Vaghel 59. Koshta/ Koshti
20.Gaddi, Ghoshi 60. Ror
21.Chikwa, Qassab Qureshi, Chak 61. Khumra, Sangatarash, Hanseri
22.Chhippi, Chipa 62 Mochi
23.Jogi 63. Khagi
24.Jhoja 64. Tanwar Singharia
25.Dhafali 65. Katuwa
26.Taraoli, Barai, Chaurasia 66. Maheegeer
27.Teli, Samani, Rogangar, 67. Dangi Sahu, Rauniar,Guandhi, Arrak
28.Darji, Idrisi, Kakutstha 68. Dhakar
29. [x x x] 69. Gada
30.Naqqal 70. Tantawa
31. Nat (Those not included in 71.Joria
Scheduled Castes category)
32. Naik 72. Patwa, Patahra, Patehara, Deovanshi
33. Faqir 73. Kalal, Kalwar, Kalar
34. Banjara, Ranki, Mukeri, Mukerani 74. Manihar, Kacher Lakhara
35. Barhai, Saifi, Vishwakarma Panchal, 75. Murao, Murai, Maurya Ramgadhiya, Jangir, Dhiman
36.Bari 76. Momin (Ansar)
37. Beragi 77. Muslim Kayastha
38.[x x x] 78. Mirasi
39.Biyar 79. Naddaf (Dhuniya), Mansoori, Kandere, Kadera, Karan (Karn)].
40.[x x x]

21. A perusal of afore quoted Schedule-1 appended to 1994 Reservation Act clearly reveals that entry-1 therein mentions the community "Ahir". Accordingly as per the identification and recognition made by the State of Uttar Pradesh for a particular community belonging to other backward class, the entries in Schedule-1 is the only source for determination of such an issue. Admittedly "Ahir" community is included in the

Schedule-1 at entry-1 and hence in terms of the identification made by the State of Uttar Pradesh for providing reservation available to O.B.C category candidates, persons belonging to "Ahir" community are identified and recognized for the said purpose.

22. If we examine the notification published in the Gazette of India, extraordinary dated 13th September, 1993 which publishes the resolution of the Government of India dated 10th September, 1993 what we find is that in the State of Uttar Pradesh Ahir community is listed at Serial No.1. Accordingly, on examination of the identification made by the Government of India as also by the State of Uttar Pradesh for the purposes of inclusion of a particular group or community amongst the Other Backward Classes or citizens entitle to seek benefit of reservation available to them, we find that there does not exist any repugnancy as far as "Ahir" community is concerned. The reason for us to observe that there is no such repugnancy is that "Ahir" community finds mentioned in the notification of the Government of India dated 13th September 1993 which published the resolution of the Government of India dated 10th September 1993 and it is also included at Entry-1 of Schedule-1 appended to 1994 Reservation Act passed by the Legislature of State of Uttar Pradesh.

23. Learned counsel for the appellant-State has also made his submissions based on the provisions contained in Section-9 of the Reservation Act 1994 which provides that for the purposes of reservation provided under the said Act Caste certificate shall be issued by such authority or officer in such manner or form as the State Government may, by order provide.

24. Learned State counsel representing the appellant-State authority does not dispute that the authority who has issued the caste certificate dated 15th April, 2021 which was furnished by the respondent-petitioner claiming the benefit of reservation available to OBC category candidates has been issued by the Tehsildar who is the competent authority as provided by the State Government for the purposes of issuing caste certificate. The Schedule appended to the **Uttar Pradesh Janhit Guarantee Adhiniyam, 2011 (U.P. Act No.3 of 2021)** also prescribes the Tehsildar to be the authority competent to issue caste certificate.

25. The only reservation expressed by the learned State counsel to the caste certificate dated 15th April, 2021 is that it is not issued in the manner prescribed by the State Government. The basis for such an argument as advanced by learned State Counsel is that the certificate dated 15th April, 2021 which had been issued by the Tehsildar clearly mentioning therein that it is a certificate to be produced by other backward classes applying for appointment to post under the Government of India. His submission is that the format as appended to the advertisement (Praroop-1) is the form prescribed by the Government for issuance of caste certificate to those who apply for appointment to the post under the State of Uttar Pradesh.

26. It is not in dispute that both the formats i.e, the format in which the respondent-petitioner had obtained the certificate which was issued to her by Tehsildar and the format as appended to the advertisement have been prescribed by the State of Uttar Pradesh itself. The first format is for a certificate to be produced by O.B.C. category candidate applying for

appointment to the posts under Government of India whereas the format as appended to the advertisement has been prescribed by the State to be produced by the Other Backward Classes candidates who apply for appointment to the posts under the State of Uttar Pradesh. The Full Bench of this Court in the case of **Gaurav Sharma (supra)**, as discussed above, has already found that so far as the criteria for exclusion on account of a person belonging to creamy layer is concerned there does not exist any repugnancy between the prescriptions made for the said purpose by the Government of India and by the State of Uttar Pradesh. The issue as to whether there is any repugnancy, so far as any person belonging to "Ahir" community claiming his/her status as O.B.C, as prescribed by the State of Uttar Pradesh and the Government of India was not an issue before the Full neither has it been discussed and considered. However, if we examine the reasoning given by the Full Bench for recording that no repugnancy exists so far as the criteria for exclusion of a candidate on account of creamy layer is concerned and apply the same to examine as to whether there is any repugnancy between the identification of a particular community as O.B.C, by the State of Uttar Pradesh and by the Government of India, we find that as far as "Ahir" community is concerned there does not exist any repugnancy. "Ahir" community is included as O.B.C. in the notification issued on 13.09.1993 on the basis of Resolution of the Government of India dated 10th September 1993 as published in the Gazette dated 13th September 1993. Similarly "Ahir" community is mentioned at Entry-1 of Schedule-1 of the 1994 Reservation Act. Hence there is no discrepancy in inclusion of "Ahir" community amongst the Other Backward Classes exist in case any person belonging to "Ahir" community claims reservation available to O.B.C, category candidates for appointment to posts either under the Government of India or under the State of Uttar Pradesh.

27. We may reiterate the basic principle which runs as a common thread through out the judgment of the Full Bench of this court in the case of **Gaurav Sharma (supra)** and the thread is that certificate produced by a candidate claiming the benefit of reservation available to O.B.C. category candidate should evidence twin facts (1) that the candidate belongs to a group identified as such by the State Government and (2) that the candidate is not excluded as per the criteria for creamy layer prescribed by the State of Uttar Pradesh.

28. Applying the reasoning as given by the Full Bench in the case of **Gaurav Sharma (supra)**, we, accordingly, are of the opinion that the certificate relied upon and submitted by the respondent-petitioner, dated 15th April 2021 which was issued by Tehsildar, Unnao sufficiently certifies and evidences that the respondent-petitioner belongs to an O.B.C, group identified and recognized by the State of Uttar Pradesh and further that she as per the criteria prescribed by the State of Uttar Pradesh for exclusion under creamy layer does not fall in the creamy layer and hence she is eligible and entitle to claim reservation available to O.B.C. category candidate.

29. Before parting with this case, we may observe that benefit of reservation in public employment to different disadvantaged sections of Society is permissible under the Constitution of India as an affirmative action. It is not in dispute that the respondent-petitioner was given

appointment while she claimed the benefit of reservation available to O.B.C. candidates in her selection to the post of Constable (Civil Police). Merely because the certificate produced by her was not in Praroop-1, though the certificate produced by her clearly evidences that she belongs to an O.B.C, group as identified by the State of Uttar Pradesh and also that she does not get excluded as a person belonging to creamy layer in terms of the criteria laid down by the State of Uttar Pradesh for the said purpose, it should not be taken aid of by the State authorities for denying her otherwise constitutionally guaranteed right of affirmative action.

30. For the reasons aforesaid, we do not find any good ground to interfere with the judgment and order dated 9th September 2022 passed by learned Single Judge in Writ-A No.4689 of 2022. The special appeal is hereby **dismissed**.

31. The appellants shall comply with the said order date 9th September 2022 passed by the learned Single Judge at the earliest.

32. There will be no order as to costs.

(2022) 12 ILRA 416
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal No. 403 of 2019
with
Special Appeal Nos. 399 of 2019, 660 of 2020(Allahabad), 465 of 2020(Allahabad),463 of 2020(Allahabad), & 775 of 2020(Allahabad)

State of U.P. ...Appellant
Versus
Anurag & Ors. ...Respondents

Counsel for the Appellant:
Sri Ajay Kumar Mishra, Advocate General, Mr. M.C. Chaturvedi, Addl. Advocate General, Mr. Suresh Singh, Addl. C.S.C. in person, Dr. L.P. Mishra, Sr. Advocate with Mr. Sarvesh Dubey, Advocate and Mr. Ran Vijay Singh, Addl. C.S.C. through V.C.

Counsel for the Respondents:
Mr. H.N. Singh, Senior Advocate with Mr. Rishabh Srivastava and Ms. Durga Tiwari, Mr. A.P. Singh, Mr. V.P. Singh, Ms. Geeta Chauhan, Ms. Pratima Rani, Ms. Richa Singh, Mr. Satyendra Kumar Om, Advocates in person and Mr. Mukund Madhav Asthana, Mr. Hemant Kumar Mishra, Ms. Surangama Sharma and Ms. Meenakshi Singh Parihar, Advocates through V.C.

A. Education/Service Law – Appointment – Honorarium - Right of part time Instructors engaged to teach children in Upper Primary Schools on contract - The Right of Children to Free and Compulsory Education Act, 2009: Section 1(3), 2(f), 7 - The decision of the Project Approval Board, as already said, to remunerate part time Instructors @ Rs.17,000/- per month was for the year 2017-18 and not in perpetuity. The direction that goes beyond that period of time cannot at all be countenanced - The learned Single Judge was not right in issuing a mandamus in perpetuity, based on the decision of the Project Approval Board dated 27.03.2017, to pay the writ petitioners honorarium @ Rs.17,000/- per month. The proposal to pay honorarium @ Rs.17,000/- per month was accepted by the Project Approval Board as part of the recurring expenditure under the head of honorarium, payable to part time Instructors for the year 2017-18. The decision of the Project Approval Board was taken on the basis of a proposal by the State Government to increase the honorarium of part time Instructors to Rs.17,000/- per month for the year 2017-18. Decisions about the recurring expenditures of the project, that is to say, Sarva Shiksha Abhiyan are taken for each financial year.

The learned Single Judge was not at all justified in issuing a mandamus ordering the appellants to pay honorarium to the writ petitioners with effect from the month of March, 2017 till the date of judgment @ Rs.17,000/- per month. At the most, the learned Single Judge could have considered the case of the writ petitioners about their entitlement to receive honorarium @ Rs.17,000/- per month for the year 2017-18, regarding which the decision was taken by the Project Approval Board. (Para 31)

B. A perusal of the Schedule appended to the Act of 2009 would show that in cases of school imparting education for Classes VI-VIII, where number of children admitted is above 100, apart from a full time head-teacher & ors., part time Instructors to impart Art Education, Health and Physical Education and Work Education are imperative. The engagement, therefore, of part time Instructors in Art Education, Health and Physical Education, besides Work Education is an integral part of the scheme of the Act of 2009. A school that is teaching Classes VI-VIII, which is precisely the case here, where the number of students exceed 100, part time Instructors in the above subjects cannot be left out. **Part time Instructors like the writ petitioners are governed by the Act of 2009.** (Para 35)

C. The Act of 2009 gives teeth to the fundamental right guaranteed u/Article 21A of the Constitution. The free and compulsory education postulated for children in the age group of 6-14 years is quality education. (Para 38)

Importance of quality education - Education is an investment made by the nation in its children for harvesting a future crop of responsible adults productive of a well-functioning society. Education connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs. (Para 38)

D. The State by an executive decision taken through the Executive Committee, Shiksha Pariyojna Parishad, acting at the instance of the State Government, cannot undo or rescind what the Project Approval Board sanctioned for the relevant year as the estimate of capital and recurring expenditure to implement the provisions of the Act of 2009. Any shortfall in the Central share would be the State Government's responsibility to make good. The learned Single Judge, has rightly analyzed the position that the decision of the Project Approval Board in their meeting dated 27.03.2017, accepting the proposal of the State Government for payment of honorarium to the writ petitioners @ Rs.17,000/- per month was a decision taken in exercise of powers u/s 7(2) of the Act of 2009. It has also been noticed by the learned Single Judge that S. 7(5) casts the residual responsibility to provide funds for implementation of the provisions of the Act of 2009 upon the State Government after the Central Government has made its contribution. Thus, once for the project in question and to the benefit of the writ petitioners a decision had been taken by the Project Approval Board on 27.03.2017 in exercise of powers u/s 7(2), notwithstanding the State Government's case that the Central Government did not provide the entire share according to the estimated expenditure for the said year, the State Government cannot absolve itself of its responsibility to provide funds for the project u/s 7(5). Of course**, the Central Government could be approached by the State Government to invoke the provisions of S. 7(4) for a request to the President to make a reference to the Finance Commission for allocation of additional funds. That is not something, which is relevant for the adjudication of the writ petitioners' rights. The writ petitioners are entitled to the benefit of the decision of the Project Approval Board dated 27.03.2017, unaffected by its review by the Executive Committee, Shiksha Pariyojna Parishad or even by the State Government.** (Para 41)

Decision dated 27.03.2017, was a concluded decision and not in any manner tentative, provisional or conditional. The decision of the Project Approval Board is statutory in character and referable to the powers of the Central Government u/s 7(2) of the Act of 2009. The decision has binding force. Therefore, the State Government have to remunerate the writ petitioner-respondents @ Rs.17,000/- per month for the year 2017-18. However, the writ petitioners are not required to be remunerated at that rate for the subsequent years. (Para 45, 46)

Special Appeal Nos. 403 of 2019, 399 of 2019 filed at Lucknow Bench and Special Appeal Nos. 775 of 2020 and 463 of 2020 and Special Appeal Defective No. 660 of 2020 are allowed in part. **The judgments of the learned Single Judge are set aside to the extent that these direct payment of honorarium to the writ petitioners beyond the year 2017-18, including incidental directions regarding payment of interest etc. The judgment is upheld only to the extent that it directs payment of honorarium to the writ petitioners for the year 2017-18 @ Rs.17,000/- per month.** Special Appeal No. 465 of 2020 is allowed as being against order passed in Writ-A No. 3169 of 2018 filed on same cause of action and on same relief on which an earlier writ petition has already been allowed. The impugned judgment passed by the learned Single Judge stands set aside and the writ petition dismissed. (Para 48) (E-4)

Precedent followed:

1. St. of T. N. & ors. Vs K. Shyam Sunder & ors., (2011) 8 SCC 737 (Para 38)

Present special appeal is directed against the judgment and order dated 03.07.2019, passed by learned Single Judge.

(Delivered by Hon'ble Rajesh Bindal, C.J. & Hon'ble J.J. Munir, J.)

ORDER

1. This order will dispose of a bunch of Appeals raising similar questions of law and fact. Writ Petition No. 7631 (SS) of 2018, titled as "Anurag and another vs. U.O.I. through Secretary, Ministry of Human Resource Development and others' and Writ Petition No. 27505 (SS) of 2018, titled as "Amit Verma and others vs. U.O.I. through Secretary, Ministry of Human Resource Development, School Education & Literacy and others' were decided by the Lucknow Bench of this Court by a common order dated July 3, 2019. Subsequently, the same order was followed at Allahabad in Writ-A No. 55328 of 2017, titled as "Rakesh Patel and another vs. Union of India and others', Writ-A No. 3169 of 2018, titled as "Bhola Nath Pandey vs. Union of India', Writ-A No. 55334 of 2017, titled as "Bhola Nath Pandey and others vs. Union of India and others' and Writ-A No. 3119 of 2018, titled as "Anita Kushwaha and another vs. Union of India through its Secretary, Ministry of Human Resources Development'.

2. To avoid repetition and give opportunity to the Counsel appearing for the parties, all the Appeals were taken up together. The Appeals pertaining to Lucknow Bench were heard through Video Conferencing, whereas in the Appeals filed at Allahabad, the Counsel were heard in person. The details of the Appeals are as under:

Sl. No.	Special Appeal	Arising out of	Decided on
Appeals pertaining to Writs decided by the Lucknow Bench			
1.	Special Appeal No. 403 of 2019	Service Single No. 7631 of 2018	03/07/2019

2.	Special Appeal No. 399 of 2019	Service Single No. 27505 of 2018	03/07/2019
Appeals pertaining to Writs decided at Allahabad			
3.	Special Appeal Defective No. 660 of 2020	Writ-A No. 55328 of 2017	20/08/2019
4.	Special Appeal No. 465 of 2020	Writ-A No. 3169 of 2018	20/08/2019
5.	Special Appeal No. 463 of 2020	Writ-A No. 55334 of 2017	20/08/2019
6.	Special Appeal No. 775 of 2020	Writ-A No. 3119 of 2018	20/08/2019

3. All the Special Appeals have been filed by the State of Uttar Pradesh. Those appeals, that have been preferred before the Lucknow Bench, arise from judgments and orders of the learned Single Judge sitting at Lucknow, whereas Special Appeals numbering four, filed at Allahabad, arise out of the judgments and orders passed by the learned Single Judge at Allahabad. Since all the appeals involve common questions of fact and law, and arise out of writ petitions involving identical cause of action, seeking substantially the same relief, albeit worded differently in some writ petitions, all the appeals have been heard together by consent of parties.

4. Special Appeal No. 403 of 2019 by the State of Uttar Pradesh is directed against the judgment and order of the learned Single Judge, allowing the petition and quashing the order dated December 21, 2017 passed by the Executive Committee of the Uttar Pradesh Shiksha Pariyojna Parishad, headed by the Chief Secretary and the order dated January 2, 2018 passed by the State Project Director, Sarva Shiksha Abhiyan, U.P. (for short, 'the Project Director'). Further, the learned Single Judge has issued a mandamus to the Executive Committee of the Shiksha Pariyojna Parishad, U.P. and the Project Director to pay arrears of enhanced honorarium @ ₹17,000/- per month to the writ petitioners with effect from March, 2017 until date of judgment. The learned Judge has further directed payment of arrears of the enhanced honorarium with interest @ 9% p.a. The connected Writ Petition No. 27505 (SS) of 2018 was allowed on the same terms as the judgment rendered in Writ Petition No. 7631 (SS) of 2018.

5. Special Appeal No. 403 of 2019, shall be treated as the leading case, wherein the order impugned is a speaking order followed by the learned Single Judge in the other writ petitions. Since the leading case arises out of the impugned judgment passed by the learned Single Judge, where all relevant facts have been noticed and dealt with, the facts in the leading case shall be mentioned by us, of course, with some additions as are imperative to elucidate matters in controversy.

6. The writ petitioner-respondent No. 1 was selected and appointed on the post of Instructor, Physical Education at the Upper Primary School, Mainpur, District Raebareli, Block Amawa, District Raebareli, whereas writ petitioner-respondent No. 2 was selected and appointed on the post of Instructor, Physical Education at the Upper Primary School, Hadipur, Block Unchahar, District Raebareli. Both the writ petitioner-

respondents were appointed in the month of June, 2013, whereafter they joined the respective schools and discharged their duties.

7. The writ petitioners have pleaded the statutory regime in the foreshadow of which their rights have arisen. They have referred to the fact that the Parliament has enacted The Right of Children to Free and Compulsory Education Act, 2009 (for short, 'the Act of 2009'). By virtue of Section 1(3) of the Act of 2009, the Act aforesaid shall come into force on such date as the Central Government may by notification in the Official Gazette appoint. The relevant notification has been published in the Officer Gazette on February 16, 2010, notifying the date of enforcement as April 1, 2010. The Act of 2009 provides for the appointment of part time Physical Education Instructors for the purpose of imparting Health and Physical Education to children. Likewise, there is provision in the Act of 2009 for appointment of Art Instructors to impart education in Art, and others, for Work Education. The State Government issued a Government Order dated October 3, 2012, by which steps were taken for implementation of the supplementary plan of the Government of India provided under the Act of 2009. The Government decided that for imparting education to children in the age group of 6-14 years, for every 100 children, one part time Instructor to teach Physical Education will be appointed on contract basis.

8. It is the writ petitioners' case that the State Government amended the Government Order dated October 3, 2012 relating to appointment of Physical Education Instructors, Art Instructors and Work Education Instructors by issuing another Government Order dated January 31, 2013. Pursuant to the later order, an advertisement was issued on February 25, 2013, inviting applications from eligible and qualified candidates for appointment as part time Instructors conforming to the National Council for Teachers Education (for short, 'the NCTE') norms about minimum qualifications. It is the writ petitioners' case that in response to the advertisement dated February 25, 2013, they applied for appointment as Instructors of Physical Education. After due selection by a selection committee constituted in terms of the Government Order dated January 31, 2013, the writ petitioners were appointed as Instructors, Physical Education vide order dated June 29, 2013.

9. It is pleaded that the writ petitioners are required to possess minimum qualifications as per norms of the NCTE provided for all teachers/ instructors vide NCTE notification dated June 10, 2011. The Physical Education Instructors are said to be selected by the same selection committee, in accordance with Government Orders issued by the State Government, as the one for appointment of other teachers. The writ petitioners work to impart education in order to give effect to the provisions of the Act of 2009. It is pointed out that by some notification dated August 25, 2011, for the Instructors appointed to impart physical education, Teachers Eligibility Test, commonly called 'the TET', is not a necessary qualification. The writ petitioners have also emphasized Clause 5 of their appointment letter/ contract, which makes it mandatory that they will not directly or indirectly engage themselves in whole time or part time profession or business or enter service of any other employer. It is emphasized that

the writ petitioners discharge the same duties as done by other teachers of the institution. They teach eight periods every day, imparting education in all subjects, besides Physical Education, Art Education and Work Education. However, they have been remunerated in the past @ ₹7000/- per month.

10. The writ petitioners' case is that under the Sarva Shiksha Abhiyan implemented by the States/ Union Territories, the appointment of teachers/ part time Instructors, salary and service conditions fall within the purview of States/ Union Territories. The writ petitioners have then pleaded various provisions of Section 7 of the Act of 2009, which instead of being paraphrased may be better appreciated by reproduction verbatim:

"7. Sharing of financial and other responsibilities.--(1) The Central Government and the State Governments shall have concurrent responsibility for providing funds for carrying out the provisions of this Act.

(2) The Central Government shall prepare the estimates of capital and recurring expenditure for the implementation of the provisions of the Act.

(3) The Central Government shall provide to the State Governments, as grants-in-aid of revenues, such percentage of expenditure referred to in sub-section (2) as it may determine, from time to time, in consultation with the State Governments.

(4) The Central Government may make a request to the President to make a reference to the Finance Commission under sub-clause (d) of clause (3) of article 280 to examine the need for additional resources to be provided to any State Government so that the said State Government may provide its share of funds for carrying out the provisions of the Act.

(5) Notwithstanding anything contained in sub-section (4), the State Government shall, taking into consideration the sums provided by the Central Government to a State Government under sub-section (3), and its other resources, be responsible to provide funds for implementation of the provisions of the Act.

(6) The Central Government shall--

(a) develop a framework of national curriculum with the help of academic authority specified under section 29;

(b) develop and enforce standards for training of teachers;

(c) provide technical support and resources to the State Government for promoting innovations, researches, planning and capacity building."

11. It is the State Government, according to the writ petitioners, who are obliged to submit a proposal to the Project Approval Board, which is a body at the level of the Central Government, set up to implement the mandate of Section 7 of the Act of 2009. The writ petitioner-respondents have come up with a specific case in Paragraph 19 of the writ petition to the effect that they were paid honorarium @ ₹8470/- per month during the year 2016-17 approved by the Project Approval Board of the Central Government and in the next year ensuing i.e. 2017-18, the State Government submitted a proposal for the payment of honorarium @ ₹17,000/- per month to the Project Approval Board. The Project Approval Board by its decision reflected in the minutes of 254th Meeting held on March 27, 2017 accepted the proposal under Section 7(2) of the Act of 2009 and released funds to the State Government.

12. It is also the writ petitioners' case that the State Government for the years 2016-17 submitted a proposal to the Project Approval Board to remunerate the Instructors, which would include the writ petitioners, @ ₹15,000/- per month. The Board, however, accepted for the said year monthly remuneration in the sum of ₹8470/-, enhancing it by ₹1470/- over what was being paid. The writ petitioners have received remuneration @ ₹8470/- from March 2016 to February, 2017. It is pleaded by the writ petitioners that at this stage one Instructor, similarly situate as them, filed Civil Misc. Writ Petition No. 57632 of 2016 before this Court, seeking a direction to the Government of India to take a decision on the writ petitioners' application for considering the proposal of the State Government for the payment of honorarium @ ₹15,000/- per month. The petition was disposed of at the stage of admission with a direction that in case the writ petitioner there submits a comprehensive application/ representation raising all his grievances before respondent No. 2, the same shall be decided by a speaking order within two months.

13. It is further asserted that the Project Approval Board, which is a body constituted by the Government of India in the Ministry of Human Resource Development, Department of School Education and Literacy, for granting financial approval under the Act of 2009, sanctioned honorarium in its Meeting dated March 27, 2017 to be paid to the writ petitioners and similar Instructors @ ₹17,000/- per month. A letter dated July 7, 2017 has been issued by the Project Director, whereby the writ petitioners have been paid honorarium for the months of March, April and May, presumably 2017, as that is not clear, @ ₹8470/- instead of ₹17,000/-, approved for them by the Project Approval Board. This has been followed by another letter by the Project Director, addressed to all the District Basic Education Officers, sanctioning an honorarium of ₹8470/- to be paid to all the Instructors, including the writ petitioners, for the months of July to December. This has been followed yet again by an order dated August 24, 2017 by the Project Director, sanctioning an honorarium of ₹8470/- for the months of January and February.

14. After the aforesaid direction was issued by this Court in Civil Misc. Writ Petition No. 57632 of 2016, directing the State Government or the Project Director, whoever was respondent No.2 to the said petition, to take a decision, unrelated to that direction, the Project Approval Board, at the level of the Central Government, sanctioned honorarium to be paid to part time Instructors @ ₹17,000/- for the year 2017-18.

15. Since the State Authorities were not taking a decision in compliance with the direction issued by this Court on December 7, 2016 in Civil Misc. Writ Petition No. 57632 of 2016, the writ petitioner of the aforesaid writ petition filed Civil Misc. Contempt Application No. 4707 of 2017, seeking to punish the violator. This Court, on the contempt side, vide order dated October 26, 2017, granted one last opportunity to the Secretary, Basic Education, U.P., Lucknow to decide the representation before him, preferred by the writ petitioner of C.M.W.P. No. 57632 of 2016.

16. It is the writ petitioners-respondents' case that the Additional Chief Secretary, Department of Education,

Government of U.P. proceeded to pass an order dated June 2, 2017, where it was clearly recorded that the proposal of the State Government to pay honorarium to the part time Instructors @ ₹17,000/- per month for the year 2017-18, has been accepted by the Government of India. It is further recorded in the said order that though the demand of Rakesh Patel, part time Instructor, is for payment of honorarium @ ₹15,000/- per month w.e.f. March, 2016, the Government of India sanctioned honorarium for such part time Instructors, working in Senior Basic Schools of the Basic Shiksha Parishad @ ₹17,000/- per month for the year 2017-18. The writ petitioners have, thus, pleaded a case that the order of the Additional Chief Secretary, dated June 2, 2017, makes it clear that the decision to pay ₹17,000/- per month honorarium for the year 2017-18, had been taken by the Government of India.

17. The State Government in their counter affidavit dated May 11, 2018 filed by the Secretary, Basic Education have taken a stand that in the yearly budget for the Sarva Shiksha Abhiyan, 2017-18, the State Government proposed to increase the honorarium of part time Instructors to ₹17,000/- per month. It was recommended by the Executive Committee of the Shiksha Pariyojna Parishad, U.P. and sent to the Government of India for acceptance of the proposal. It is admitted in Paragraph No. 5 of the said counter affidavit that the Project Approval Board of the Government of India accepted the estimate for enhancement of honorarium of Instructors in principle. The Project Approval Board of the Government of India accepted the estimate of ₹20,688.13 crores as the yearly outlay for the Sarva Shiksha Abhiyan in principle, but in the minutes of the Project Approval Board, it has been recorded that the Government of India, according to the budget available, would contribute to the Sarva Shiksha Abhiyan a sum of ₹3943.40 crores, which shall be released as the Central Share to the State of U.P., wherein teacher's salary and non-salary account heads would be included. The stand is that the total expenditure on the Sarva Shiksha Abhiyan approved ₹20,688.13 crores for the year 2017-18, as already mentioned, wherein the total estimate of outlay sanctioned by the Project Approval Board under the head of teachers' salary/ honorarium is a sum of ₹18,284.37 crores. Of the aforesaid estimated expenditure on the teachers' salary/ honorarium, the Central share has been pegged down to a figure of ₹3943.40 crores.

18. It is the State Government's case that the Centre have contributed much less than their share to the Sarva Shiksha Abhiyan, where the sharing has to be done in cases of States like Uttar Pradesh in the proportion of 60:40, that is to say, the Central Government bearing 60% of the burden. It is on account of the short contribution by the Centre that the State Government say that they were compelled to review their proposal and decision to pay in honorarium ₹17,000/- per month to part time Instructors during the year 2017-18, and, instead, enhanced it to a lower figure of ₹9800/- per month.

19. A supplementary counter affidavit has also been filed in the writ petition on behalf of respondent No. 3 there, that is to say, the Secretary, Basic Education, Government of U.P., where in compliance with the order of the Court passed in the writ petition on July 9, 2018, saying that the learned Additional Chief Standing Counsel appearing on behalf of the State

respondents had, in substance, stated to the effect that the Central Government and the State Government were working together to better the lot of teachers by enhancing their remuneration, upon which the learned Additional Chief Standing Counsel would report back in two weeks, the Secretary in the supplementary counter affidavit has averred that far from enhancement of the honorarium claimed, currently the payment of honorarium has been restricted to ₹7000/- per month under the Sarva Shiksha Abhiyan and the State Government is not in a position to manage funds to enhance the honorarium.

20. The learned Single Judge has taken note of the fact that the decision of the Project Approval Board, Sarva Shiksha Abhiyan dated March 27, 2017, which is a decision by the Central Government, provides vide Clause 8 of the minutes, that the State Government, after taking into consideration the sum provided by the Central Government and the mandatory matching share by the State, provide the balance fund to fulfill the estimate of the expenditure out of its own resources, including additional funds, that may be provided through the Finance Commission to meet the shortfall. The learned Judge has taken note of a letter dated July 18, 2017 issued by the Government of India to the State Government, represented by the Chief Secretary, where it is noticed that Para 7 clearly mentions that with enhanced devolution of funds, the State Government may like to consider allocating more funds for school education so as to implement the obligations under Section 7(5) of the Act of 2009.

21. The learned Single Judge has noticed the stand of the State Government in their counter affidavit acknowledging the fact that the Executive Committee of the Shiksha Pariyojna Parishad, U.P. reviewed the matter of honorarium payable to part time Instructors in their meeting dated December 21, 2017 and sanctioned ₹9800/- per month, which they say is permissible under the law. It has also been noticed by the learned Single Judge that in Paragraph 7 of the rejoinder affidavit, it is mentioned that on March 27, 2017, the Project Approval Board in their 254th Meeting had accepted the proposal of the State Government for payment of honorarium @ ₹17,000/- to the writ petitioners and other similarly situate Instructors, and that the Executive Committee had no vested powers to review a decision taken by the Project Approval Board, a body acting under Section 7 of the Act of 2019.

22. The learned Judge has opined that the State Government have no right by their executive instruction to withdraw a benefit that has been conferred upon the writ petitioners by the Project Approval Board, functioning under Section 7 of the Act of 2009. He has referred to the principle that rights created under statutory rules cannot be taken away by executive instructions. Executive instructions cannot override or supersede statutory rules. The learned Judge has, therefore, concluded that the decision of the Project Approval Board dated March 27, 2017 accepting the proposal of the State Government for payment of honorarium @ ₹17,000/- per month to the writ petitioners under Section 7(3) of the Act of 2009, which is a statutory provision for payment of honorarium, could not have been reviewed by the Executive Committee of Shiksha Pariyojna Parishad of State Government, who had no power or authority to undo the Project Approval Board's decision. It is for this reason that scaling down the honorarium

payable to the writ petitioners for the year 2017-18 from a figure of ₹17,000/- to ₹9800/- vide orders dated December 21, 2017 and January 2, 2018 have been found invalid by the learned Single Judge, who has quashed those orders. Now, the learned Judge has issued a mandamus directing the Government of U.P. and the Project Director to pay arrears of enhanced honorarium @ ₹17,000/- to the writ petitioners w.e.f. March, 2017 till date. The learned Judge has directed payment of interest @ 9% per month on the arrears of enhanced honorarium on the foot of the reasoning that though the Executive Committee of the Shiksha Pariyojna Parishad had decided to reduce the honorarium from ₹17,000/- per month to ₹9800/- per month vide order dated December 21, 2017 since quashed by the learned Judge, but the writ petitioners have not been paid honorarium @ ₹9800/-; instead they have been paid honorarium @ ₹8470/- per month.

23. Aggrieved, the State of Uttar Pradesh and their officials in the appropriate department have appealed under Chapter VIII Rule Rule 5 of the Rules of Court.

24. Heard Mr. Ajay Kumar Mishra, learned Advocate General, Mr. M.C. Chaturvedi, learned Additional Advocate General, Mr. Suresh Singh, learned Additional Chief Standing Counsel and Dr. L.P. Mishra, learned Counsel for appellants, and Mr. H.N. Singh, learned Senior Advocate with Mr. Rishabh Srivastava and Ms. Durga Tiwari, Mr. A.P. Singh, Mr. V.P. Singh, Ms. Geeta Chauhan, Ms. Pratima Rani, Ms. Richa Singh, Mr. Satyendra Kumar Singh, Mr. B.M. Singh and Mr. Sanjay Kumar Om, Advocates for respondents.

25. It has been argued by the learned Advocate General appearing for the State of U.P. along with Mr. M.C. Chaturvedi, learned Additional Advocate General and Mr. Suresh Singh, learned Additional Chief Standing Counsel, besides Dr. L.P. Mishra, Advocate appearing for the appellants in the two appeals filed at Lucknow that the learned Single Judge erred in issuing a mandamus directing payment of honorarium @ ₹17,000/- per month to the writ petitioners based on the decision of the Project Approval Board dated March 27, 2017 for all times to come, inasmuch as the decision of the Project Approval Board and the proposal upon which it was found, was limited to the year 2017-18. Therefore, no direction could be issued for the subsequent years relying on that decision. Elaborating on their submissions, the learned Counsel appearing for the appellants point out that the Sarva Shiksha Abhiyan is a Society, registered under the Societies Registration Act. Each State/ Union Territory managing the project has a separate Society with its bye-laws.

26. The All India Project is managed on a year to year basis with budgetary allocation in case of States/ Union Territories, opting for the Sarva Shiksha Abhiyan, in accordance with their financial resources. The fund contribution towards Sarva Shiksha Abhiyan in the State of Uttar Pradesh is in the ratio of 60:40. In other States and Union Territories, the ratio may be different. The project, including making of appointments, is under the management and control of the State Government. Part time Instructors engaged under the Sarva Shiksha Abhiyan are to be appointed on contractual basis. They are required to execute an agreement, which inter alia provides for the amount of monthly honorarium payable for each year. The

year-wise project implementation is dependent on the actual availability of financial resources in the relevant financial year, both with the Central Government and the State Governments. In June, 2017, engagement of part time Instructors all over the State, including that of the writ petitioners, was renewed on the basis of agreements entered into between the part time Instructors, including the writ petitioners and the concerned District Basic Education Officer.

27. The contract stipulated honorarium for the year 2017-18 as ₹8470/- . The Project Approval Board on March 27, 2017 in their 254th Meeting approved ₹17,000/- per month as honorarium payable to part time Instructors for the year 2017-18, but they did not release adequate funds commensurate to the Central Government's 60% share of the total outlay. The figure have already been mentioned and need not be re-stated. The State Government upon receiving less than the 60% share of the Central Government worked out on the estimate of expenditure on the project for the year 2017-18 wrote to the Executive Committee, Shiksha Pariyojna Parishad to review and re-determine the monthly honorarium payable to part time Instructors, earlier fixed at ₹17,000/- per month. Accordingly, the proposal to pay honorarium @ ₹17,000/- per month for the year 2017-18 to the part time Instructors was fixed at ₹9800/- per month, that is to say, for 11 months in the year 2017-18.

28. Upon an overall vantage of the appellants' case, the contractual nature of appointment and the honorarium to which the writ petitioners and other similarly situate part time Instructors have agreed to in terms of the contract that they have signed, have been much emphasized. The appellants say that the writ petitioners are contractual part time employees and are bound by their contract. They cannot ask the Court to look into what transpired between the Central Government and the State Government in the process of fixation of the writ petitioners' honorarium and how it came to be scaled down from ₹17,000/- to ₹8470/- per month. Each of the writ petitioners and all other part time Instructors have signed contracts for the year 2017-18 agreeing to receive honorarium @ ₹8470/- per month, beyond which the learned Single Judge could not have considered the writ petitioners' claim. The reference to the provisions of the Act of 2009 is misplaced. It is a matter of contract, pure and simple, and nothing more.

29. The learned Counsel for the writ petitioners have countered the submissions of the appellants and submit that their right to receive honorarium as part time Instructors cannot be put in the confines of a contract to the extent that by dictation of terms owing to their superior position, the appellants defeat the purpose and object of the Act of 2009. The object of the Act of 2009 is to provide free and compulsory education to all children in the age group of 6-14 years. It is submitted that free and compulsory education to children in the specified age group means good quality elementary education, conforming to the Schedule specified in the Act of 2009. The Schedule mentions imparting of Art Education, Health and Physical Education and Work Education through part time Instructors employed by schools, teaching children in the relevant age group from Classes VI-VIII. The writ petitioners have been engaged in Senior Basic Schools, which teach children from Classes VI-VIII.

30. It is argued, therefore, that citing financial constrains or the terms of a contract, the appellants cannot unshackle themselves of their obligations to engage part time Instructors on reasonable and commensurate remuneration, which would enable them to discharge their functions to impart education, conforming to high standards. The submission further proceeds that by paying paltry sums of money in terms of the contract that the writ petitioners have little choice, but to sign owing to unemployment, the appellants cannot defeat the very scheme of the Act of 2009. The writ petitioners have to be incidental beneficiaries and reasonably remunerated to enable them to be the effective arm of implementing the objects of the Act of 2009.

31. Upon a consideration of the rival submissions advanced before us, we are of the considered opinion that the learned Single Judge was not right in issuing a mandamus in perpetuity, based on the decision of the Project Approval Board dated March 27, 2017, to pay the writ petitioners honorarium @ ₹17,000/- per month. The proposal to pay honorarium @ ₹17,000/- per month was accepted by the Project Approval Board as part of the recurring expenditure under the head of honorarium, payable to part time Instructors for the year 2017-18. The decision of the Project Approval Board was taken on the basis of a proposal by the State Government to increase the honorarium of part time Instructors to ₹17,000/- per month for the year 2017-18. Decisions about the recurring expenditures of the project, that is to say, Sarva Shiksha Abhiyan are taken for each financial year. The decision of the Project Approval Board, as already said, to remunerate part time Instructors @ ₹17,000/- per month was for the year 2017-18 and not in perpetuity. The learned Single Judge was, therefore, not at all justified in issuing a mandamus ordering the appellants to pay honorarium to the writ petitioners with effect from the month of March, 2017 till the date of judgment @ ₹17,000/- per month. At the most, the learned Single Judge could have considered the case of the writ petitioners about their entitlement to receive honorarium @ ₹17,000/- per month for the year 2017-18, regarding which the decision was taken by the Project Approval Board. The direction that goes beyond that period of time cannot at all be countenanced.

32. Now, falls the question for consideration whether the decision of the Project Approval Board dated March 27, 2017 to pay honorarium to part time Instructors, including the writ petitioners @ ₹17,000/- per month for the year 2017-18 could be reviewed by the Executive Committee of the Shiksha Pariyojna Parishad, acting on the instructions of the State Government on account of short funding by the Central Government.

33. We assume that the Central Government did not provide the entire funds that were due in accordance with the estimated expenditure in the State on the implementation of the project during the year 2017-18. The question is whether on account of short funding by the Central Government based on its share regarding the estimated expenditure for the year 2017-18, the decision of the Project Approval Board to pay the writ petitioners honorarium @ ₹17,000/- per month could be revoked and the honorarium reduced. The State Government has taken a stand that it has the right to do so under the law and it has enforced that right through a contract inter se the State and the writ

petitioners, entered into at the time of renewal of their contract as part time Instructors for the year 2017-18 under the project. The Act of 2009 has been enacted to provide free and compulsory education to all children in the age group of 6-14 years and Section 8 spells out the duties of the appropriate Government. Section 8 reads:

"**8. Duties of appropriate Government**.--The appropriate Government shall--

(a) provide free and compulsory elementary education to every child:

Provided that where a child is admitted by his or her parents or guardian, as the case may be, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school.

Explanation.--The term "compulsory education" means obligation of the appropriate Government to--

(i) provide free elementary education to every child of the age of six to fourteen years; and

(ii) ensure compulsory admission, attendance and completion of elementary education by every child of the age of six to fourteen years;

(b) ensure availability of a neighbourhood school as specified in section 6;

(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

(d) provide infrastructure including school building, teaching staff and learning equipment;

(e) provide special training facility specified in section 4;

(f) ensure and monitor admission, attendance and completion of elementary education by every child;

(g) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;

(h) ensure timely prescribing of curriculum and courses of study for elementary education; and

(i) provide training facility for teachers."

34. Of particular relevance is Clause (g) of Section 8, which mandates that the appropriate Government shall ensure good quality elementary education conforming to the standards and norms specified in the Schedule. Elementary education has been defined in Section 2(f) of the Act of 2009, which says it means education from Class-I to Class-VIII. The Schedule appended to the Act of 2009, which is framed under Sections 19 and 25, speaks about norms and standards for schools. Item 1 in the Schedule deals with number of teachers and subdivides them into two categories, viz., those for teaching Classes first to fifth, and the others, teaching Classes sixth to eighth. The relevant part of the Schedule is extracted below:

"THE SCHEDULE
(See sections 19 and 25)
NORMS AND STANDARDS FOR A SCHOOL

Sl. No.	Item

Norms and Standards

1. Numbers of teachers:

(a) For first class to fifth class

Admitted children	Number of teachers
Up to Sixty	Two
Between sixty-one to ninety	Three
Between Ninety-one to one hundred and twenty	Four
Between One hundred and twenty-one to two hundred	Five
Above One hundred And fifty children	Five plus one Headteacher
Above Two hundred children	Pupil-Teacher Ratio (excluding Head-teacher) shall not exceed forty.

(b) For sixth class to eighth class (1) At least one teacher per class so that there shall be at least one teacher each for--

(i) Science and Mathematics;
(ii) Social Studies;
(iii) Languages.
(2) At least one teacher for every thirty-five children.
(3) Where admission of children is above one hundred--
(i) a full time head-teacher;
(ii) part time Instructors for--
(A) Art Education;
(B) Health and Physical Education;
(C) Work Education.

35. A perusal of the Schedule appended to the Act of 2009 would show that in cases of school imparting education for Classes VI-VIII, where number of children admitted is above 100, apart from a full time head-teacher and others, part time Instructors to impart Art Education, Health and Physical Education and Work Education are imperative. The engagement, therefore, of part time Instructors in Art Education, Health and Physical Education, besides Work Education is an integral part of the scheme of the Act of 2009. A school that is teaching Classes VI-VIII, which is precisely the case here, where the number of students exceed 100, part time Instructors in the above subjects cannot be left out. Their presence to groom the young children is a necessary concomitant under the Act of 2009 - an integral part of elementary education. There is, therefore, not the slightest doubt, which otherwise also has been accepted by the Central Government, as well as the State Government, that part time Instructors like the writ petitioners are governed by the Act of 2009.

36. To our understanding, as rightly urged on behalf of the writ petitioners, part time Instructors in Senior Basic Schools or Upper Primary Schools teaching Classes VI-VIII are the instruments of a good part of the education that the Act of 2009 postulates; and makes it a duty of the appropriate Government to impart to children in the relevant age group.

37. The Act of 2009, in fact, is one of the instruments, though enforced earlier than Article 21A of the Constitution, which came into effect in consequence of the Constitution (Eighty-sixth Amendment) Act, 2002, sec.2 (w.e.f. 1-4-2010) to give effect to the said fundamental right. Article 21A of the Constitution mandates:

"21A. Right to education.--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."

38. Not much requires to be said about the most obvious that the Act of 2009 gives teeth to the fundamental right guaranteed under Article 21A of the Constitution. The free and compulsory education postulated for children in the age group of 6-14 years is quality education. The importance of quality education has been emphasized by the Supreme Court in **State of Tamil Nadu and others v. K. Shyam Sunder and others, (2011) 8 SCC 737**, which was a case that arose in the context of **The Tamil Nadu Uniform System of School Education (Amendment) Act, 2011**. It was observed in **K. Shyam Sunder:**

"21. There has been a campaign that right to education under Article 21-A of our Constitution be read in conformity with Articles 14 and 15 of the Constitution and there must be no discrimination in quality of education. Thus, a common syllabus and a common curriculum is required. The right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the ground of its economic, social and cultural background. Arguments of the propagators of this movement draw support from the judgment of the US Supreme Court in Brown v. Board of Education [98 L Ed 873 : 347 US 483 (1953)] overruling its earlier judgment in Plessy v. Ferguson [41 L Ed 256 : 163 US 537 (1895)] where it has been held that "separate education facilities are inherently unequal" and thus, violate the doctrine of equality.

22. The propagators of this campaign canvassed that uniform education system would achieve the code of common culture, removal of disparity and depletion of discriminatory values in human relations. It would enhance the virtues and improve the quality of human life, elevate the thoughts which advance our constitutional philosophy of equal society. In future, it may prove to be a basic preparation for the uniform civil code as it may help in diminishing opportunities to those who foment fanatic and fissiparous tendencies.

23. In *Rohit Singhal v. Jawahar N. Vidyalaya* [(2003) 1 SCC 687 : 2003 SCC (L&S) 113 : AIR 2003 SC 2088] , this Court expressed its great concern regarding education for children observing as under: (SCC p. 691, para 6)

"6. Children are not only the future citizens but also the future of the earth. Elders in general, and parents and teachers in particular, owe a responsibility for taking care of the well being and welfare of children. The world shall be a better or worse place to live according to how we treat the children today. *Education is an investment made by the nation in its children for harvesting a future crop of responsible adults productive of a well-functioning society.* However, children are vulnerable. They need to be valued, nurtured, caressed and protected."

(emphasis added)

24. In *State of Orissa v. Mamata Mohanty* [(2011) 3 SCC 436 : (2011) 2 SCC (L&S) 83] , this Court emphasised the importance of education observing that education connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. The Court further relied upon the earlier judgment in *Osmania University Teachers' Assn. v. State of A.P*. [(1987) 4 SCC 671 : AIR 1987 SC 2034] , wherein it

has been held as under: (*Osmania University Teachers' Assn. case* [(1987) 4 SCC 671 : AIR 1987 SC 2034] , SCC p. 685, para 30)

"30. ... Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs."

The case at hand is to be proceeded with keeping this ethical backdrop in mind."

39. The necessary concomitant of the principles that have evolved around the right to free and compulsory education for children in the age group 6-14 years, is that this part of the education for the community is sacrosanct and cannot be left unguided or subservient to mere considerations of the term of contract and engagement of those, in whose hands the implementation and realization of free and compulsory education to children lies.

40. The issue could have been examined on wider parameters, but the petitions here are confined to the right of part time Instructors engaged to teach children in Upper Primary Schools on contract, who are writ petitioners here. The engagement as per existing policy is on a yearly basis with annual renewals. Considering what these writ petitioners seek and what has been argued on both sides, we deem it appropriate to consider rights of parties, dependent on decisions by Authorities, functioning under the Act of 2009. We have not the slightest doubt that the Project Approval Board acts under Section 7 of the Act of 2009 on behalf of the Central Government to prepare the estimates of capital and recurring expenditure for the implementation of the provisions of the Act of 2009, envisaged under Section 7(2) of the Act.

41. The learned Single Judge, in our opinion, has rightly analyzed the position that the decision of the Project Approval Board in their meeting dated March 27, 2017, accepting the proposal of the State Government for payment of honorarium to the writ petitioners @ ₹17,000/- per month was a decision taken in exercise of powers under sub-Section (2) of Section 7 of the Act of 2009. It has also been noticed elsewhere by the learned Single Judge and we must do so here, that sub-Section (5) of Section 7 casts the residual responsibility to provide funds for implementation of the provisions of the Act of 2009 upon the State Government after the Central Government has made its contribution. Thus, once for the project in question and to the benefit of the writ petitioners a decision had been taken by the Project Approval Board on March 27, 2017 in exercise of powers under sub-Section (2) of Section 7, notwithstanding the State Government's case that the Central Government did not provide the entire share according to the estimated expenditure for the said year, the State Government cannot absolve itself of its responsibility to provide funds for the project under sub-Section (5) of Section 7. The State by an executive decision taken through the Executive Committee, Shiksha Pariyojna Parishad, acting at the instance of the State Government, cannot undo or rescind what the Project Approval Board sanctioned for the relevant year as the estimate of capital and recurring expenditure to implement the provisions of the Act of 2009. Any shortfall in the Central share would be the State Government's responsibility to make good. Of course, the Central Government could

be approached by the State Government to invoke the provisions of sub-Section (4) of Section 7 for a request to the President to make a reference to the Finance Commission for allocation of additional funds. That is not something, which is relevant for the adjudication of the writ petitioners' rights. The writ petitioners are entitled to the benefit of the decision of the Project Approval Board dated March 27, 2017, unaffected by its review by the Executive Committee, Shiksha Pariyojna Parishad or even by the State Government.

42. The assertion in Paragraph No. 5 of the counter affidavit filed by the Secretary, Basic Education that the Project Approval Board of the Government of India had accepted enhancement of honorarium for the part time Instructors in principle, is incorrect for a fact. In Paragraph No. 3 of the counter affidavit filed on behalf of the Union of India before the learned Single Judge, which is an affidavit sworn by Dalbir Singh, Under Secretary to the Central Government, it is averred:

"3. That during 2017-18, the Project Approval Board (PAB) of the Department estimated a total amount of Rs. 20688.13 crore out of which Rs. 57874.63 lakh was estimated for 30949 part time Instructors @ Rs. 17000 per month for 11 months, as proposed by the State. However, it was indicated clearly in the minutes of the PAB meeting (Annexure No. CA-1), that "Against the above estimates, Central Government shall provide to the State Government Rs 4249.81 crore (including the enhanced amount for Learning Outcomes) as its share as per Section 7(3) of the RTE Act. The State would contribute Rs 2833.20 crore as its State share matching the above Central share as per the existing fund sharing pattern of SSA. As per Section *7(5) of the RTE Act, 2009, the State Government shall after taking into consideration the sum provided by the Central Government above and the mandatory matching State share, provide the balance funds necessary to fulfill the estimate for the implementation of the Act. It is recommended that the State should meet this balance amount from its own resources including the additional funds devolved under the 14th Finance Commission.* "A copy of the relevant portion of Section 7(5) of the RTE Act, 2009 is being annexed herewith as **ANNEXURE No.CA-2 to this affidavit. Thus, the complete due Central share as indicated to the state was fully released to the State during 2017-18."**

43. In the resolution of the Project Approval Board dated March 27, 2017, annexed as Annexure No. 8 to Writ Petition No. 7631 (S/S) of 2018, it has been recorded in Paragraph No. 8 (relevant part) at Page 14 of the document as follows:

"Actual Releases by GoI during 2017-18

The amount provided by Ministry of Finance at BE 2017-18 is Rs. 23,500.00 crore. Against the above estimates, Central Government shall provide to the State Government Rs. 3943.40 crore as its share as per Section 7(3) of the RTE Act. The State would contribute Rs. 2622.933 crore as its State share matching the above Central share as per the existing fund sharing pattern of SSA. In order to emphasize focus on quality of education, it is advised that least 30% of the releases in 2017-18 are spent on interventions under Category - 1 and Category - 2.

As per Section 7(5) of the RTE Act, 2009, the State Government shall after

taking into consideration the sum provided by the Central Government above and the mandatory matching State share, provide the balance funds necessary to fulfill the estimate for the implementation of the Act. It is recommended that the State should meet this balance amount from its own resources including the additional funds devolved under the 14th Finance Commission.

The State should provide for a separate budget head for the SSA central share in the State Budget. State should release/transfer the central share to State implementing Society within 15 days of its receipt in the State treasury. The State share should be released to the State Implementing Society within one month of the release of the central share. All releases by the Centre would be subject to fulfillment of provisions of GFR by the State."

(emphasis by Court)

44. Likewise, in the resolution of the Board under reference, under the estimated outlay on teachers' salary, mentioned at Pages 29 and 30, the figure for the teachers' salary have been shown as under:

iv. Teachers' Salary (Rs.1828437.84 lakh)

The PAB estimated an outlay of Rs.1828437.84 lakh for teachers' salary for teachers in position detailed below:

(Rs.in lakh)

Intervention	Unit cost	Phy.	Fin.
Teachers Salary (Recurring-sanctioned earlier) in Position			
Primary teachers			
Primary Teachers - Existing, in position (Regular) (for 12 months)	0.42155	33631	170125.78
Primary Teachers - Existing, in position (Contractual) (for 11 months)	0.10000	26504	29154.40
Primary Teacher (Para Teachers upgraded as Teachers) (for 12-months)	0.38878	121063	564802.48
Head Teacher for Primary (if the number of children exceeds 150) (for 12 months)	0.52450	16206	102000.56
Additional Teachers - PS (Special BTC/ TET) (for 12 months)	0.40055	67669	325257.82
Subject Specific Upper			

Primary teachers (Regular) (for 12 months)			
(a) Science and Mathematics	0.52450	26286	165444 .08
(b) Social Studies	0.52450	20651	129977 .39
(c) Languages	0.52450	22385	140891 .19
Head Teacher for Upper Primary (if the number of children exceeds 100)- Existing (for 12 months)	0.58510	20354	142909 .50
part time Instructors in position (11 months)			
(a) Art Education	0.17000	10947	20470. 89
(b) Health and Physical Education	0.17000	11405	21327. 35
(c) Work Education	0.17000	8597	16076. 39
		385698	182843 783

45. The clear averment in Paragraph No. 3 of the counter affidavit, filed on behalf of the Union of India and the relevant resolution of the Project Approval Board read together, do not spare an shadow of doubt that the Project Approval Board in their 254th Meeting held on March 27, 2017 accepted the proposal of the State Government for the payment of honorarium to part time Instructors in Art Education, Health and Physical Education and Work Education, which would cover the writ petitioners, @ ₹17,000/- per month. The assertion in the affidavit of the Secretary, Basic Education that the sum of ₹17,000/- per month, was accepted by the Project Approval Board of the Government of India in principle is incorrect. The Project Approval Board took a final decision to determine the honorarium for part time Instructors as ₹17,000/- per month, for the year 2017-18. It was a concluded decision and not in any manner tentative, provisional or conditional. The decision of the Project Approval Board is statutory in character and referable to the powers of the Central Government under Section 7(2) of the Act of 2009. The decision has binding force. The contentions to the contrary urged on behalf of the appellants are rejected.

46. It is also pellucid that under sub-Section (5) of Section 7 of the Act of 2009, any shortfall in the estimate of expenditure for the implementation of the project, that is to say, Sarva Shiksha Abhiyan, which would qualify as expenditure for implementation of the provisions of the Act of 2009 is to be borne by the State Government, in the event of the Central Government share falling short of the estimated outlay. Therefore, we are of opinion that the State Government have to remunerate the writ petitioner-respondents @ ₹17,000/- per month for the year 2017-18. However, the writ petitioners are not

required to be remunerated at that rate for the subsequent years.

47. Before parting with the matter, we must note that Special Appeal No. 463 of 2020 is directed against the judgment and order of the learned Single Judge dated August 20, 2019 passed in Writ-A No. 55334 of 2017. In the said writ petition, Bhola Nath Pandey son of late Sri Kedar Nath Pandey, resident of 103, Shaheed Nagar, Koraon, District Prayagraj was the first petitioner. The said writ petition was allowed by the judgment and order dated August 20, 2019. It has to be recorded that Bhola Nath Pandey filed Writ-A No. 55334 of 2017 in the year 2017, substantially seeking relief of payment of honorarium @ ₹17,000/- per month, pursuant to the decision of the Project Approval Board, Government of India from the month of March, 2017. This relief was granted to him by the learned Single Judge following the judgment in Writ Petition No. 7631 (SS) of 2018. Surprisingly, Bhola Nath Pandey subsequently instituted another writ petition in the year 2018, being Writ-A No. 3169 of 2018. The said writ petition is one substantially for the sale relief as that sought in Writ-A No. 55334 of 2017, though couched in different words and more elaborate in its terms. This writ petition came to be allowed by the learned Single Judge, also by an order dated August 20, 2019 following the judgment and order of the learned Single Judge in Writ Petition No. 7631 (SS) of 2018, dated July 3, 2019, under challenge in the leading appeal. Clearly, the judgment impugned in Special Appeal No. 465 of 2020 passed in Writ-A No. 3169 of 2018 cannot be sustained as the second writ petition, filed by Bhola Nath Pandey on the same cause of action and for the same relief is not maintainable. On the said ground alone, Special Appeal No. 465 of 2020 deserves to be allowed in toto.

48. In the result, Special Appeal Nos. 403 of 2019, 399 of 2019 filed at Lucknow Bench and Special Appeal Nos. 775 of 2020 and 463 of 2020 and Special Appeal Defective No. 660 of 2020 are allowed in part. The judgments of the learned Single Judge are set aside to the extent that these direct payment of honorarium to the writ petitioners beyond the year 2017-18, including incidental directions regarding payment of interest etc. The judgment is upheld only to the extent that it directs payment of honorarium to the writ petitioners for the year 2017-18 @ ₹17,000/- per month. Special Appeal No. 465 of 2020 is allowed. The impugned judgment passed by the learned Single Judge stands set aside and the writ petition dismissed.

(2022) 12 ILRA 435
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2022

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 3950 of 2022
and other connected cases.

Dr. Prem Chandra Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

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

Counsel for the Respondents:
C.S.C., Anurag Kumar Singh

A. Service Law – Age of Superannuation - University Grants Commission Act, 1956 -

Clause (e) and (g) Section 26(1) - U.P. State Universities Act, 1973: Section 50(6) - The states are free to decide as to whether the scheme would be adopted by them or not and there was no automatic application of recommendation made by the UGC. However, if any petitioner, who claims any benefit under the scheme without the responsibility attached thereto, should also fail, which also meant that **the scheme has to be implemented in a composite manner and not in a piece-meal manner as is being suggested by the Respondents.** (Para 17)

The state cannot pick and choose a part of the scheme to its liking and not implement the other part of the scheme. Both the responsibility and the benefit have to go side-by-side and has to be dealt in a composite & together manner, provided always that the state is free to decide to whether implement the scheme or not. The state of Uttar Pradesh has already taken the benefit of the scheme of UGC and is now refusing the responsibility of increasing the age of superannuation. (Para 18)

B. Distinction between 'quashing of an order' and 'stay of operation of an order' - Quashing of an order result in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the stay order and it does not mean that the said order has been wiped out from existence. (Para 19)

It cannot be said that merely because there is a stay granted by the DB of this Court that the order of the Ld. Single Judge has been "wiped out from existence." Thus, stay of operation of an order cannot be considered as quashing of an order. In any case, **the need for consistency of approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievances of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consistency, uniformity, predictability and certainty of judicial approach.** (Para 21)

C. Rule of Precedent - A coordinate bench cannot comment upon the discretion exercised or judgment rendered by another coordinate bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. A bench must follow the decision of a coordinate bench and take the same view as has been taken earlier. The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench. (Para 22, 23)

In the present case, this Court finds it appropriate to extend the benefit to the petitioner as has been granted to other similarly situated parties. Moreover, this court cannot be oblivious of the law of precedents, which forms the foundation of administration of justice and it has been held time and again that a Single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court. **The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law.** (Para 22)

This court finds that the issue relating to the present case is no longer *res integra*, as it already stands decided by at least three judgment/order of this court. The judgment of this court was based on a finding returned by the Uttarakhand High Court, which has considered the issue in the correct perspective, wherein it was held that **the members of the teaching staff of the university of the state of Uttarakhand have acquired a right in their favour to have their age of superannuation increased to 65 years and such right can be enforced through a mandamus u/Article 226 of the**

Constitution of India. The judgment passed by this court or the Hon'ble Uttarakhand High court is squarely applicable to the facts of the present case. (Para 16)

In view of the facts & circumstances, **it is hereby directed that the Respondent state of Uttar Pradesh will get the statutes of University of Lucknow altered providing for increase of age of superannuation of the members of teaching staff from 62 years to 65 years, preferably within a period of three months.** The petitioner shall continue to work on his post, if they are working, till the appropriate decision is taken by the state Government as indicated above. The impugned letters issued on behalf of the university or the state Government shall abide by the direction of this court passed in other identical matter of *Dr. Devendra Narain Mishra* case, *Chandra Mohan Ojha* case and *Dr. Anil Kumar Singh* case as mentioned *infra*. (Para 24)

D. Words and Phrases – '*Qualification*' – The word "qualification" used in S.26(1)(e) would also mean to include age, qualification and therefore it was within the competence of UGC to prescribe age superannuation. (Para 12)

Writ petitions allowed. (E-4)

Precedent followed:

1. Jagdish Prasad Sharma & ors. Vs St. of Bihar & ors., (2013) 8 SCC 633 (Para 13)

2. Chandra Mohan Ojha & ors. Vs St. of U.P. & ors., Writ Petition No. 7085 of 2022, decided on 11.05.2022 (Para 15) p

3. Shree Chamundi Mopeds Ltd. Vs Church of South India Trust Association CSI Cinod Secretariat, Madras, (1992) 3 SCC 1 (Para 20)

4. Sant Lal Gupta & ors. Vs Modern Co-operative Group Housing Society Ltd. & ors., (2010) 13 SCC 336 (Para 22)

5. State of Punjab & anr. Vs Devans Modern Breweries Ltd. & anr., (2004) 11 SCC 26 (Para 23)

Precedent cited:

1. B. Uharat Kumar Vs Osmania University, 2007 (11) SCC 58 (Para 13)

(Delivered by Hon'ble Om Prakash Shukla, J.)

1. These bunch of writ petitions involve common questions of law and fact. It is the case of the petitioners that they were entitled to be allowed to continue their services as teachers in the university concerned till the age of 65 years and relies on three identical orders passed by a coordinate bench of this Court in similar situation in the following cases:

(i) Order dated 19.04.2022 passed in Writ A No. 3433 of 2022 titled as Dr. Devendra Narain Mishra V/s State of Uttar Pradesh & Ors;

(ii) Order dated 11.05.2022 passed in Writ A No. 7085 of 2022 titled as Chandra Mohan Ojha & 19 others V/s State of Uttar Pradesh & Ors;

(iii) Order dated 27.05.2022 passed in Writ A No. 3369 of 2022 titled as Dr. Anil Kumar Singh V/s State of Uttar Pradesh & Ors;

2. All the petitioners have common ground, that in all these cases, it was directed to the state Government to incorporate the necessary amendments in the respective university statues, so as to raise/increase the age of superannuation from the existing 62 years to 65 years. Since, common ground is engaging the attention of this court in all these bunch of writ petitions, these petitions are being disposed of by a common order and for the sake of convenience, the facts of leading petition being Writ-A No. 4440 of 2022 (Dr. Prem Chandra Mishra V/s State of U.P & Others) is being considered for disposal of these writ petition. The petitioner, in the said writ petition claims to have been

working as a Professor (Psychology) in the University of Lucknow, wherein he superannuated on attaining the age of 62 years on 08.07.2020. However, since the petitioner was extended the session benefit, he actually retired on 30.06.2021. Thus, the petitioner has filed the present writ petition for the following relief:

"(i) to issue a writ, order or direction in the nature of Certiorari quashing the impugned letter dated 27.01.2020 issued on behalf of respondent University of Lucknow contained as Annexure - 12 to the writ petition, to the extent that it prescribe superannuation of the petitioner on attainment of 62 years of age.

(ii) to issue a writ, order or direction in the nature of Mandamus commanding the opposite parties state to alter and modify the statutes of the Lucknow University providing for increase in age of superannuation of teachers in Universities and its affiliate Colleges from 62 years to 65 years in terms of the University Grants Commission (Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and other Measures for Maintenance of Standards in Higher Education) Regulations, 2010 and allow the petitioner to perform his duties of the post of Professor (Psychology), with consequential benefits of pay and allowances."

(iii) to issue a writ, order or direction in the appropriate nature declaring the condition of point no. 2.3 of said Government Order dated 28.06.2019 as ultra vires and the age of superannuation of teachers including petitioner may be directed to be corrected as 65 years and extension of 2 years of service after attaining the age of superannuation may be given after completing the age of 65 years."

3. This court finds that similar prayers have been made by the other writ petitioners in their respective petition. Counter have been invited by this court, wherein although counter has been filed in the lead matter, the same is not the fate of other connected matters. This court does not wish to deal with the pleadings of each & every writ petition separately as the court is deciding the common issue raised by the writ petitioner in these bunch of petition. It is made clear that only the counter filed in the lead matter Prem Chandra Mishra case is being dealt with this court and any pleadings not commensurate & not in conformity to the pleadings of the lead matter stands rejected /allowed as per the findings arrived by this court hereinafter.

4. This court has patiently heard Shri Dhruv Mathur, Ld. counsel for petitioner in Writ A No. 3803 of 2022, Shri Sharad Pathak, ld. counsel for the petitioner in Writ A No. 3542 of 2022, Shri Rajesh Tiwari, Additional C.S.C. assisted by Shri Akash Mishra and Ms. Shagun Srivastava, learned State Law Officer's for the State of Uttar Pradesh and Shri Anurag Kumar Singh, Advocate assisted by Shri Akhilendra Singh, learned Counsel for the Lucknow University.

5. It is the common submission of the counsels for the petitioners that the Government of India through the Ministry of Human Resources Development, department of Higher Education had decided to increase the age of superannuation for all persons holding teaching positions on regular employment against sanctioned posts as on 15.03.2017 in any of the centrally funded higher and technical education institute under the said Ministry. In the said chronology, the Government of India, on the

recommendation of the University Grant Commission has also decided to revise the pay scale of teachers in Central Universitates subject to the various provisions of "Scheme of pay scales as contained in Government Order dated 31.12.2008"

6. In order to buttress their further submission, the Ld. Counsels for the petitioners have brought to the notice of this court, clause 8(f) of the scheme notified vide the aforesaid government order dated 31.12.2008, which also provides for the age of superannuation and acknowledges the age thereof to be 65 years. He has also submitted that in pursuance of the government order dated 31.12.2008, the UGC in exercise of its power under Clause (e) and (g) of sub section (1) of section 26 of the University Grant Commission Act, 1956 has also framed the university Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic staff in universities and colleges and other Measures for Maintenance of Standards in Higher education) Regulations, 2010 dated 30.06.2010.

7. It has been submitted that Clause 1.1.2 of the aforesaid Regulations of 2010 provides for its application to every University established or incorporated by or under a Central Act, Provincial Act or State Act and included every institution including a constituent or affiliated college recognized by the commission. It is submitted that the annexure appended to the said regulations at clause 2.0.0 contained the provisions for pay scales, pay fixation and age of superannuation etc. and clause 2.1.0 says that the revised scales of pay and other service conditions including age of superannuation in central universities and other institutions maintained and/or funded by the University Grants Commission (UGC), shall be strictly in accordance with the decision of the Central Government, Ministry of Human Resource Development (Department of Education), as contained in Appendix-I.

8. This court finds that Appendix-1 which is a government of India letter dated 31.12.2008 is addressed to the UGC relating to the scheme of revision of pay of teachers etc. and clause 8 of the said appendix, contains the heading "other terms & conditions", wherein clause 8(f), contained inter-alia:

(f) Age of Superannuation:

(i) In order to meet the situation arising out of shortage of teachers in universities and other teaching institutions and the consequent vacant positions therein, the age of superannuation for teachers in Central Educational Institutions has already been enhanced to sixty five years, vide the Department of Higher Education letter No.F.No.119/2006-U.II dated 23.3.2007, for those involved in class room teaching in order to attract eligible persons to the teaching career and to retain teachers in service for a longer period. Consequent on upward revision of the age of superannuation of teachers, the Central Government has already authorized the Central Universities, vide Department of Higher Education D.O. letter No.F.1-24/2006-Desk(U) dated 30.3.2007 to enhance the age of superannuation of Vice-Chancellors of Central Universities from 65 years to 70 years, subject to amendments in the respective statutes, with the approval of the competent authority (Visitor in the case of Central Universities).

(ii) Subject to availability of vacant positions and fitness, teachers shall also be reemployed on contract appointment

beyond the age of sixty-five years up to the age of seventy years. Reemployment beyond the age of superannuation shall, however, be done selectively, for a limited period of 3 years in the first instance and then for another further period of 2 years purely on the basis of merit, experience, area of specialization and peer group review and only against available vacant positions without affecting selection or promotion prospects of eligible teachers. (ii) Whereas the enhancement of the age of superannuation for teachers engaged in class room teaching is intended to attract eligible persons to a career in teaching and to meet the shortage of teachers by retaining teachers in service for a longer period, and whereas there is no shortage in the categories of Librarians and Directors of Physical Education, the increase in the age of superannuation from the present sixty two years shall not be available to the categories of Librarians and Directors of Physical Education.

9. Moreover, relating to the applicability of the said scheme, it is contained at clause 8 (p) (v) of Appendix-1, as follows:

(v) This Scheme may be extended to universities, Colleges and other higher educational institutions coming under the purview of State legislatures, provided State Governments wish to adopt and implement the Scheme subject to the following terms and conditions:

(a) Financial assistance from the Central Government to State Governments opting to revise pay scales of teachers and other equivalent cadre covered under the Scheme shall be limited to the extent of 80% (eighty percent) of the additional expenditure involved in the implementation of the revision.

(b) The State Government opting for revision of pay shall meet the remaining 20% (twenty percent) of the additional expenditure from its own sources.

(c) Financial assistance referred to in sub-clause (a) above shall be provided for the period from 1.01.2006 to 31.03.2010.

(d) The entire liability on account of revision of pay scales etc. of university and college teachers shall be taken over by the State Government opting for revision of pay scales with effect from 1.04.2010.

(e) Financial assistance from the Central Government shall be restricted to revision of pay scales in respect of only those posts which were in existence and had been filled up as on 1.01.2006.

(f) State Governments, taking into consideration other local conditions, may also decide in their discretion, to introduce scales of pay higher than those mentioned in this Scheme, and may give effect to the revised bands/ scales of pay from a date on or after 1.01.2006; however, in such cases, the details of modifications proposed shall be furnished to the Central Government and Central assistance shall be restricted to the Pay Bands as approved by the Central Government and not to any higher scale of pay fixed by the State Government(s). (g) Payment of Central assistance for implementing this Scheme is also subject to the condition that the entire Scheme of revision of pay scales, together with all the conditions to be laid down by the UGC by way of Regulations and other guidelines shall be implemented by State Governments and Universities and Colleges coming under their jurisdiction as a composite scheme without any modification except in regard to the date of implementation and scales of pay mentioned herein above.

10. It has been claimed by the petitioners that the sate of U.P has availed

the financial assistance from the central Government to the extent of 80% for revising the pay scale of Teachers and others under the scheme and the regulations of 2010 has sought to be adopted by the state of U.P vide various government orders dated 31.12.2010, 28.05.2015, 22.11.2016 and 08.04.2017. Thus, it is the grievance of the petitioner that the provisions related to increase in the age of superannuation of teachers working in the universities college and institutions of higher education under the state legislature were never implemented by the state of Uttar Pradesh, while exercising its powers under section 50(6) of the U.P State Universities Act, 1973, although the State of U.P has availed all the financial assistance as made available to them by the Central Government.

11. It is the case of the petitioners that although the salaries of the teachers in the state universities including the Lucknow university were revised under the scheme, however the Lucknow university failed to modify its statutes so as to bring the age of superannuation of teaching staff in conformity with the said scheme/regulations. The petitioner further submits that as late as on 13.09.2018, the state of UP while implementing the central government order dated 02.11.2017 has sought to avail the 50% grant of the financial burden relating to recommendation of the 7th central pay commission, which as per clause 12 provides for existing provisions on superannuation and re-employment, however the state of Uttar Pradesh has failed to implement the said regulations in letter & spirit. It has also been submitted that these grant of financial burden of the central government was subject to implementation of the regulations by the state government and universities and colleges concerned as the scheme was a composite scheme and cannot be implemented in piece-meal.

12. Thus, the Ld. Counsels have tried to bring home the point that since section 26(1)(e) and 26(1)(g) of the UGC act, 1956 provides to define and prescribe qualifications that should be ordinarily be required of any persons to be appointed to the teaching staff of the university, having regard to the branch of education in which he is expected to give instruction and further UGC may regulate the maintenance of standards and the co-ordination of work of facilities in universities, it can be safely concluded that the word "qualification" used in section 26(1) (e) would also mean to include age, qualification and therefore it was within the competence of UGC to prescribe age of superannuation. It has been thus argued that by operation of law the age of superannuation of teachers in the Lucknow university stands increased to 65 years and the failure on the part of the university and state of UP to make necessary changes in the statute cannot deprive the petitioner of his right to continue in service till the age of 65 years in terms of the UGC regulations of 2010, which have a binding effect on the University.

13. Separate Counter-Affidavit have been filed by the Respondent No. 1 / State of Uttar Pradesh and Respondent No.2/ University of Lucknow in the lead matter. The respondents having filed their counter-affidavit, have also taken common grounds and have relied on the Judgment of the Hon'ble Apex Court in ***Jagdish Prasad Sharma & Ors V/s State of Bihar & Ors.; (2013) 8 SCC 633***, to contend that the decision of the State Government for non-

accepting increase of the age of superannuation to 65 years in terms of composite character of the scheme of central Government dated 31.12.2008 and regulation 2010, through different writ petitions stands settled in the said judgment, in as much as it was held by the Hon'ble Apex court that the state of U.P had discretion and they were statutorily not bound by the decision of the commission to enhance the age of superannuation. The Ld. Counsel has also relied on the judgment of **B. Uharat Kumar Vs Osmania University (2007 (11) SCC 58)**, wherein the Hon'ble Apex court has held that even if the state Government accepts a part of the scheme of UGC, it is not necessary that all the scheme has to be accepted by the state Government. Further, it has been submitted that the regulation of the commission would not be binding on the university of Delhi and did not impinge upon the university's power to select its teacher.

14. The Ld. Counsels for the respondent has also submitted that the role of the UGC is only to prescribe academic standards and the question of enhancement of the age of retirement is exclusively within the domain of the policy making part of the state government. Thus, it has been contended that the petitioner has no right available to be enforced under the writ. The regulations, 2010 as framed by the commission could not, therefore, be enforced on unwilling states in view of the federal stature of our constitution. In any case, it has been argued by the Ld. Counsels that the conditions of service in state universities could not be controlled by the UGC and even on receipt of 80% of the expenses to be incurred by the colleges the state's power under the statute could not be taken away.

15. Towards the end, the Ld. Counsels has argued that although a similar writ petition being No. 7085 of 2022 (Chandra Mohan Ojha and Ors. Vs State of U.P & Ors.) had been decided vide order dated 11.05.2022, whereby certain direction had been given to the state government to alter the age of superannuation of the members of the teaching state from 62 to 65 years in respect wherein state Government has control, however the said order of the Single Bench has been stayed by the Division Bench of this court vide order dated 28.06.2022 passed in Special Appeal No. 486 of 2022. To the similar effect is another identical matter being Dr. Devender Narain Mishra V/s State of U.P & Ors. (Writ A No. 3433 of 2022), wherein order dated 19.04.2022 of the Single Bench has been stayed vide interim order dated 07.07.2022 by a Division bench of this Court.

16. Having heard the learned counsels for the parties at length, this court finds that the issue relating to the present case is no longer res integra, as it already stands decided by at least three judgment/order of this court, which has been referred by the counsels for the petitioner. Further, this court finds that the judgment of this court was based on a finding returned by the Uttarakhand High Court, which has considered the issue in the correct perspective, wherein it was held that the members of the teaching staff of the university of the state of Uttarakhand have acquired a right in their favour to have their age of superannuation increased to 65 years and such right can be enforced through a mandamus under Article 226 of the constitution of India. The judgment passed by this court or the Hon'ble Uttarakhand High court is squarely applicable to the facts of the present case.

17. The reliance of the Ld. Counsels for the Respondents in the case of Jagdish

prasad case is misplaced, in as much as the issue before the Apex Court in the said bunch of matter as has been indicated in paragraph 19 was;

"It appears that the States of West Bengal, Uttar Pradesh, Haryana, Punjab and Madhya Pradesh implemented the Scheme without waiting for the UGC Regulations, which were framed only on 30.6.2010, whereas the said Scheme was implemented by the aforesaid States long before the said date. It is when the reimbursement of 80% of the expenses was sought for from the Central Government that the problems arose, since in keeping with the composite scheme, the concerned States had not enhanced the age of superannuation simultaneously. The Central Government took the stand that since the Scheme in its composite form had not been given effect to by the States concerned, the question of reimbursement of 80% of the expenses did not arise. This is one of the core issues, which has arisen in these cases for decision."

And the Hon'ble Apex Court concluded at paragraph 65 as herein below:

"We are then faced with the situation where a composite scheme has been framed by the UGC, whereby the Commission agreed to bear 80% of the expenses incurred by the State if such scheme was to be accepted, subject to the condition that the remaining 20% of the expense would be met by the State and that on and from 1st April, 2010, the State Government would take over the entire burden and would also have enhanced the age of superannuation of teachers and other staff from 62 to 65 years. There being no compulsion to accept and/or adopt the said scheme, the States are free to decide as to whether the scheme would be adopted by them or not. In our view, there can be no automatic application of the recommendations made by the Commission, without any conscious decision being taken by the State in this regard, on account of the financial implications and other consequences attached to such a decision. The case of those Petitioners who have claimed that they should be given the benefit of the scheme dehors the responsibility attached thereto, must, therefore, fail."

(emphasis supplied)

This court finds the Hon'ble Apex court has dealt with the issue in a very lucid and crystal-clear manner, wherein it has certainly clarified that the states are free to decide as to whether the scheme would be adopted by them or not and there was no automatic application of recommendation made by the UGC. However, it also clarified that if any petitioner, who claims any benefit under the scheme without the responsibility attached thereto, should also fail, which also meant that the scheme has to be implemented in a composite manner and not in a piece-meal manner as is being suggested by the Respondents.

18. Thus, in the opinion of this court, the state cannot pick and choose a part of the scheme to its liking and not implement the other part of the scheme. Both the responsibility and the benefit have to go side-by-side and has to be dealt in a composite & together manner as has been held by the Apex Court, provided always that the state is free to decide to whether implement the scheme or not. This court finds that the state of Uttar Pradesh has already taken the benefit of the scheme of UGC and is now refusing the responsibility of increasing the age of superannuation.

19. In any case, on a query to the counsels for the Respondents as to whether any appeal has been filed or pending against the order/judgment passed by the Single Bench on identical issues, the respondents have stated that special appeals have been filed against the single bench order and an interim order of stay has been also granted in their favour in those special appeals.

20. Having recorded the submission of the Ld. Counsel for the respondents and as to the effect of stay granted by the Division Bench of this Court on the relied upon order of the Single Judge, this Court finds that the Apex Court in the case of ***Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, reported as (1992) 3 SCC 1*** has held at paragraph 11 of the said judgment as follows:

"10. ..... While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order result in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the stay order and it dose not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending....."

21. The said judgment of the Apex Court has been consistently followed by the High Courts and the Apex Court. Thus, to borrow the phraseology of the Supreme Court in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association (supra), it cannot be said that merely because there is a stay granted by the DB of this Court that the order of the Ld. Single Judge has been "wiped out from existence." Thus, stay of operation of an order cannot be considered as quashing of an order. In any case, this Court finds that the need for consistency of approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievances of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consistency, uniformity, predictability and certainty of judicial approach.

22. Thus, this court finds it appropriate to extend the benefit to the petitioner as has been granted to other similarly situated parties in (i) Writ A No. 3433 of 2022 titled as Dr. Devendra Narain Mishra V/s State of Uttar Pradesh & Ors; (ii) Writ A No. 7085 of 2022 titled as Chandra Mohan Ojha & 19 others V/s State of Uttar Pradesh & Ors, (iii) Writ A No.

3369 of 2022 titled as Dr. Anil Kumar Singh V/s State of Uttar Pradesh & Ors. Moreover, this court cannot be oblivious of the law of precedents, which forms the foundation of administration of Justice and it has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court. The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law. The Hon'ble Supreme court in the case of ***Sant Lal Gupta and Ors. vs. Modern Co-operative Group Housing Society Ltd. and Ors., (2010) 13 SCC 336***, held that it was neither desirable nor permissible by the coordinate Bench to disapprove the earlier judgment and take view contrary to it. A coordinate bench cannot comment upon the discretion exercised or judgment rendered by another coordinate bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. A bench must follow the decision of a coordinate bench and take the same view as has been taken earlier. The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench.

23. To the same effect is the judgment of the Apex Court reported in the ***State of Punjab and another versus Devans Modern Breweries ltd. and another, (2004) 11 SCC 26***, wherein paragraph 339 laid down the following: -

"339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1 followed in Union of India Vs. Hansoli Devi, (2002) 7 SCC 273. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

24. In view of the facts & circumstances, it is hereby directed that the Respondent state of Uttar Pradesh will get the statutes of University of Lucknow altered providing for increase of age of superannuation of the members of teaching staff from 62 years to 65 years, preferably within a period of three months. The petitioner shall continue to work on his post, if they are working, till the appropriate decision is taken by the state Government as indicated above. The impugned letters issued on behalf of the university or the state Government shall abide by the direction of this court passed in other identical matter of Dr. Devendra Narain Mishra case, Chandra Mohan Ojha case and Dr. Anil Kumar Singh case as mentioned supra.

25. As an upshot to the aforesaid observation, these writ petitions are accordingly **allowed** in the above terms. In the facts of the case, there shall be no order as to costs.

(2022) 12 ILRA 446
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ-A No. 21333 of 2014

Awadh Bihari Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri P.C. Mishra, Sri Dharmendra Kumar Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension - Uttar Pradesh St. Aided Educational Institution Employees Contributory Provident Fund Insurance Pension Rules, 1964 - Rule 19(b) - Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service. (Para 5)

It is clear that petitioner is entitled to pensionary benefits under the Uttar Pradesh St. Aided Educational Institution Employees Contributory Provident Fund Insurance Pension Rules, 1964 and for such purposes the *ad hoc* continuance from 1995-2013 followed with regularization would have to be counted towards qualifying service for sanction and fixation of pension. Accordingly, a mandamus is issued to the respondents for grant of pensionary benefits to the petitioner. (Para 8)

Writ petition allowed. (E-4)

Precedent followed:

1. Sunita Sharma Vs St. of U.P. & ors., Writ- A No. 25431 of 2018, decided on 20.12.2018 (Para 4)

2. St. of Guj. & anr. Vs Talsibhai Dhanjibhai Patel, decided on 18.02.2022 (Para 6)

Present petition assails order dated 23.01.2014, passed by District Inspector of Schools, District- Firozabad.

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Dharmendra Kumar Pandey, learned counsel for the petitioner and Sri Govind Narain Srivastava,learned Standing counsel for the State respondent nos. 1 to 3.

2. The present writ petition under Article 226 of the Constitution has been filed for quashing the impugned order dated 23.01.2014 passed by the respondent no.3, District Inspector of Schools, District-Firozabad whereby the period of ad hoc service rendered by the petitioner has not been taken into account for the purpose of pension.

3. The petitioner retired on 30.6.2013 after completing more than 17 years of regular service on the post of Assistant Teacher (L.T. Grade). His services were regularized in the year 2016, grievance of the petitioner is that the ad hoc services rendered by him has not been counted in fixation of his pension.

4. At the outset, learned counsel for the petitioner submits that the controversy involved in the present case has already been decided in Writ- A No. 25431 of 2018 (Sunita Sharma Vs. State of U.P. & 5 Ors) decided on 20.12.2018.

The aforesaid order dated 20.12.2018 passed in Writ-A No. 25431 of 2018 reads as under:-

"Petitioner was appointed as Assistant Teacher in J.A.S. Inter College, Khurja, Bulandshahar on 21st of June, 1996. The institution in question is a recognized aided intermediate institution and the provisions of the U.P. Intermediate Education Act, 1921 as also the provisions of U.P. Act No. 24 of 1971 are applicable. Admittedly, petitioner joined pursuant to the order of appointment as Assistant Teacher in L.T. Grade for teaching Hindi along with ten other teachers. Salary was released to the petitioner pursuant to an order passed by this Court on 4.8.1998 in Writ Petition No. 29626 of 1996. Arrears of salary from May, 1996 to August, 1996 was also disbursed to him. Services of petitioner have subsequently been regularized under an order of the Joint Director of Education, Meerut dated 16.8.2016 with effect from 22nd of March, 2016. Petitioner has also been granted benefit of selection grade vide order dated 13th of January, 2017. Having attained the age of superannuation, the petitioner has retired on 31st of March, 2018. However, retiral benefits including gratuity and pension were not released to the petitioner, on account of which, she has approached this Court by filing the present writ petition. Petitioner has claimed benefit of the Provisions of the Uttar Pradesh State Aided Educational Institution Employees Contributory Provident Fund-Pension Rules 1964. The matter was adjourned on different dates, and thereafter, following orders were passed in the matter on 11th of December, 2018:-

"This writ petition has been filed for an appropriate direction to the respondents to include petitioner's entire length of service rendered with effect from 01.07.1996 towards qualifying service for sanction and fixation of pension and to release the same to the petitioner accordingly.

It appears that J.A.S. Inter College, Khurja, District Bulandsahar is a recognized and aided Intermediate College governed by the provisions of U.P. Intermediate Education Act, 1921 and the provisions of the U.P. Act No. 24 of 1971. Reliance is placed upon the provisions contained in Rule 19(b) of the Uttar Pradesh State Aided Educational Institution Employees Contributory Provident Fund Insurance Pension Rules, 1964 Rules to contend that continuance on temporary or officiating basis followed by regularization would be counted for the grant of pension and other retiral benefits. It is stated that petitioner was appointed on temporary basis in the year 1996 and has been regularized in the year, 2016. Submission is that period of 1996 to 2016 is liable to be taken note for the purposes of determination of qualifying service for payment of pension under Rule 19(b).

Learned Standing Counsel may obtain instruction.

Put up in the additional cause list once again on 19.12.2018."

Learned Standing Counsel has obtained instructions, according to which, pension is not payable to petitioner in view of the Government Order dated 18th of October, 1997, which provides that services rendered by a teacher, pursuant to his substantive appointment alone, would be counted for the purposes of determining the qualifying service and that adhoc services would not be included for payment of pension. Subsequent orders of the Deputy Director of Education dated 17.5.2017 has also been relied upon. Yet another Government Order dated 14th of June, 2017 has also been relied upon, which deals with employees engagement in work charge establishment. The Government Order of 14th of June, 2017 apparently has

no applicability in the facts of the present case.

Learned counsel for the petitioner places reliance upon the provisions contained under Rule 19(b) of the Rules of 1964, which is reproduced hereafter:-.

"(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service.

Rule 3 of 1964 Rules clearly provides that these Rules shall apply to permanent employees serving in the State aided educational institution of the category specified thereunder, be it run by a local body or a private management, if it is recognized by the competent authority for the purposes of extending of grant-in-aid. It is not in issue that the provisions of Rules of 1964 are attracted in the facts of the present case, inasmuch as the Institution is a recognized Institution, wherein salary is being extended to teaching and non-teaching staff by the State by virtue of the provisions contained in the Act of 1971. On the date of his retirement, petitioner was a permanent employee serving in aided educational institution, which is recognized by a competent authority for the purposes of aid. Rule 19(b) of the Act would clearly come to the rescue of the petitioner, inasmuch as it clearly provides that continuous temporary or officiating service followed without interruption by confirmation in the same or another post, shall also count as qualifying service. Petitioner's engagement from 1996 till 2016, when she was regularized, would be treated as continuous temporary service followed without interruption by confirmation on same post. The adhoc continuance followed with regularisation, therefore would be covered within the ambit and scope of Rule 19-B of the 1964 rules, and therefore, such period would have to be counted towards qualifying service for the purposes of payment of pension etc.

Learned Standing Counsel has not placed any provision whereunder the Rules of 1964 have either been rescinded, modified or substituted by any other provision and the Rules of 1964 therefore continues to remain in force.

So far as the Government Order relied upon by learned Standing Counsel is concerned, it is settled that in hierarchy of laws a statutory Rule would stand at a higher pedestal than a Government instructions. Once the statutory Rules of 1964 remains in force and is attracted in the facts of the present case, the provisions of the Rules cannot be by passed merely by relying upon a Government instructions. The defence set up by the respondents, therefore to non suit the petitioner cannot be sustained. It appears that though U.P. Retirement Benefits Rules, 1961 and other like provisions were amended w.e.f. 1.4.2005, but no such amendment has been incorporated in the Rules of 1964. As a consequence, the benefits admissible under the Rules of 1964 would continue to be applicable upon teachers, who are covered thereunder.

The view, which this Court proposes to take, is also supported by a judgment of the Division Bench in Special Appeal (Defective) No. 678 of 2013 State of U.P. through its Secretary Secondary Education vs. Mangali Prasad Verma and two others, wherein the benefit under the Rules of 1964 have been made applicable upon the respondents therein. Relevant portion of the judgment of the Division Bench is reproduced thereinafter:-

"We may, however, clarify that the Government Order dated 28.1.2004 which was so heavily relied upon by the

State Government does not alter the legal position in any manner inasmuch as, the applicability of Rules 1964 is not depended upon any declaration being made by the Governor or by the State Government. If a teacher was working in an aided institution prior to the date of his retirement provisions of rules 1964 become applicable by operation of law. The manner of counting the qualifying service stands explained under the Government Order dated 26.7.2001.

We may also clarify that the teachers and employees of institutions which are brought on the grant-in-aid for the first time on or subsequent to 1.4.2005 would be covered by the new scheme enforced on 1.4.2005 and this judgment will have no application in their case.

We may notice that similar view has taken by the Division Bench of this Court in the case of State of U.P. And 6 Ors Vs. Shir Krishna Prasad Yadav and 13 Ors being Special No.228 of 2016 decided on 24.5.2017.

In view of the aforesaid, we find no illegality in the judgment and order of the learned Single Judge, it is accordingly, affirmed. The Appeal is Dismissed."

In view of the discussions aforesaid, it is clear that petitioner is entitled to pensionary benefits under the Rules of 1964 and for such purposes the adhoc continuance from 1996-2016 followed with regularization would have to be counted towards qualifying service for sanction and fixation of pension. A mandamus is issued accordingly to the respondents for grant of pensionary benefits to the petitioner. Necessary order in that regard could be passed by the competent authority within a period of three months. All consequential benefits would also be extended to the petitioner within a further period of two months thereafter. "

After hearing counsel for the the parties and perusing the record, in the opinion of this Court, the present dispute is squarely covered by the principle of law laid down in Sunita Sharma's case (supra) as well as latest judgment of Hon'ble Apex Court in State of Gujarat & Anr. Vs. Talsibhai Dhanjibhai Patel, decided on 18.2.2022.

Accordingly, the impugned order dated 23.01.2014 passed by the respondent no.3, District Inspector of Schools, District-Firozabad is hereby quashed. The writ petition stands allowed.

In view of the discussions aforesaid, it is clear that petitioner is entitled to pensionary benefits under the Uttar Pradesh State Aided Educational Institution Employees Contributory Provident Fund Insurance Pension Rules, 1964 and for such purposes the ad hoc continuance from 1995-2013 followed with regularization would have to be counted towards qualifying service for sanction and fixation of pension. Accordingly, a mandamus is issued to the respondents for grant of pensionary benefits to the petitioner.

Necessary order in that regard could be passed by the competent authority within a period of three months. All consequential benefits would also be extended to the petitioner within a further period of two months thereafter.

(2022) 12 ILRA 449
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J.MUNIR, J.

Special Appeal No. 214 of 2022

Committee of Management ...Appellant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellant:

Sri Ravi Shankar Prasad (Sr. Advocate), Sri Mithilesh Kumar Rai, Sri Rahul Sri vastava, Sri Sikandar Khan

Counsel for the Respondents:
Sri A.K.Ray Addl. Chief Standing Counsel, Sri G.K. Singh (Sr. Advocate), Sri Sankalp Narain, Sri Hritudhwaj Pratap Sahi

A. Education Law – Election of Committee of Management – Uttar Pradesh Intermediate Education Act, 1921 - Section 16-A(7) - The jurisdiction of the Joint Director of Education, or for that matter, the Regional Level Committee u/s 16-A(7) r/w the GO dated 20.10.2008 is not dependent upon a reference made by the DIOS alone. It all depends at what stage a dispute with respect to the management of the institution arises. (Para 14)

The Committee of Management, whose elections were first permitted and then recognized by the DIOS vide orders dated 14.08.2020 and 01.10.2020, respectively, is represented by its Manager, Afaq Ahmad. The rival Committee of Management, who claims to have held elections on 08.10.2020, is represented by Firoz Khan, the Manager shown to be elected in elections. The faction of the management led by Afaq Ahmad are the appellant to this appeal, whereas the faction represented and led by Firoz Khan are the writ petitioner-respondents, who are 65 in number, excluding the jural presence of the Committee of Management represented by Firoz Khan. (Para 4)

In the present case, the dispute arose after the appellant had secured recognition for the elections that they claim to have held on 31.08.2020 and recognized on 01.10.2020. The permission for the elections that was granted on 14.08.2020 and its later recognition on 01.10.2020 in the absence of the petitioner-respondents and without notice to them would not imbue those elections with the imprimatur of validity, merely because the appellant has stealthily approached the DIOS and sought permission to hold elections. The elections held by them, for that reason alone, would not become infallible. This is not to say that the elections held by the appellant are unlawful in any manner. This is a question which the Joint Director of Education has to go into, sitting in the Regional Level Committee, exercising power u/s 16-A(7) of the Act read with the GO dated 20.10.2008. He would be required to decide the issue on the basis of evidence placed before him by parties regarding the validity of their respective elections claimed. **In any eventuality, the Joint Director of Education, or for that matter, the Regional Level Committee cannot abdicate their obligations under the Statute to summarily determine the dispute with regard to the management of an institution governed by the Act. They are required to decide, albeit summarily, the validity of the elections rivalry claimed by the appellant and the petitioner-respondents, on the basis of which, recognition would follow, subject, of course, to the determination of a Court of competent jurisdiction.** (Para 15)

Special appeal dismissed. (E-4)

Precedent followed:

1. Committee of Management, Sri Yadvesh Inter College & anr. Vs St. of U.P. & ors., 2011 (8) ADJ 493 (Para 14)

Present special appeal assails judgment and order dated 21.01.2022, passed by Hon'ble Mr. Justice Saumitra Dayal Singh in Writ-C No. 6906 of 2021.

(Delivered by Hon'ble Rajesh Bindal, C.J.
&
Hon'ble J.J. Munir, J.)

1. The Joint Director of Education, First Region, Meerut thought that when there are two or more rival Committees of Management, who claim to be validly elected to office, he could exercise his powers under Section 16-A(7) of the Uttar

Pradesh Intermediate Education Act, 1921; not otherwise. He also seems to have thought that if there is a complainant assailing the validity of an elected management, he could go into its validity if there was a direction to that effect made by this Court. About the first part of the Joint Director's opinion, we find that he was wrong on facts and about the second part, he was in error about the law.

2. The facts in this case show that the last undisputed elections to the Committee of Management of National Inter College, Shikarpur, District Bulandshahr, the institution being governed by the Uttar Pradesh Intermediate Education Act, 1921 (for short, "the Act'), were held on 29.10.2017. The Committee had a term of three years and one month. This term ended on 28.11.2020. The outgoing Committee of Management say that they called a meeting of the General Body to hold the next elections, scheduled for 14.07.2020 through a notice dated 04.07.2020. The said meeting and the contemplated elections could not be held on the said date due to lack of quorum. The meeting was adjourned. This event appears to have prompted 19 Members of the General Body of the Society to seek permission of the District Inspector of Schools to hold a meeting of the General Body to conduct the next elections. This permission was sought by 19 Members of the General Body and they stated that they were more than 1/10th of the General Body Membership. The District Inspector of Schools put the 19 applicants to notice alone and passed an order dated 14.08.2020, scheduling an election meeting for 31.08.2020. The election meeting was convened on 16.10.2020, wherein, 39 out of 110 Members of the General Body (of the Society) participated. The result of these elections was approved and recognized by the District Inspector of Schools vide order dated 01.10.2020.

3. There was a parallel election convened by Members of the General Body, where the election programme was circulated on 25.08.2020 and the elections were held on 08.10.2020. These proceedings were submitted for approval and recognition to the District Inspector of Schools as well.

4. The Committee of Management, whose elections were first permitted and then recognized by the District Inspector of Schools vide orders dated 14.08.2020 and 01.10.2020, respectively, is represented by its Manager, Afaq Ahmad. The rival Committee of Management, who claims to have held elections on 08.10.2020, is represented by Firoz Khan, the Manager shown to be elected in elections. The faction of the management led by Afaq Ahmad are the appellant to this appeal, whereas the faction represented and led by Firoz Khan are the writ petitioner-respondents, who are 65 in number, excluding the jural presence of the Committee of Management represented by Firoz Khan.

5. The District Inspector of Schools did not pass any order regarding the elections claimed by the Committee of Management led by Firoz Khan, apparently so, as he had already passed an order on October 1, 2020, recognizing the management led by Afaq Ahmad. The petitioner-respondents to this appeal approached the Joint Director of Education, invoking his powers under Section 16-A(7) of the Act. They apparently asserted that it was a case where there was a dispute with respect to the management of the institution

and it was he who had to decide that dispute; else it was the Regional Level Committee, which would exercise the powers of the Joint Director of Education under the Statute, with the Joint Director of Education as its head, in terms of the Government Order dated 20.10.2008, that could decide a dispute about the management.

6. The Joint Director of Education by his order dated 31.12.2020 neither decided the dispute himself nor placed it before the Regional Level Committee constituted under the Government Order dated September 2, 2008. He held that the power under Section 16-A(7) of the Act can be exercised by the Regional Level Committee with the aid of the Government Order if there were two parallel Committees of Management constituted; else it could be exercised if the High Court, by a direction issued in a writ petition, ordered the competent Authority to decide. The competent Authority mentioned in the order dated 31.12.2020 appears to be a reference to the Regional Level Committee or the Joint Director, in either case exercising jurisdiction under Section 16-A(7) of the Act.

7. The two orders dated 14.08.2020 and 01.10.2020 passed by the District Inspector of Schools and the order dated 31.12.2020 passed by the Joint Director of Education were impugned by the writ petitioner-respondents in Writ - C No. 6906 of 2021. The learned Single Judge, before whom the writ petition aforesaid came up, declined to interfere with the orders dated 14.08.2020 and 01.10.2020 on ground that these had recognized elections held by the appellant, the process whereof had been completed. Apparently, the learned Single Judge did not disturb the orders passed in favour of the appellant's elections, inasmuch as the District Inspector of Schools had recognized one set of elections before the rival claim was laid before him. And, after the rival claim was laid, the District Inspector of Schools would have no jurisdiction. It would lie under the Statute, with the Joint Director of Education or with the Regional Level Committee exercising those statutory powers in terms of the Government Order dated 20.10.2008. The learned Single Judge, therefore, scrutinized the order dated 31.12.2020 passed by the Joint Director of Education, declining to exercise his jurisdiction under Section 16-A(7) of the Act and refusing to place the matter before the Regional Level Committee. The learned Judge has quashed the last mentioned order by the judgment and order impugned and directed the Regional Level Committee to issue notice to all affected parties, hear them and pass orders, preferably within a period of three months the date the claim was instituted before the Joint Director of Education, First Region, Meerut.

8. Aggrieved, this appeal has been preferred.

9. Heard Mr. Ravi Shankar Prasad, learned Senior Advocate assisted by Mr. Mithilesh Kumar Rai, learned Counsel for the appellant, Mr. G.K. Singh, learned Senior Advocate assisted by Mr. Sankalp Narain, learned Counsel appearing on behalf of petitioner-respondents nos. 5 to 70 and Mr. A.K. Ray, learned Additional Chief Standing Counsel for respondent nos.1 to 4.

10. It is submitted by the learned Counsel for the appellant that the learned Single Judge has erred in quashing the order passed by the Joint Director of

Education, inasmuch as the learned Judge has failed to appreciate that it was the appellant alone who was competent to hold elections, once permitted by the District Inspector of Schools vide order dated 14.08.2020. No one else could hold a parallel election, valid enough to bring into existence a dispute about rival committees meriting a reference to the Joint Director of Education or to the Regional Level Committee under Section 16-A(7) of the Act read with the Government Order dated 20.10.2008. Learned Counsel for the appellant emphasizes that there was only one election in existence on or after 01.10.2020 and the subsequent elections held by the writ petitioner-respondents on 08.10.2020 had no semblance of legitimacy worth consideration as a rival claim.

11. Mr. G.K. Singh, learned Senior Advocate appearing for the writ petitioner-respondents, on the other hand, submits that there was a substantial issue about the validity of the elections held by a small group of Members of the General Body, who had virtually tricked the District Inspector of Schools into granting an ex parte permission and then an ex parte recognition. The petitioner-respondents had no opportunity or notice to contest the appellant's claimed elections when the permission was granted by the District Inspector of Schools or when the elections held were recognized. In his submission, there is a substantial and *bona fide* dispute that requires to be summarily determined by the Joint Director of Education or the Regional Level Committee in the exercise of their powers under Section 16-A(7) of the Act read with the Government Order under reference.

12. We have carefully considered the submissions advanced on behalf of both parties and perused the record.

13. It appears to us that before the learned Single Judge it was contended that a reference under Section 16-A(7) of the Act read with the Government Order dated 20.10.2008 could be made before the District Inspector of Schools decided upon the validity of elections and recognized it, and not thereafter. It was also contended that the Regional Level Committee could decide on the basis of a reference made by the District Inspector of Schools alone, in case the District Inspector of Schools felt that there was a legal impediment in attesting the signatures of the Manager claimed on the basis of an election held. It was urged that no private reference of the dispute to the Joint Director of Education and a *fortiori* to the Regional Level Committee could be made.

14. This part of the submission was negatived by the learned Single Judge based on the decision of a Division Bench of this Court in **Committee of Management, Sri Yadvesh Inter College and another vs. State of U.P. and others, 2011 (8) ADJ 493.** There is absolutely no doubt in our mind that the principle laid down in **Committee of Management, Sri Yadvesh Inter College** *(supra)* and the exposition of the legal position by the learned Single Judge on its basis is without the slightest flaw. The jurisdiction of the Joint Director of Education, or for that matter, the Regional Level Committee under Section 16-A(7) read with the Government Order dated 20.10.2008 is not dependent upon a reference made by the District Inspector of Schools alone. It all depends at what stage a dispute with respect to the management of the institution arises.

15. In the present case, the dispute arose after the appellant had secured

recognition for the elections that they claim to have held on 31.08.2020 and recognized on 01.10.2020. The permission for the elections that was granted on 14.08.2020 and its later recognition on 01.10.2020 in the absence of the petitioner-respondents and without notice to them would not imbue those elections with the imprimatur of validity, merely because the appellant has stealthily approached the District Inspector of Schools and sought permission to hold elections. The elections held by them, for that reason alone, would not become infallible. This is not to say that the elections held by the appellant are unlawful in any manner. This is a question which the Joint Director of Education has to go into, sitting in the Regional Level Committee, exercising power under Section 16-A(7) of the Act read with the Government Order dated 20.10.2008. He would be required to decide the issue on the basis of evidence placed before him by parties regarding the validity of their respective elections claimed. In any eventuality, the Joint Director of Education, or for that matter, the Regional Level Committee cannot abdicate their obligations under the Statute to summarily determine the dispute with regard to the management of an institution governed by the Act. They are required to decide, albeit summarily, the validity of the elections rivally claimed by the appellant and the petitioner-respondents, on the basis of which, recognition would follow, subject, of course, to the determination of a Court of competent jurisdiction.

16. In the opinion of this Court, there is no error in the judgment passed by the learned Single Judge. This appeal **fails** and is **dismissed**. There shall be no order as to costs.

(2022) 12 ILRA 454
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal Defective No. 558 of 2022

Nabeel Husain ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Shiv Bhushan Singh, Sri Mahendra Kumar Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment - Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - Rule 5(1) - U.P. Basic Education Act, 1972 - Sections 3 & 13 - Rule 5(1) of 1974 Rules indicates that the claim for compassionate appointment is not maintainable where the spouse of the deceased government servant is already employed under the Central Government or a St. Government or a Corporation owned or controlled by the Central Government or a St. Government. (Para 11)

In the instant case, there is no dispute that the spouse of the deceased employee, namely Tabassum Khan, is employed as Head-Mistress of a primary institution under the Board of Basic Education which is established by the St. Government u/s 3 of the U.P. Basic Education Act, 1972 and is under the control of the St. Government as per section 13 of the 1972 Act. (Para 12)

The submission that Tabassum Khan is appellant's step mother and he would get no benefit of his step mother's employment is not

acceptable because compassionate appointment cannot be claimed as of right. It can be provided only if the policy or the rules governing such appointment permits. **As per Rule 5(1), once it is not in dispute, that Tabassum Khan, spouse of the deceased employee was under employment**, **the claim for compassionate appointment was not sustainable.** Consequently, the claim of the petitioner for compassionate appointment was rightly rejected and the learned Single Judge was justified in dismissing the writ petition. (Para 13, 14)

Special appeal dismissed. (E-4)

Present special appeal is against the judgment and order dated 26.09.2022, passed by learned Single Judge in Writ A No. 15313 of 2022. whereby the petition of the petitioner seeking quashing of the order dated 23.05.2022 rejecting his claim for compassionate appointment, has been dismissed.

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard counsel for the appellant and learned Standing Counsel for the respondents.

In Re: Delay Condonation Application No. 01 of 2022

2. By this Delay Condonation Application which is supported by an Affidavit, the appellant seeks condonation of about 20 days' delay in filing the Appeal against the judgement and order dated 26.09.2022 passed by learned Single Judge in Writ A No. 15313 of 2022.

3. Considering the explanation offered in the Affidavit filed in support of Delay Condonation Application, the delay in filing the appeal is condoned.

4. The Delay Condonation Application is allowed.

5. Office to assign a regular number to the appeal.

In Re: Appeal

6. This intra court appeal is against the judgement and order of learned Single Judge passed on 26.09.2022 in Writ A No. 15313 of 2022 whereby the Writ Petition of the petitioner seeking quashing of the order dated 23.05.2022 rejecting his claim for compassionate appointment, has been dismissed.

7. The undisputed facts giving rise to the instant Appeal are as follows:

8. The father of the petitioner i.e. Rahat Husain was an Assistant Teacher in Government Girls Inter College, Etah which is attached to Pandit Deen Dayal Upadhyay Government Model Inter College, Moiuddinpur, Jaithra (Etah). He died in harness on 21.04.2021. As per the heirs certificate including the service record, Sri Rahat Husain had five heirs i.e. Tabassum Khan (wife), Nabeel Husain (son-petitioner-appellant), Iram Jafri (married daughter), Km. Alihara Husain (unmarried daughter) and Km. Alkhizra Husain (unmarried daughter). The wife of Rahat Husain i.e. Tabassum Khan is a Head-Mistress in a Basic School under the Basic Shiksha Parishad.

9. On death of Rahat Husain, the petitioner applied for compassionate appointment by taking recourse to the provisions of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974

("for short 1974 Rules"). As the claim of the petitioner was not being considered, Writ A No. 1019 of 2021 was filed for a direction upon the concerned respondent to consider the claim of the petitioner for appointment on the post of Assistant Teacher in Government Girls Inter College, Etah on compassionate ground. The said petition was disposed off vide order dated 2.03.2022 requiring the concerned officer to take an appropriate decision. Pursuant to that direction, the District Inspector of Schools, Etah (DIOS) considered the claim and rejected it by order dated 23.05.2022, inter alia, on the ground that spouse of the deceased employee was a Headmistress in a Basic School under the Basic Shiksha Parishad. This order dated 23.05.2022 was challenged in Writ A No. 15313 of 2022 which has been dismissed by the order impugned in this appeal.

10. We have heard counsel for the appellant and the learned Standing Counsel for the Respondents at length.

11. It is not in dispute that the claim of the appellant for compassionate appointment was made under the 1974 Rules. The relevant portion of Rule 5 (1) of the 1974 Rules is extracted below:

*"**5. Recruitment of a member of the family of the deceased**.- (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, ... "*

12. Perusal of the aforesaid extracted Sub-Rule (1) of Rule 5 of 1974 Rules would indicate that the claim for compassionate appointment is not maintainable where the spouse of the deceased government servant is already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government.

13. In the instant case, there is no dispute that the spouse of the deceased employee, namely Tabassum Khan, is employed as Head-Mistress of a primary institution under the Board of Basic Education which is established by the State Government under Section 3 of the U.P. Basic Education Act, 1972 and is under the control of the State Government as per section 13 of the 1972 Act.

14. The learned counsel for the appellant to wriggle out of the situation submits that Tabassum Khan is appellant's step mother. Appellant is son of predeceased wife of deceased employee Rahat Hussain therefore, appellant's case is a typical case where he would get no benefit of his step mother's employment.

15. The above submission is not acceptable because compassionate appointment cannot be claimed as of right. It can be provided only if the policy or the rules governing such appointment permits.

Rule 5(1) allows a claim for compassionate appointment only when the spouse of the deceased employee is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government therefore, once it is not in dispute that Tabassum Khan, spouse of the deceased employee was under employment as noticed above, the claim for compassionate appointment was not sustainable. Consequently, the claim of the petitioner for compassionate appointment was rightly rejected and the learned Single Judge was justified in dismissing the writ petition.

16. The Appeal is dismissed.

(2022) 12 ILRA 457
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2021

BEFORE

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

Writ-C No. 31006 of 2021
With
Writ-C No. 31010 of 2021

Smt. Omwati ...Petitioner
Versus
Collector, District Pilibhit & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Nandan

Counsel for the Respondents:
C.S.C.

A. Civil Law - UP Revenue Code, 2006 – Section 98(1) – UP Revenue Code Rules, 2016 – R. 99 – Transfer of land by a person belongs to Schedule Caste – Restriction imposed – Permission was rejected on the ground that she had not produced any certificate from the Gram Pradhan to the effect that no member of the Scheduled Caste/Scheduled Tribe of the village was ready to purchase the property in question – Validity challenged – High Court set aside the impugned orders holding that it was passed in the absence of consideration of the relevant provisions and being based on wholly irrelevant consideration and as such are legally unsustainable. (Para 19 and 26)

B. Discretionary power – Exercise thereof – Keeping the irrelevant consideration in mind – Effect – Held, if the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account or by disregard of the relevant considerations required to be taken into account, the decision arrived at by the authority would be invalid. (Para 23)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Sitaram Vs St. of U.P. & ors.; 2022 (155) RD 178

2. R. Vs St Pancras Vestry; (1890) 24 Q.B.D. 371

3. Associated Provincial Picture Houses, Ltd. Vs Wednesbury Corp.; [1947] 2 All E.R. 680

4. Padfield & ors. Vs Minister of Agriculture, Fisheries & Food & ors.; [1968] 1 All E.R. 694

5. Breen Vs Amalamated Engineering Union & ors.; [1971] 2 Q.B. 175

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

1. The two writ petitions are based on similar set of facts and raise common questions of law, accordingly with the consent of the parties, the petitions are being taken up for hearing together.

2. Heard Sri Siddharth Nandan, learned counsel for the petitioners and Ms. Shivi Mishra, learned Standing Counsel for the State respondents.

3. Writ C No. -31006 of 2021 seeks to raise a challenge to an order dated 9.11.2021 passed by the respondent no.1/Collector, District Pilibhit in Case No. 1307 of 2021 (Omwati vs. State of U.P.) under Section 98(1) of U.P. Revenue Code, 20061. A further prayer has been made for a direction to the respondent authorities to grant permission for executing the sale deed in pursuance of an agreement to sell dated 5.12.2019 as per terms of Section 98 of the Code, 2006 read with Rule 99 of the U.P. Revenue Code Rules, 20162.

4. The petitioner claims to be recorded as a bhumidhar with transferable rights over half portion of land bearing Khata no.13, Gata no. 218 area 0.679 hectares situate at Village Simraya, Tehsil Puranpur, District Pilibhit. It has been submitted that the petitioner is married and is residing with her husband at Village Mainakot, which is situate at a distance of 50 kms and since it is not possible for her to carry out agriculture over the land in question, she entered into a registered agreement to sell dated 5.12.2019 with the respondent no.3 and submitted an application dated 6.12.2019 to the Collector seeking permission under Section 98(1) of the Code, 2006. A report thereon dated 20.1.2022 was submitted by the Tahsildar concerned. The petitioner thereafter, approached this Court by filing Writ C No. 7110 of 2020 (Smt. Omwati vs. Collector, District Pilibhit and 2 Others) which was disposed of in terms of an order dated 4.5.2020 directing the respondent no.1 to pass an appropriate order on the application submitted by the petitioner within a prescribed time period. The application filed by the petitioner was subsequently rejected by the respondent no.1 by means of an order dated 6.12.2019. Being aggrieved, against the aforesaid order, the petitioner has preferred the present writ petition.

5. Writ C No. 31010 of 2021 seeks to bring into question the order dated 9.11.2021 passed by the respondent no. 1/Collector, District Pilibhit in Case No. 1306 of 2021 (Shiv Narayan vs. State of U.P.) under Section 98(1) of the Code, 2006. A further prayer is sought for a direction to the respondent no.1 to grant permission for execution of the sale deed in furtherance of an agreement to sell dated 9.12.2019 as per terms of Section 98 of the Code, 2006 read with Rule 99 of the Rules, 2016. The petitioner has asserted himself to be a bhumidhar with transferable rights over land under Khata no. 289, Gata no. 412, area 0.301 hectares and 2/4th of Khata no. 54, Gata no. 556 area 0.122 hectares and Khata no. 215, Gata no. 413Aa, area 0.080 hectares situate at Village Simraya, Tehsil Ghunghchihai, Tehsil Puranpur, District Pilibhit and also half share of Khata no. 002, Gata no. 301 area 3.561 hectares situate at Village Bhagwantapur, Tehsil Puranpur, District Pilibhit. It is submitted that petitioner had entered into a registered agreement to sell dated 9.12.2019 with the respondent no.3 in respect of the land in question which is situate at a distance of 18 kms and accordingly, it was not possible for him to carry out agriculture over the said land. The petitioner has also stated that he was in need of funds to repay the loan which he had taken. An application was therefore, submitted before the respondent no.1 in the prescribed format for seeking permission as per Section 98(1) of the Code, 2006. A

report dated 20.1.2020 was submitted by the Tahsildar thereon. The matter remained pending and in view thereof, the petitioner had to approach this Court by filing Writ C No. 7115 of 2020 (Shiv Narayan vs. Collector, District Pilibhit and 2 Others) which was disposed of by an order dated 4.5.2020 directing the respondent authorities to pass appropriate order within a time bound period. The application of the petitioner was subsequently rejected by the respondent no.1 by an order dated 10.12.2019. It is against the aforesaid order that the writ petition has been filed.

6. Counsel for the petitioner has referred to the provisions contained under Section 98 of the Code, 2006 and Rule 99 of the Rules, 2016 to contend that in the case of Smt. Omwati (petitioner in Writ C no. 31006 of 2021) the petitioner had fulfilled the conditions mentioned in Rule 99 of the Rules, 2016 and accordingly, was entitled for being granted permission. It is submitted that the application of the petitioner has been rejected merely on the ground that she had not produced any certificate from the Gram Pradhan to the effect that no member of the Scheduled Caste/Scheduled Tribe of the village was ready to purchase the property in question and therefore, she was not entitled for grant of permission solely for the reason that the agricultural land was at a distance of 50 kms from the place where she was residing.

7. It is sought to be contended that there is no requirement under the relevant statutory provisions or the rules made thereunder with regard to filing of a certificate of the Gram Pradhan to indicate that no person belonging to the Scheduled Caste in the village was ready to purchase the property and that the petitioner having specifically stated that it was not feasible for her to travel a distance of 50 kms to cultivate the land, she was entitled for grant of permission. Learned counsel has submitted that the provision under Section 98 of the Code, 2006 read with Rule 99 of the Rules, 2016 is a beneficial piece of legislation and the discretion granted to the Collector in this regard under clause (c) of the proviso to Section 98(1) ought to have been exercised liberally and in furtherance with the intent of the legislature. Accordingly, it is urged that the order passed by the Collector rejecting her application is erroneous and legally unsustainbale.

8. As regards the case of Shiv Narayan (petitioner in Writ C no. 31010 of 2021), learned counsel for the petitioner has pointed out that here also the application has been rejected by assigning the reason that the petitioner had not submitted any certificate from the Gram Pradhan that no person in the village belonging to the category of Scheduled Caste/Scheduled Tribe was ready to purchase the property in question and in view thereof, the permission could not be granted only for the reason that the agricultural land was at a distance of 18 kms from the place where he was residing.

9. Learned counsel appearing for the State respondents has supported the order passed by the respondent authorities by pointing out that the petitioners having not fulfilled the conditions specified under Section 98(1) of the Code, 2006 read with Rule 99 of the Rules, 2016, the applications seeking permission have rightly been rejected. It has been submitted that the restrictions ingrained in the aforesaid statutory provisions are with a view to protect the interest of the *bhumidhars* belonging to Scheduled Castes and the

discretion conferred on the Collector under clause (c) of the proviso to Section 98(1) is structured in the manner as prescribed under Rule 99 and cannot be extended beyond the specified terms.

10. Section 98 of the Code, 2006 and Rule 99 of the Rules, 2016 which are relevant for the purpose of the controversy in question are being extracted below:

"98. Restrictions on transfer by bhumidhars belonging to a Scheduled Caste.--(1) Without prejudice to the provisions of this Chapter, no bhumidhar belonging to a scheduled caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste, except with the previous permission of the Collector in writing:

Provided that the permission by the Collector may be granted only when--

(a) the bhumidhar belonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110, as the case may be; or

(b) the bhumidhar belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(c) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

(2) For the purposes of granting permission under this section the Collector may make such inquiry as may be prescribed.

Rule 99. Collector's permission for transfer of Scheduled Caste bhumidhar's land. (Section 98).-- (1) An application under section 98 (1) or under section 98 (1) read with section 107, for permission to transfer land by way of sale or gift or for permission to bequeath land by will, as the case may be, shall be made by a Bhumidhar with transferable rights belonging to Scheduled Caste to the Collector in R.C. Form-27.

(2) An application under section 98 (1), for permission to mortgage his interest in the land shall be made by a bhumidhar, belonging to a Scheduled Caste to the Collector in **R.C. Form-28.**

(3) An application under section 98 (1), for permission to let out land shall be made by a bhumidhar belonging to a Scheduled Caste to the Collector in R.C. Form-29.

(4) On receipt of an application under section 98 (1) the Collector shall make such inquiry as he may, in the circumstances of the case, deem necessary. He may also depute an officer not below the rank of Naib Tahsildar for:

(a) verification of the facts stated in the application; and

(b) reporting the circumstances in which permission for transfer is sought.

(5) The inquiry officer referred to in sub-rule (4) of this rule shall submit the report in duplicate within the period of fifteen days, from the date of receiving the order of such inquiry.

(6) A copy of the report shall be supplied to the applicant free of charge, from the office of the Collector where such report has been submitted.

(7) The applicant may file objection against the report submitted by the inquiry officer within the period of seven days from the date of receipt of the copy of the report.

(8) After receiving the report submitted under sub-rule (3) and the objection, if any, if the Collector is satisfied that-

(a) the conditions of clause (a) or clause (b) of subsection (1) of section 98 are fulfilled; or

(b) the tenure holder or any member of his family is suffering from any fatal disease regarding which the certificate has been issued by any physician or surgeon specialist in the disease concerned and the permission for transfer is necessary to meet out the expenses for the treatment of such disease; or

(c) the applicant is seeking permission under section 98(1) of the Code for the proposed transfer to purchase any other land from the consideration of such proposed transfer and the facts in this regard in the application are supported with certified copy of a registered agreement to sell in favour of the applicant; or

(d) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(e) if the permission is being sought for transfer by sale the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector;

he may grant the permission by recording the reasons.

Explanation. --For the removal of doubt it is a hereby clarified that if the condition enumerated in clause (d) of this sub-rule is not fulfilled but any condition enumerated in clauses (a) to (c) of this rule is fulfilled the permission under section 98(1) of the Code may be granted by Collector.

(9) An application referred to in sub-rule (2) or sub-rule (3) of rule 99 for permission to mortgage or to let out land, as the case may be, may be granted by the Collector on his being satisfied that the mortgage or letting out, as the case may be, is not possible in favour of a person belonging to a Scheduled Caste or Scheduled Tribe.

(10) An application referred to in sub-rule (1) of rule 99 for permission to bequeath land by will, may be granted by the Collector on his being satisfied that the bequeath of the land was not possible in favour of the person belonging to a Scheduled Caste or a Scheduled Tribe.

(11) The Collector shall make an endeavor to dispose of the application under section 98(1) within the period of fifteen days from the date of receiving the report submitted by the inquiry officer and if the application is not disposed of within such period the reason for the same shall be recorded."

11. Section 98 of the Code mandates that no bhumidhar belonging to a scheduled

caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste except with the previous permission of the Collector in writing. The previous permission of the Collector is therefore, a condition precedent before any bhumidhar of scheduled caste can seek to transfer his land to a person not belonging to a scheduled caste. In the absence of such permission having been obtained, the transfer would be rendered void as per Section 104, and would be subject to the consequences provided under Section 105.

12. The proviso to Section 98 enumerates the conditions under which permission may be granted by the Collector, and the same are as follows:

(i) the *bhumidhar* belonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110, as the case may be; or

(ii) the *bhumidhar* belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(iii) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

13. The reasons prescribed, as referred to under clause (c) of the proviso to Section 98(1), upon which the Collector is to record its satisfaction that it is necessary to grant permission for transfer of the land, are specified under sub-rule (8) of Rule 99 of the Rules, 2016, and the same are as follows:

(i) the conditions of clause (a) or clause (b) of subsection (1) of section 98 are fulfilled; or

(ii) the tenure holder or any member of his family is suffering from any fatal disease regarding which the certificate has been issued by any physician or surgeon specialist in the disease concerned and the permission for transfer is necessary to meet out the expenses for the treatment of such disease; or

(iii) the applicant is seeking permission under section 98(1) of the Code for the proposed transfer to purchase any other land from the consideration of such proposed transfer and the facts in this regard in the application are supported with certified copy of a registered agreement to sell in favour of the applicant; or

(iv) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(v) if the permission is being sought for transfer by sale the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector;

14. The conditions under which permission may be granted for transfer to a *bhumidhar* belonging to a scheduled caste can thus be summarised as follows:-

(i) in the absence of surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110;

(ii) the transferor has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business;

(iii) for the reasons prescribed under the Rules, i.e.

(a) the tenure holder or any member of his family is suffering from any fatal disease; or

(b) the applicant is seeking permission for the proposed transfer to purchase any other land from the consideration of such proposed transfer; or

(c) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(d) if the permission is being sought for transfer by sale the consideration is not below the amount calculated as per the circle rate fixed by the Collector.

15. The explanation to Rule 99 clarifies that in a situation where any condition enumerated in clause (a) to (c) of sub-rule (8) of Rule 99 is fulfilled, the permission may be granted even if the holding of the bhumidhar (transferor) after such transfer reduces to less than 1.26 hectares.

16. The procedure for obtaining permission for transfer under Section 98 is provided for under Rule 99 of the Rules, 2016 and as per sub-rule (3) thereof an application seeking permission to transfer land by way of sale or gift or for permission to bequeath land by will, as the case may be, is to be made by a bhumidhar with transferable rights belonging to scheduled caste to the Collector in RC-Form 27. Upon receipt of such an application, the Collector under sub-rule (4) shall make an enquiry as he may, in the circumstances of the case deem necessary. For the purpose he may depute an officer not below the rank of Naib Tehsildar for : (a) verification of the facts stated in the application; and (b) reporting the circumstances in which permission for transfer is sought. Thereafter, under sub-rule (5), the inquiry officer shall submit the report in duplicate within a period of 15 days from the date of receiving the order of such enquiry. The copy of the report is to be supplied to the applicant under sub-rule (6) whereupon the applicant may file objections against the report within a period of seven days and thereafter the Collector upon being satisfied that any of the conditions under sub-rules (8)(a) to (d), and sub-rule (8)(e) of Rule 99, are fulfilled, he may grant permission after recording reasons.

17. In a case where the application has been made as per the prescribed procedure and upon due enquiry as provided under the Rules, 2016 either of the aforestated conditions are held to be satisfied, the permission is required to be granted for transfer under Section 98.

18. The aforementioned legal position with regard to the interpretation of the provisions contained under Section 98 of the Code, 2006 and Rule 99 of the Rules, 2016 which relate to the restrictions on transfer by *bhumidhars* belonging to a Scheduled Caste and the manner in which permission may be granted for the purpose by the Collector, were subject matter of consideration in a recent decision of this

Court in **Sitaram vs State of U.P. and others3**, which has been relied upon by counsel for both the parties.

19. In Omwati's case (Writ C no. 31006 of 2021), the respondent authority taking note of the fact that the principal ground for seeking permission was that the land in question was situate at a distance of 50 kms from the place where she was residing with her husband, has held that the petitioner had not produced any certificate from the Gram Pradhan to the effect that no person in the village belonging to the category of Scheduled Caste/Scheduled Tribe was ready to purchase the property in question and that consequent to the sale transaction, the petitioner will be left with no land and would become landless. In the light of the aforesaid fact, the respondent authority has arrived at a conclusion that merely the reason that the land in question was situate at a distance of 50 kms from the place where the petitioner was residing would not be a valid ground for grant of permission under Section 98 of the Code, 2006.

20. In the case of Shiv Narayan (Writ C no. 31010 of 2021), the contention of the petitioner that the land in respect of which permission was sought was at a distance of 18 kms from the place where he was residing has been taken note of by the respondent authority and in this case also it has been held that since the petitoner had not produced any certificate from the Gram Pradhan to the effect that no person in the village belonging to Scheduled Caste/Scheduled Tribe was ready to purchase the property in question, the requisite permission could not be granted only for the reason that the land in question was situate at a distance of 18 kms from the place of residence of the petitioner.

21. The requirement of submission of a certificate from the Gram Pradhan that no person in the village belonging to the category of Scheduled Caste/Scheduled Tribe was ready to purchase the property in question is not one of the conditions specified under Section 98 of the Code, 2006 read with sub rule (8) of Rules 99 of the Rules, 2016, and therefore, the same cannot be said to be a condition precedent for the purpose of grant of permission under Section 98 of the Code, 2006.

22. As per the statutory scheme laid down under Section 98(1) of the Code, 2006 read with Rule 99 of the Rules, the Collector may grant permission for transfer by bhumidhars belonging to scheduled caste upon fulfilment of either of the five specified conditions: (i) in the absence of a surviving heir; (ii) the transferor has settled or is ordinarily residing in a different district or State; (iii) the tenure holder or any member of his family is suffering from any fatal disease; (iv) the applicant is seeking permission for transfer to purchase any other land from the consideration of such proposed transfer; (v) the area of the land held by the applicant on the date of application does not, after such transfer, reduces to less than 1.26 hectares. This is subject to a further condition that the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector. The condition with regard to the area of the land, held by the applicant, consequent to the transfer of the land being reduced to less than 1.26 hectares, is not mandatory subject to the fulfilment of any of the other conditions

23. In this regard, it would be relevant to reiterate the view taken by this Court in the case of **Sitaram** (supra) to the effect

that in exercise of its discretionary power, if the concerned authority ignores or does not take into account considerations which are relevant to the purpose of the statute in question, then its action would be invalid. This would be more so where the statute conferring discretion on the authority has structured the discretion by expressly laying down the consideration which should be taken into account by the authority for exercise of the discretion. In such a case, if the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account or by disregard of the relevant considerations required to be taken into account, the decision arrived at by the authority would be invalid.

24. The authority while exercising the discretionary power in a case where the discretion of the authority has been structured while laying down specific conditions would be required to exercise the discretionary power taking into account only the relevant considerations and disregarding the consideration which are irrelevant.

25. The legal position in this regard has been summarised in the case of Sitaram by referring to the decisions in **R. vs. St Pancras Vestry4, Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation5, Padfield And Others vs. Minister of Agriculture, Fisheries And Food And Others6** and **Breen vs. Amalamated Engineering Union And Others7.** The relevant observations made in the case of Sitaram are being extracted below:-

"21. The "irrelevant considerations" doctrine was stated by **Lord Esher MR in R. vs. St Pancras Vestry** by observing as follows:

"But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

22. The scope of interference by Courts in matters relating to exercise of discretion conferred by a statute upon an authority was subject matter of consideration in **Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation** wherein it was stated by **Lord Greene, M.R.** as follows:

"... The law recognises certain principles on which the discretion must be exercised ... They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters.

.... the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to

take into account matters which it ought to take into account."

23. The circumstances under which exercise of discretionary powers by a statutory authority may be held to be invalid were stated in **Padfield And Others vs. Minister of Agriculture, Fisheries And Food And Others,** wherein **Lord Upjohn** observed as follows:

"Unlawful behaviour by the Minister may be state with sufficient accuracy ... (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration."

24. The principle laid down in the decision of the **House of Lords** in **Padfield's case** (supra) was reiterated by **Lord Denning, M.R. in Breen vs. Amalamated Engineering Union And Others,** by stating as follows:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside."

25. The proposition can thus broadly be laid down by stating that a decision by an authority exercising discretionary power under a statute must be arrived at by taking into account the relevant considerations and eschewing the irrelevant considerations, in the absence of which the action would have to be held as ultra vires and void."

26. The conditions which are required to be satisfied while considering grant of permission by the Collector to a *bhumidhar* belonging to a scheduled caste seeking to transfer land belonging to him having been clearly specified under the proviso to sub-section (1) of Section 98 read with sub-rule (8) of Rule 99, the reference made in the orders impugned to any other circumstance and on the basis thereof to reject the application of the petitioner seeking grant of permission to transfer, would therefore render the exercise of the discretionary power as ultra vires and invalid. The orders impugned having been passed in the absence of consideration of the relevant provisions and being based on wholly irrelevant consideration, are accordingly held to be legally unsustainable and are set aside.

27. In both the writ petitions, the matter is remitted to the Collector for passing of fresh order on the basis of the provisions contained under Section 98 of the Code, 2006 read with sub-rule (8) of Rule 99 of the Rules, 2016 in the light of the discussion made hereinabove. The respondent authority would be expected to pass appropriate orders on the applications of the petitioners under Section 98 seeking grant of permission for transfer, expeditiously, and preferably within a period of three months from the date of presentation of a certified copy of this order.

28. The writ petitions are **allowed** to the extent indicated above.

(2022) 12 ILRA 467
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2020

BEFORE

THE HON'BLE ASHOK KUMAR, J.

Criminal Misc. Anticipatory Bail Application No. 4502 of 2020
(U/S 438 CR.P.C.)

Sugreev Nishad ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Vinay Kumar Mishra

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 307, 353, 332, 333, 336, 341, 323, 504, 506 & 427 - The Code of Criminal Procedure, 1973 - Section 438 - Anticipatory Bail, Criminal Law Amendment Act, 2013 - Section 7, Prevention of Damages to Public Property Act, 1984 - Section3/5

Illegal sand mining and transportation - sand mafia - policies related to sand mining made by government - violated with connivance of officials of administration - lease - lease rent in lieu of sand mining - illegal sand transported operated by same lease holders - unregistered vehicles.**(Para - 15,17)**

HELD:-Ordered senior officials of the Uttar Pradesh government to verify facts, take cognizance and immediate action, stop illegal sand mining and transportation immediately, and issue guidelines to all their subordinates (subordinate officers) directing them to submit to the government all details related to sand mining under their respective jurisdictions every month.**(Para -18)**

Anticipatory bail application rejected. (E-7)

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

1. प्रस्तुत आपराधिक प्रकीर्ण अग्रिम जमानत प्रार्थना पत्र, आवेदक- सुग्रीव निषाद पुत्र शिवकरन निवासी ग्राम कन्जासा, पुलिस स्टेशन घूरपुर, जिला प्रयागराज द्वारा अन्तर्गत धारा 438 आपराधिक (आपराधिक प्रक्रिया संहिता) प्रस्तुत की गई।

2. वाद के तथ्य इस प्रकार हैं कि दिनांक 10.05.2020 को समय मध्य रात्रि 12.40 बजे जब उपनिरीक्षक सुमित आनन्द मय हमराह के मय वाहन यू.पी.70ए जी 1819 व यू.पी. 32 बी जी 7510 थाना हाजा को यह सूचना प्राप्त हुई की उक्त थाने के क्षेत्राधिकार के अन्तर्गत अवैध बालू खनन व परिवहन किया जा रहा है तो समस्त पुलिस टीम यमुना नदी के घाट पर दबिश देने पहुंची जहाँ पर पुलिस टीम को दो ट्रैक्टर पर बालू लदी खड़ी प्राप्त हुई साथ ही आस-पास के क्षेत्र पर भारी मात्रा में बालू डम्प करके टीले नुमा स्थल दिखायी दिया व लगभग 10-15 व्यक्ति जो उक्त बालू खनन व परिवहन से सम्बन्धित थें मौजूद मिले।

3. पुलिस टीम द्वारा खनन स्थल पर मौजूद व्यक्तियों से उनके नाम व पते पूँछे गए जिस पर उन्होंने अपने नाम व वल्दियत का निम्न विवरण दियाः

1. गुलबदन निषाद पुत्र भुल्लन निषाद, 2. मन्जीत निषाद पुत्र स्व० रामधनी, 3. अनिल निषाद पुत्र स्व० रामधनी, 4. फूल चन्द्र पुत्र स्व० बाबूलाल, 5. निर्मला निषाद पत्नी राजाराम, 6. रमेश निषाद पुत्र राजाराम, 7. दिनेश निषाद पुत्र स्व० रामानुज, 8. प्रवीण निषाद पुत्र स्व० रामानुज, 9. सुग्रीव निषाद पुत्र शिवकरन, 10. धर्मेन्द्र निषाद पुत्र स्व० रामकरन समस्त नि० गण ग्राम कन्जासा थाना घूरपुर जनपद प्रयागराज।

4. पुलिस को घटनास्थल / खनन स्थल पर आते देख 4-5 व्यक्ति उक्त घाट से कन्जासा ग्राम की ओर भाग गए।

5. जब पुलिस टीम द्वारा मौजूद पकड़े गये व्यक्तियों को गिरफ्तार करने का प्रयास किया गया तो वे सभी आमदा फौजदारी हो गए परन्तु पुलिस टीम के सदस्यों द्वारा बल प्रयोग कर उन्हें वहाँ पर उपस्थित बालू से लदी ट्रैक्टर ट्रालियों पर बैठाया गया और थाने लाया जाने लगा।

6. प्रथम सूचना रिपोर्ट जो कि उपनिरीक्षक सुमित आनन्द थाना घूरपुर जनपद प्रयागराज द्वारा लिखायी गयी में इस बात का जिक्र किया गया कि जब उपरोक्त दो ट्रैक्टर ट्रालियों को घाट से थाने की ओर लाया जा रहा था तब घाट से ऊपर आकर कन्जासा ग्राम के सामने मन्दिर के पास लगभग 100-150 व्यक्तियों द्वारा जिनके हाँथों में लाठी डण्डा, लोहे की रॉड, ईंट व पत्थर थें रोकने का प्रयास किया गया। भीड़ में उपस्थित अवांछनीय व्यक्तियों द्वारा भद्दी भाषा का प्रयोग कर पुलिस टीम को ललकारा गया व ट्रैक्टर ट्राली पर लदी बालू को पुनः यमुना घाट की ओर ले भगाने का प्रयास किया गया व ट्रैक्टर ट्राली पर बैठे ऊपरलिखित व्यक्तियों द्वारा भीड़ का फायदा उठाकर ट्रैक्टर ट्राली से उतरकर भीड़ के साथ होकर पुलिस पार्टी पर जान से मारने की नियत से सरकारी कार्यवाही में बाधा पहुँचाते हुए लाठी डण्डा, ईंट पत्थर व लोह की रॉड से हमला कर दिया गया व पुलिस बल के साथ उपस्थित दोनों पुलिस वाहनों को काफी नुकसान पहुँचाया गया व सरकारी जीप में बैठे कांस्टेबल मनोज यादव को डण्डो से पीटकर चोटिल किया गया।

7. ऊपर नामित अपराधियों द्वारा भीड़ का फायदा उठाकर गाँव में भय का माहौल उत्पन्न किया गया व पुलिस टीम में उपस्थित महिला कांस्टेबल बल के साथ अनुचित व्यवहार किया गया जिसके पश्चात पुलिस टीम किसी तरह अपनी जान बचाकर मौकाये वारदात से भागने में सफल रही।

8. प्रथम सूचना रिपोर्ट में उक्त घटना का समय मध्य रात्रि 12.40 से 12.55 का दर्शाया गया है।

9. प्रस्तुत अग्रिम जमानत प्रार्थनापत्र के समर्थन में याची के विद्वान अधिवक्ता द्वारा यह कहा गया कि जिन धाराओं के अन्तर्गत मुकदमा कायम किया गया वह प्रथम सूचना रिपोर्ट में वर्णित तथ्यों से परे है।

10. विद्वान अधिवक्ता का कथन है कि प्रथम सूचना रिपोर्ट के पंजीकृत होने के पश्चात पुलिस बल प्रार्थी को परेशान कर रहा है और अनेकों बार प्रार्थी को पकड़ने हेतु घर व गाँव में दबिश दी जा चुकी है।

11. प्रार्थी के विद्वान अधिवक्ता द्वारा कथन किया गया कि प्रस्तुत अग्रिम जमानत प्रार्थनापत्र इस न्यायालय के सम्मुख प्रथम बार दाखिल किया गया है एवं जमानत प्रार्थनापत्र प्रार्थी के द्वारा जिला सत्र न्यायालय में दाखिल नहीं किया गया है जिसकी वजह कोविड-19 महामारी के कारण से लॉकडाउन का चलना बताया गया है जिस वजह से प्रार्थी के लिए जिला न्यायालय के सम्मुख जाना सम्भव नहीं है।

12. निर्विवादित रूप से उक्त घटना दिनांक 10.05.2020 रात्रि 12.40 से 12.55 मिनट के मध्य घटित हुई।

13. दिनांक 10.05.2020 को पूरे देश में कोविड-19 महामारी की वजह से लॉकडाउन चल रहा था तब प्रश्न यह उठता है कि किन परिस्थितियों में अवैधानिक रूप से बालू का अवैध खनन यमुना नदी के तट पर हो रहा था

एवं न सिर्फ खनन होता हुआ पाया गया वरन् बालू का लदान ट्रैक्टर ट्रालियों पर परिवहन हेतु भी पाया गया।

14. विद्वान अपर शासकीय अधिवक्ता द्वारा प्रस्तुत अग्रिम जमानत प्रार्थनापत्र का विरोध किया गया।

15. यहाँ यह कहना समाचीन होगा कि सम्पूर्ण प्रदेश में बालू माफिया द्वारा बालू का अवैध खनन एवं परिवहन किया जा रहा है। यद्यपि शासन द्वारा समय-समय पर बालू खनन से सम्बन्धित अनेकों नीतियाँ बनायी जाती रही हैं परन्तु यह पाया गया है कि सरकार / शासन की उक्त नीतियों का हनन प्रशासन के पदाधिकारियों की मिलीभगत से होता रहा है एवं हो रहा है। प्रदेश में अरबों रुपये की बालू का अवैध खनन व परिवहन प्रतिदिन लगातार अनवरत रूप से होता है जिसमें खनन विभाग के कुछ संदिग्ध लोग निश्चित रूप से अपने कार्य को सम्पादित करने में असफल रहते हैं दूसरे शब्दों में उनकी मिलीभगत से अवैध बालू खनन एवं परिवहन निरन्तर चल रहा है।

16. मुख्यतः सम्पूर्ण प्रदेश में बालू खनन हेतु शासन द्वारा पट्टा (लीज) पर दिया जाता है और पट्टेदार से बालू खनन के एवज में लीज रेन्ट प्राप्त किया जाता है।

17. पट्टाधारक लाईसेन्स की आँड़ में न जाने कितने गुना बालू का अवैध खनन व परिवहन करते हैं एवं यह समस्त कार्य सम्पूर्ण प्रदेश में ज्यादातर रात्रि में सम्पादित होता है। जिन वाहनों (ट्रकों) द्वारा अवैध बालू का परिवहन किया जाता है वे मुख्यतः उन्हीं पट्टा धारकों द्वारा संचालित होते हैं। ऐसा देखा एवं पाया गया है कि ट्रक का लोड यदि 20 टन भार को ले जाने हेतु स्वीकृत है तो बालू का परिवहन उससे डेढ़ से दो गुना ज्यादा मात्रा में किया जाता है जिससे न सिर्फ राजस्व की भारी हानि होती है वरन् प्रदेश की सड़कों की दुर्दशा भी होती है। जिन ट्रैक्टर ट्रालियों से बालू का परिवहन निरन्तर किया जाता है वे ज्यादातर (सम्भवतः 90%) क्षेत्रीय परिवहन विभाग से पंजीकृत नहीं होते हैं। किसी भी ट्रैक्टर ट्राली जिससे अवैध बालू का परिवहन किया जाता है पर परिवहन विभाग द्वारा आवंटित पंजीयन संख्या नहीं लिखी जाती है क्योंकि वे परिवहन विभाग के यहाँ पंजीकृत ही नहीं होते हैं। तब प्रश्न यह उठता है कि ऐसे अपंजीकृत वाहनों से अवैध बालू का परिवहन किस दशा में प्रशासन के विभिन्न विभागों की आंखों में धूल झोंककर किया जा रहा है या फिर किन्ही और मन्तव्यों को पूरा कर किया जा रहा है।

18. उपरोक्त वर्णित तथ्यों से समाज के हर वर्ग का व्यक्ति अच्छी तरह से वाकिफ है परन्तु यह बड़ी विडम्बना है कि उक्त तथ्यों को प्रत्येक व्यक्ति बड़े आराम से नकार रहे हैं जो आने वाले समय के लिए एक दुखद पहलू है। उपरोक्त परिस्थितियों को दृष्टिगत रखते हुए मैं प्रस्तुत अग्रिम जमानत प्रार्थनापत्र खारिज करते हुए उत्तर प्रदेश शासन के वरिष्ठ अधिकारियों अर्थात मुख्य सचिव उत्तर प्रदेश शासन, पुलिस महानिदेशक उत्तर प्रदेश, प्रमुख सचिव माइन्स एवं मिनरल, प्रमुख सचिव परिवहन को यह आदेशित करता हूँ कि वह ऊपरलिखित तथ्यों का संज्ञान लेते हुए त्वरित कार्यवाही करते हुए अवैध बालू खनन व परिवहन को तत्काल रोकें एवं अपने सभी मातहतों (सबोर्डिनेट अधिकारियों) के लिए दिशा निर्देश जारी कर यह निर्देशित करें कि वे प्रत्येक माह अपने-अपने क्षेत्राधिकार के अन्तर्गत बालू खनन से सम्बन्धित समस्त विवरण शासन को उपलब्ध करावें ताकि भविष्य में इस तरह की घटना प्रदेश के किसी भी जिले में न होने पावे जैसा कि प्रस्तुत वाद में हुई जिसमें पुलिस बल को बालू माफिया के द्वारा संगठित गिरोह के लोगों से कठिनाई का सामना करना पड़ा।

19. यहाँ यह कहना समाचीन होगा कि प्रयागराज जिले की विभिन्न तहसीलों एवं स्थलों पर, मुख्यतः घूरपुर क्षेत्र, रीवा क्षेत्र, नैनी क्षेत्र व अन्य क्षेत्रों में बड़ी मात्रा में बालू का अवैध खनन एवं परिवहन हो रहा है, अतः मैं विशेष रूप से प्रयागराज के मण्डलायुक्त, जिलाधिकारी, वरिष्ठ पुलिस अधीक्षक व उनके मातहत सभी सम्बन्धित अधिकारियों को यह निर्देश देता हूँ कि वे त्वरित गति से अवैध बालू खनन, व परिवहन को शीघ्रताशीघ्र रोकें एवं शासन को विस्तृत रिपोर्ट प्रस्तुत करें।

20. इस आदेश की प्रतिलिपि महानिबंधक, उच्च न्यायालय, इलाहाबाद द्वारा दो सप्ताह के अन्दर सभी सम्बन्धित अधिकारियों, जिनका उल्लेख इस आदेश में किया गया है को उपलब्ध करवायी जावे।

21. उपरोक्त तथ्यों को दृष्टिगत रखते हुए प्रस्तुत अग्रिम जमानत प्रार्थनापत्र निरस्त की जाती है।

(2022) 12 ILRA 470
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 9391 of 2022
(U/S 438 CR.P.C.)

Shahzad ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri M.J. Akhtar, Sri V.M. Zaidi (Sr. Advocate)

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 438 - Anticipatory Bail - The Essential commodities Act, 1955 - Section 3/7 - Applicant enlarged on bail in the said F.I.R. - sections added to frustrate case of applicant - to sent again behind bar - not misused during investigation - no apprehension of tampering with evidence - **HELD -** applicant behind bars again in the added sections would be of no fruitful use. Applicant liable to be enlarged on anticipatory bail in view of the judgment of Supreme Court in the case of *"Sushila Aggarwal Vs. State (NCT of Delhi), (2020) 5 SCC 1".***(Para - 3,6,8)**

Anticipatory bail application allowed. (E-7)

List of Cases cited:-

1. Bhadresh Bipinbhai Sheth Vs St. of Guj. & Anr. , 2016 (1) SCC (Cri) 240

2. Manoj Suresh Jadhav & Ors. Vs The St. of Maha. , 2018 SCC OnLine SC 3428

3. Sushila Aggarwal Vs St. (NCT of Delhi), (2020) 5 SCC 1

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri V.M. Zaidi, learned Senior Counsel assisted by Sri M.J. Akhtar, learned counsel for the applicant and Sri Vibhav Anand Singh, learned A.G.A. for the State as well as perused the record.

2. The present anticipatory bail application has been filed on behalf of the applicant in Case Crime No.390 of 2021, under Section 3/7 of The Essential Commodities Act, Police Station- Sarsawa, District Saharanpur with a prayer to enlarge him on anticipatory bail.

3. Learned Senior Counsel for the applicant has stated that the applicant was enlarged on bail by the Sessions Judge, Saharanpur vide order dated 28.02.2022,

under Sections 379, 427 IPC, Sections 15, 16 of The Petroleum and Minerals Pipeline (Acquisition of Users in Land) Act, Section 3/4 of the Exclusive Substances Act and 3/4 of The Prevention of Damages to Public Property Act. Learned Senior Counsel has further stated that after investigation, final report has been submitted in the added Sections 3/7 of Essential Commodities Act. The said sections have been added just to frustrate the case of the applicant, so that he may be sent behind the bars. Learned Senior Counsel has further stated that once the applicant has been admitted to bail and there is nothing on record to suggest that he has misused it or he has committed any other offence, then he may be enlarged on bail under the added sections under the provisions of 438 Cr.P.C. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. Learned counsel for the applicant undertakes that he has co-operated in the investigation and is ready to do so in trial also failing which the State can move appropriate application for cancellation of anticipatory bail.

4. Learned Senior Counsel has placed much reliance on the judgments of the Apex Court passed in case of ***Bhadresh Bipinbhai Sheth vs. State of Gujarat & Another*** reported in ***2016 (1) SCC (Cri) 240 and Manoj Suresh Jadhav & Ors. vs. The State of Maharashtra,*** reported in ***2018 SCC OnLine SC 3428***, wherein the applicant therein was enlarged on anticipatory bail in the added sections U/S 438 Cr.P.C. after being enlarged on regular bail U/S 439 Cr.P.C. Learned Senior Counsel has also placed reliance on the judgment of this Court passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.9742 of 2021, wherein the accused was enlarged on anticipatory bail after being granted regular bail. He has further stated that the applicant does not have any criminal antecedents to his credit.

5. Per contra, the prayer for anticipatory bail has been vehemently opposed learned A.G.A. However, he could not dispute the said facts advanced by learned Senior Counsel for the applicant.

6. It is true that the applicant was enlarged on bail in the said F.I.R. and he has not misused it during investigation and no apprehension of tampering with evidence has been raised by the A.G.A. Sending the applicant behind bars again in the added sections would be of no fruitful use.

7. The expression 'bail' whether it is a regular bail or an anticipatory bail from Sections 437 to 439 of the Code states that a person accused of, or suspected of, the commissioning of offences of the type referred therein may be 'released on bail'. The only difference between Sections 437, 438 and 439 Cr.P.C. is that an order of anticipatory bail under Section 438 Cr.P.C. insulates a person arrested from custody, while an order of bail under Section 437 or 439 Cr.P.C. gets him released from custody. Under all the three provisions, Sections 437 to 439 Cr.P.C., the person is set at liberty on security being taken for his appearance on a bail and a place.

8. On due consideration to the arguments advanced by learned counsel for the applicant as well as learned A.G.A. and considering the nature of accusations and antecedents of the applicant and the case law produced by learned Senior Cousel, the

applicant is liable to be enlarged on anticipatory bail in view of the judgment of Supreme Court in the case of ***"Sushila Aggarwal Vs. State (NCT of Delhi), (2020) 5 SCC 1".*** The future contingencies regarding the anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

9. In view of the above, the anticipatory bail application of the applicant is allowed. Let the accused-applicant- **Shahzad** be released forthwith in the aforesaid case crime (supra) on anticipatory bail on furnishing a personal bond of Rs.50,000/- and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

1. that the applicant shall make himself available for interrogation by a police officer as and when required;

2. that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

3. that the applicant shall not leave India without the previous permission of the court;

4. that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

5. that the applicant shall not pressurize/ intimidate the prosecution witness;

6. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

7. that in case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

10. It is made clear that observations made hereinabove are exclusively for deciding the instant anticipatory bail application and shall not affect the trial or deciding the regular bail application.

(2022) 12 ILRA 472
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 9403 of 2022
(U/S 438 CR.P.C.)

Lakhan Singh & Anr. ....Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri P.K. Singh, Sri Vijay Kumar Mishra

Counsel for the Opposite Parties:
G.A., Sri Aman Kumar Dwivedi, Sri Kamlesh Kumar Dwivedi, Sri Manoj Kumar Singh

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 438 - Anticipatory Bail , Indian Penal Code, 1860 - Sections 420, 467, 468, 471, 386, 120B, 504, 506, 409, 34 - Proclaimed offender not entitled to anticipatory bail as they do not cooperated with the investigation. (Para -15)

Applicants being proclaimed offenders - long criminal antecedents - proceedings u/s 82/83 Cr.P.C. complete - long criminal antecedents. **(Para -16,18)**

HELD:-Every judgement has to be seen to its own context and facts and the precedents cannot be applied universally to every case. Applicants not entitled for anticipatory bail.**(Para -21,22)**

Anticipatory bail application rejected. (E-7)

List of Cases cited:-

1. Upkar Singh Vs Ved Prakash & Ors. , (2004) 13 SCC 292

2. Amitbhai Anilchandra Shah Vs The C.B.I. & Anr. , (2013) 6 SCC 348

3. T.T. Antony etc. Vs St. of Kerala & Ors. , (2001) 6 SCC 181

4. Suresh Babu Vs St. of U.P. & Anr. , 2022 0 Supreme (AII) 653

5. Lavesh Vs St. (NCT of Delhi), (2012) 8 SCC 730

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard P.K. Singh, learned counsel for the applicants and Sri Kamlesh Kumar Dwivedi, learned counsel for the informant as well as Sri Vibhav Anand Singh, learned A.G.A. for the State.

2. The present anticipatory bail application has been filed on behalf of the applicants, **Lakhan Singh** and **Dinesh,** in F.I.R./Case Crime No. 258 of 2021, under Sections 420, 467, 468, 471, 386, 120B, 504, 506, 409, 34 of IPC, Police Station- Shamshabad, District- Agra, with a prayer to enlarge them on anticipatory bail.

PROSECUTION STORY

3. As per prosecution story, the informant is a farmer by profession and he is even involved in the cultivation of agricultural land of his brother-in-law Lokendra Singh and gets the benefit thereon. He also sows the land of other persons on contract. The informant is stated to have placed 713 bags of potatoes of his own and 1018 bags of potatoes of his brother-in-law Lokendra Singh in the cold storage owned by Bhagwan Singh and his family members. The main accused Bhagwan Singh, in collusion with the applicants, is stated to have been running the said cold storage without licence and they all are stated to have refused to return the said potatoes and the bags thereof to the informant. The applicants and other co-accused persons are stated to have illegally sold the said potatoes thereby defrauded the informant. The informant is stated to be having receipts of the said deposition of the potato bags.

RIVAL CONTENTIONS

4. Learned counsel for the applicants has stated that the applicants have been falsely implicated in the present case. The informant is the maternal uncle of Ravi Parihar son of Lokendra Singh who has registered another FIR No.192 of 2020 against the applicants on almost identical allegations. Learned counsel has further stated that the present FIR has been instituted against the applicants out of vengeance and the allegations in both the FIRs are in-verbatim of each other. The present FIR is hit by Section 300 Cr.P.C. as the applicants have been put to double jeopardy by the said FIR. He has further stated that the complainant at the instance of his nephew and brother-in-law has lodged this false and frivolous FIR.

5. Learned counsel has also placed much reliance upon an application sent by Lokendra Singh, brother-in-law of the informant to the Regional Manager of Canara Bank on 23.6.2020 wherein it has been stated that he is residing at Thane in Maharashtra and, as such, he is unable to come to the State of U.P. owing to lockdown imposed due to Covid-19

pandemic. He has further stated that the money being procured from the farmer by Bhagwan Singh may be deposited in the account for the payment of the CC Limit. The said letter is filed as Annexure-6 to the affidavit accompanying the instant anticipatory bail application. He has also stated that there is no whispering of the said letter in the instant FIR lodged by the informant.

6. Learned counsel has further stated that the matter is a civil dispute between the two directors and the brother-in-law of the informant has filed a case before the Company Law Tribunal on 30.9.2021 and just to harass the applicants, absolutely vague allegations have been levelled against them. The co-accused Gaurav and Banti @ Brijesh have already been enlarged on regular bail by another Bench of this Court passed in Criminal Misc. Bail Application Nos. 27619 of 2022 and 28072 of 2022 vide orders dated 21.7.2022 and 4.8.2022, respectively. The applicants have no concern whatsoever with the business transactions of the co-accused Bhagwan Singh as they live separately and they are not a beneficiary to the business transactions conducted by him. They have been falsely implicated owing to their relationship with the co-accused Bhagwan Singh.

7. To buttress his arguments, learned counsel has placed much reliance upon the judgement of the Apex Court passed in **Upkar Singh Versus Ved Prakash and Others1,** wherein it has been laid down that the legal right of an aggrieved person to file counter case is permissible.

8. Learned counsel for the applicants has next placed reliance upon the judgement of the Apex Court passed in **Amitbhai Anilchandra Shah Versus The Central Bureau of Investigation and Another2,** wherein it has been stated that the second FIR on same set of facts is barred and it is clearly violative of fundamental rights enshrined under Article 14, 20 & 21 of the Constitution of India.

9. Learned counsel has next relied upon another judgement of the Apex Court passed in **T.T. Antony etc. Versus State of Kerala and Others3**, wherein it has categorically been stated that the second FIR with respect to the same offence is barred.

10. So far as the proceedings of Sections 82/83 Cr.P.C. are concerned, learned counsel for the applicants has also relied upon the judgement of this Court in **Suresh Babu Versus State of U.P. and Another4,** wherein it has been stated that when the investigation is going on against a Government Servant and the proceedings u/s 82 of Cr.P.C. have been undertaken, the accused person is entitled for anticipatory bail.

11. It is further submitted that the criminal history assigned to applicant no.1 is of 10 cases and the applicant no.2 is of 7 cases and the said criminal history of the applicants has been explained in the affidavit. They are not a previous convict. Therefore, the applicants are entitled for anticipatory bail as they are the reputed persons in the locality. In case, the anticipatory bail application of the applicants is allowed, they will not misuse the liberty and shall cooperate with trial.

12. On the other hand, Sri Kamlesh Kumar Dwivedi, learned counsel for the informant as well as Sri Vibhav Anand Singh, learned A.G.A. have vehemently

opposed the prayer for anticipatory bail on the ground that the instant FIR is not barred by Section 300 of Cr.P.C. as the informant and the allegation of cheating are entirely different in both the FIRs and even in both FIRs, the time of offence is altogether different. The co-accused Gaurav and Banti @ Brijesh have not been granted anticipatory bail rather they have been released on regular bail.

13. It is also argued on behalf of the informant that the applicants have not come with clean hands as they have not disclosed their entire criminal history as the applicant no.1 and applicant no.2 are having criminal history of 11 and 9 cases, respectively. The number of criminal antecedents of the applicants as disclosed by the learned counsel for the applicants which are 10 and 7, respectively, have also not been properly explained in the instant anticipatory bail application as no orders have been annexed thereon.

14. To add to it, learned counsels have further stated that the applicants are proclaimed offenders as the proceedings u/s 82/83 Cr.P.C. have been taken up against them.

15. In support of his submissions, learned counsel for the informant has relied upon the judgement of the Apex Court passed in **Lavesh versus State (NCT of Delhi)5,** wherein it has categorically been held that a proclaimed offender is not entitled to anticipatory bail as he has not cooperated with the investigation.

16. They have further argued that the applicants being proclaimed offenders and having long criminal antecedents, are not entitled for anticipatory bail. Granting of anticipatory bail would defeat the object of Section 438 Cr.P.C.

CONCLUSION

17. Considering the overall facts and circumstances of the case and upon hearing the learned counsel for the parties at length and also considering the judgements of the Apex Court referred above, this Court is of the view that first of all, the judgements of **Upkar Singh (supra)** and **T.T. Antony (supra)** do not help the applicants at all as the said judgements are not applicable to the present case wherein it has categorically been held that second FIR is not barred although, the said facts are different as it pertains to a cross-case.

18. So far as the applicability of the judgement of this Court passed in **Suresh Babu (supra)** in the present case is concerned, this Court is of the view that the said judgement also does not help the applicants at all as the accused person in the said case had no criminal history and was a Government Servant and, thus, he was granted anticipatory bail.

19. Now, coming to the judgement of **Lavesh (supra)** , the said case law holds good to-date and the applicants are proclaimed offenders as the proceedings u/s 82/83 Cr.P.C. are almost complete and also they are having criminal antecedents of 11 and 9 cases, respectively which has not been properly explained either.

20. Here, in the context of the present case, it would be proper to refer an excerpt of a renowned book "Nature of the Judicial Process" written by Justice Benjamin N. Cardozo as under:-

"Today, most judges are inclined to say that what was once thought to be the exception is the rule, and what was the rule is the exception..... There has been a new generalization which, applied to new particulars, yields results more in harmony with part particulars, and, what is still more important, more consistent with the social welfare. This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

Lord Halsbury said in Quinn v. Leathom, 1901, A.C. 495, 506: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

21. Thus, every judgement has to be seen to its own context and facts and the precedents cannot be applied universally to every case.

22. In view of the aforesaid facts and circumstances, I am not inclined to grant anticipatory bail to the applicants.

23. The anticipatory bail application is found devoid of merits and is, accordingly, rejected.

24. However, it is made clear that the observations made hereinabove in declining the anticipatory bail to the applicants shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2022) 12 ILRA 476
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.10.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 9423 of 2022

Manish Gupta ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Alok Ranjan Mishra, Sri G.S. Chaturvedi, Sr. Advocate

Counsel for the Opposite Party:
G.A., Sri Sunil Kumar

(A) Criminal Law - Anticipatory Bail - Indian Penal Code, 1860 - Sections 177, 182, 191, 192, 193, 196, 200, 207, 209, 463, 464, 468, 471, 120-B, 420, 504 & 506 - Application u/s 156(3) of Cr.P.C. - Matter related to family discord - civil proceedings between parties since 1983 - final report u/s 173(2) Cr.P.C. - challenged under 482 Cr.P.C. - possibility of an amicable solution - matter of apprehension of arrest - non-bailable warrant issued against applicant - no likelihood of applicant absconding **- Held -** applicant entitled to be granted anticipatory bail. **(Para - 16,17)**

Anticipatory Bail application allowed. (E-7)

List of Cases cited:-

1. Satender Kumar Antil Vs C.B.I. & anr. , 2022 SCC Online SC 825

2. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC online SC 98

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri G.S. Chaturvedi, learned Senior Counsel assisted by Sri Alok Ranjan Mishra, learned counsel for the applicant and Sri Sunil Kumar, learned counsel for the informant as well as Sri Vibhav Anand Singh, learned A.G.A. for the State.

2. The present anticipatory bail application has been filed on behalf of the applicant in F.I.R./Case Crime No.1532 of 2021, under Sections 177, 182, 191, 192, 193, 196, 200, 207, 209, 463, 464, 468, 471, 120-B, 420, 504 & 506 IPC, Police Station- Kotwali Shahar, District- Bulandshahr, with a prayer to enlarge him on anticipatory bail during the pendency of the trial.

PROSECUTION STORY

3. An application u/s 156(3) of Cr.P.C. was filed by the first informant Mahesh Kumar, in the Court of Chief Judicial Magistrate, Bulandshahr on 20.09.2021 alleging that the informant and his brothers are the landlords and are in possession of Jagdish Cinema. The informant and his brothers had decided to rent the said cinema hall to Vipul Mittal and Atul Mittal. On 06.09.2021 at about 08:00 AM, when the informant and his brothers were preparing a rent deed with deed writer Sudhir Gupta at the Jagdish Cinema hall then at about 08:30 AM, the applicant and co-accused persons Chandra Prakash Gupta and Pradeep Kumar along with three unknown persons came there, started hurling abuses at them and are stated to have demanded a ransom of Rs.1 crore in lieu of the said rent deed/ any sale-deed. On the same day at about 11:00 AM, when the informant and his brothers reached the office of Registrar then again the said six persons met them and misbehaved with them. The Sub-Registrar showed three applications filed by the applicant and his brothers to stop the registration of the said rent deed. The informant along with the persons accompanied with him perused the said three applications and it was found that the language used in the said applications are similar and the witness in one application is the complainant in another application. Further in the said applications, it was alleged that the Court below has passed an order dated 18.9.2002 in Case No.07 of 2008, Mahendra Kumar Vs. Chavli Devi, restraining the informant and his brothers to transfer the alleged property through sale-deed or any other means. The informant apprehended that the applicant and his brothers are trying to rent the said property to someone else. Thereupon, the applicant showed the other documents including the order dated 5.4.2011 wherein the informant and his brothers were declared as the sole owners of the said cinema hall and thereafter, the said rent deed was registered by the Registrar in spite of the said applications filed by the applicant and his brothers. It is also alleged that the applicant and his brothers have filed fake and forged documents before the Registrar and have interfered in his official work who is a public servant.

4. The accused persons have furnished false information with intent to cause public servant to use his lawful power to the injury of another person, and have given false evidence and have used the said documents knowing them to be false, and have fraudulently claimed the property not vested in them and, thus, have committed forgery by preparing a false document for the purpose of cheating and dishonestly made a false claim in Court. Learned Magistrate had ordered for registration of FIR and after investigation, the charge-sheet against the applicant and his brothers has been filed on 03.11.2021.

RIVAL CONTENTIONS

5. Learned Senior Counsel for the applicant has submitted that a Civil Suit No.97 of 1983 (Smt. Chavli Devi and others Vs. Mahendra Kumar and others) was filed for declaration regarding the ownership of property of Jagdish Cinema Hall and the same was dismissed ex-parte by learned Additional Civil Judge (Sr. Division), Court No.4, Bulandshahr vide order dated 18.9.2002. Against the said dismissal order dated 18.9.2002, Smt. Chavli Devi and others had filed Civil Appeal No.204 of 2002 which was allowed ex-parte by the Court of Additional District Judge, Court No.12, Bulandshahr vide order dated 23.1.2008. Aggrieved by the order dated 23.1.2008, an application under Order 41 Rule 21 of C.P.C. was filed by Mahendra Kumar bearing Misc. Application No.7 of 2008 in Civil Appeal No.204 of 2002 (Mahendra Kumar vs. Chavli Devi and others) on which the learned Court below vide order dated 22.2.2008 directing the respondents/plaintiffs in the original suit, not to sale out the property in question, till the next date of listing, but subsequently, the said application was dismissed on 5.4.2011 by learned Additional District Judge, Court No.8, Bulandshahr. Consequently, a First Appeal From Order (FAFO) No.2300 of 2011 (Mahendra Kumar (deceased) and others vs. Chavli Devi (deceased) and others) has been filed before this Court, which is still pending for final disposal. Learned Senior Counsel has further submitted that in the meantime, a rent deed of whole property including the residential house (the property in question) was executed by the informant Mahesh Kumar and his brothers on 6.9.2021 in favour of Atul Mittal and Vipul Mittal, sons of Ashok Mittal, which was registered in Bahi No.1, Zild No.8279, Page No.291 to 302 at Serial No.5861 in the office of Sub-Registrar, Sadar-I, Bulandshahr.

6. Learned Senior Counsel has further stated that prior to the registration of the aforesaid rent deed in favour of the Atul Mittal and Vipul Mittal, an application was given to Sub-Registrar, Sadar-I, Bulandshahr on 6.9.2021 by the applicant to restrain the informant and his brothers from exhibiting any deed regarding the property in question as the matter is stated to be subjudiced. He has further stated that thereafter the informant filed an Original Suit bearing No.1803 of 2021 (Mahesh Kumar Agarwal Vs. Pradeep Kumar and Others) before the Court of Civil Judge (Jr. Division), Court No.1, Bulandshahr wherein the applicant has been arrayed as one of the respondents. The applicant had filed a written statement in the said O.S. and the suit is pending for adjudication. The informant and his brothers filed another Original Suit being O.S. No.2050 of 2021 before the Court below on 12.10.2021 wherein the applicant is the sole respondent/defendant with respect to the same property and the written statement has already been filed on behalf of the applicant in it.

7. Learned Senior Counsel has further stated that after the submission of charge-sheet, the cognizance has been taken by the Chief Judicial Magistrate, Bulandshahr on 16.2.2022 and non-bailable warrants have been issued against the applicant and other accused persons without considering the fact that the summons have never been served to him. He has further stated that the applicant has very much apprehension that he may be arrested in the present matter instituted at the behest of the informant. The present charge-sheet has been filed

under duress without going through the fact that there is a civil litigation going on between the parties.

8. Admittedly, the parties belong to the same family and having fallen apart over partition in the ancestral property, several civil and criminal proceedings have been initiated against each other. Learned Senior Counsel has further stated that the applicant has no other criminal antecedents except the cases pertaining to the same property. The informant has agitated the recourse to civil court and the criminal court simultaneously for the alleged act committed by the applicant and his brothers. Learned Senior Counsel has placed much reliance upon the Annexure-2 filed with the supplementary affidavit dated 30.9.2022 wherein it has been stated that NBW is in operation against the applicants vide order dated 27.9.2022 which was earlier issued on 18.8.2022.

9. Learned Senior Counsel has also stated that the applicant has challenged the impugned charge-sheet by filing an Application u/s 482 Cr.P.C. No.19652 of 2022 wherein the following order has been passed on 26.9.2022:-

"Heard Santosh Kumar Singh, learned counsel for applicants and Shri. Sunil Kumar, learned counsel for O.P. No.2.

Learned counsel for parties fairly submits that parties are closely related to each other and there is a possibility of mediation.

Considering the aforesaid fair submissions of learned counsel for parties, let the parties shall appear before this Court on 13.10.2022.

Put up as fresh on 13.10.2022 at 2 P.M."

10. Learned Senior Counsel has further argued that there is every likelihood of amicable settlement between the parties.

11. Per contra, Sri Sunil Kumar, learned counsel for the informant as well as Sri Vibhav Anand Singh, learned AGA for the State have vehemently opposed the prayer for anticipatory bail on the ground that although there is a possibility of an amicable settlement between the parties, the said application is not maintainable as there is no apprehension to the applicant of his arrest as the learned C.J.M. has observed in his order dated 27.9.2022 which read as under:-

"वादी मुकदमा की ओर से अभियुक्त के विरूद्ध बिना जमानती अधिपत्र व 82–83 सी0आर0पी0सी0 की कार्यवाही जारी करने की याचना की गयी है, परन्तु उनके द्वारा माननीय उच्च न्यायालय द्वारा पारित आदेश दिनांकित 26.9.2022 से इन्कार नहीं किया गया है। अतः समस्त तथ्यों एवं परिस्थितियों एवं माननीय उच्च न्यायालय द्वारा पारित आदेश दिनांकित 26.9.2022 व सतेन्द्र कुमार अंतिल बनाम सेन्ट्रल ब्यूरो ऑफ इन्वेस्टीकेशन एवं अन्य (2022) एस0सी0 में माननीय सर्वोच्च न्यायालय द्वारा पारित विधि व्यवस्था को दृष्टिगत रखते हुए अभियुक्त को न्यायहित में न्यायालय में उपस्थित होने हेतु अवसर दिया जाना न्यायोचित प्रतीत होता है।"

12. Learned counsel for the informant has further stated that in the FAFO filed against the said Civil Suit, there is no stay of the proceedings. Learned counsel has placed much reliance upon Sections 70 and 438 of Cr.P.C. and stated that since the applicant has no apprehension of his arrest, the present anticipatory bail application is not maintainable and Section 438 Cr.P.C. does not apply.

13. Learned counsel for the informant has relied upon Sections 6, 23, 24, 25, 26, 29 & 30 IPC but for the sake of prolixity, the same are not being reproduced here.

Learned counsel has also placed reliance upon Section 3 of the Indian Evidence Act and stated that the bar u/s 195(b)(i) of Cr.P.C. is not applicable to the present case. He has also stated that the general exception u/s 79 of IPC is also not available to the applicant.

14. In rejoinder to the said arguments, learned Senior Counsel Sri G.S. Chaturvedi has placed much reliance upon Illustration (a) of Section 464 IPC which read as under:-

"(a) A has a letter of credit upon B for rupees 10,000 written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 1,00,000 intending that it may be believed by B that Z so wrote the letter. A has committed forgery."

15. Learned Senior Counsel has further stated that the applicant has neither forged a document nor filed it by impersonating somebody else. He has signed the said document for himself only. No offence is made out. If some statement in the said document is found false then only an offence u/s 182 IPC is made out, wherein the maximum punishment is six months. The applicant belongs to a respectable family of the area and there is no likelihood of him absconding.

CONCLUSION

16. As admitted by both the parties, the matter is of family discord and civil proceedings have been going on between the parties since 1983. The applicant has challenged the filing of final report u/s 173(2) Cr.P.C. by filing an application u/s 482 Cr.P.C. wherein there is a possibility of an amicable solution to the said dispute once for all. The matter of apprehension of arrest is in the mind of the accused and there are non-bailable warrant issued against the applicant although, C.J.M., Bulandshahr has passed an order to the effect that the applicant may appear in the light of the judgement of *Satender Kumar Antil vs. Central Bureau of Investigation and another, 2022 SCC Online SC 825*. The application u/s 482 Cr.P.C. is pending in this Court and the offence does not fall within the category of economic offences rather it may be termed to be of making false statement before the executive officer. There is no likelihood of applicant absconding.

17. Considering the arguments advanced by the learned counsel for the parties, nature and gravity of the offences, facts of the case and in view of the law laid down by the Apex Court in the case of **"Sushila Aggarwal Vs. State (NCT of Delhi)-2020 SCC online SC 98"**, the applicant is entitled to be granted anticipatory bail in this case.

18. Without expressing any opinion upon ultimate merits of the case either ways which may be adversely affect the trial of the case, the anticipatory bail application of the applicant is **allowed.**

19. In the event of arrest of the applicant, **Manish Gupta,** involved in the aforesaid case crime number, shall be released on bail on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Presiding Officer/Court Concerned, with the conditions that:-

1. that the applicant shall make himself available for interrogation by a police officer as and when required;

2. that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

3. that the applicant shall not leave India without previous permission of the court;

4. that the applicant shall not tamper with the evidence during the trial;

5. that the applicant shall not pressurize/ intimidate the prosecution witness;

6. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

20. In case of breach of any of the above conditions, the court below shall have the liberty to cancel the bail granted to the applicant.

(2022) 12 ILRA 481
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Criminal Misc. Ist Bail Application No. 24375 of 2022

Indrajeet Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri R.S. Dubey, Smt. Savita Dubey

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Bail - The Code of criminal procedure, 1973 - Section 439 , Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 8/20 , 37 - Offences to be cognizable and non-bailable - "Reasonable grounds" - exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC - but is also subject to the limitation placed by Section 37 which commences with non-obstante clause - merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind.(Para - 8,9)

Commercial quantity of Ganja 20 kgs - recovered & seized total amount of Ganja 151.45 Kgs - more than commercial quantity - recovery of huge quantity of Ganja - applicant was apprehended at spot - conscious and constructive possession over recovered Ganja .**(Para - 5)**

HELD:- No reasonable ground in terms of Section 37 of N.D.P.S. Act to hold that applicant is not guilty of an offence and he is not likely to commit any offence while on bail.**(Para -)**

Bail application rejected. (E-7)

List of Cases cited:-

1. St. of Kerala Vs Rajesh, AIR 2020 SC 721

2. U.O.I. Vs Prateek Shukla, AIR, 2021 SC 1509

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

1. This bail application has been filed to enlarge the applicant on bail in Case Crime No. 127/2022, under section 8/20 of Narcotics Drugs and Psychotropic Substances Act,1985 Police Station-Geeda, District Gorakhpur.

2. According to the prosecution story, believing upon the information of the *"Mukhbir"*, during patrolling duty, police personnel went on the spot i.e. Tandua Toll Plaza, at Devariya- Gorakhpur By-pass and arrested all the the three accused persons including the present applicant and recovered 151.450 kg 'Ganza' from the

Truck bearing No.HR38Z7205, wherein, applicant was a driver.

3. Learned Counsel for the applicant submitted that the applicant is innocent and has been falsely implicated in the present crime due to ulterior motive. It is further submitted that instant FIR has been lodged by the police is only with the a view to harass the applicant. The alleged truck was found at the public place and crowded area but neither any public witness has supported the prosecution story nor the Investigation Team has recorded any statements of any individual witnesses, who have supported the case.

4. Learned AGA appearing for the State has very vehemently opposed the prayer for the grant of bail of the applicant and submitted that applicant was arrested on the spot and he was involved in committing the aforesaid offence as has been narrated in the FIR.

5. Having heard learned counsel for the parties and after perusal of records, it is evident that there is no dispute that commercial quantity of Ganja is 20 kgs and recovered & seized total amount of Ganja is 151.45 Kgs in the present case, which is more than the commercial quantity, therefore, Section 37 of Narcotics Drugs and Psychotropic Substances Act is attracted in this case, which is in addition to the Section 439 of Cr.P.C. and mandatory in nature.

6. In view of Section 37 of N.D.P.S Act, before granting the bail for the offence under N.D.P.S Act twin conditions as provided under Section 37(1)(b)(i) and (ii) and have to be satisfied. For ready reference, Section 37 of NDPS Act, reads as follows:-

*"**37. Offences to be cognizable and non-bailable-***

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]

7. On several occasions, the Hon'ble Apex Court has considered the issue relating to provisions of Section 37 of the N.D.P.S. Act and after wholesome treatment laid down guidelines in this regards, which would be useful to quote herein-below:

*"The expression 'reasonable grounds' has not been defined in the N.D.P.S. Act, but the Apex Court in the case of **Union of India Vs. Rattan Mallik @Habul** has settled the expression "reasonable grounds". Relevant paragraphs no. 12, 13 and 14 are quoted herein below:*

"12.It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of subsection (1) of Section 37 of the NDPS Act. Apart from 8 giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression `reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari, 2007(7) SCC 798] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

8. In the recent judgment of Apex Court in case of **State of Kerala Vs. Rajesh; AIR 2020 SC 721,** Hon'ble Apex Court again considered the scope of Section 37 of N.D.P.S Act as under:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged

offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in 11 addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

9. The Apex Court in **Union of India vs Prateek Shukla, AIR, 2021 SC 1509** has held that merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind. The provisions of Section 37 of the N.D.P.S. Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. The relevant paragraph nos. 11,12 and 13 of the said judgment are reproduced herein under :

"11. Ex facie, there has been no application of mind by the High Court to the rival submissions and, particularly, to the seriousness of the allegations involving an offence punishable under the provisions of the NDPS Act. Merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind by the Single Judge of the High Court to the basic question as to whether bail should be granted. The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. There has been a serious infraction by the High Court of its duty to apply the law. The order granting bail is innocent of an awareness of the legal principles involved in determining whether bail should be granted to a person accused of an offence under the NDPS Act. The contention of the respondent that he had resigned from the Company, Altruist Chemicals Private Limited, must be assessed with reference to the allegations in the criminal complaint which has been filed in the Court of the District and Sessions Judge. Gautam Budh Nagar (Annexure P-6).

The relevant part of the complaint reads as follows:

"18. That during investigation of the case, letter dated 27.11.2018 was sent to the Registrar of Companies for providing details of the Directors etc of the company in question i.e. U/s Altruist Chemicals Pvt Ltd and vide its report dated 03.12.2018 Registrar of Companies provided the said information and from the perusal of said information/documents, it reveals that accused Prateek Shukla and Bismillah Khan are the Directors.

Accused Himanshu Rana was also Director but he has resigned from the directorship. From the perusal of the documents, it also reveals that they had registered the company, i.e., Altruist Chemical Pvt. Ltd. At 001, Block Ab-Sector-45, Noida, which is a residential area and accused persons also obtained Unique Registration No. from the NCB on the above said premises."

12. We may also note at this stage the contention of the respondent in the application for bail which was filed before the High Court (Annexure P-8) that he had transferred 99% of his shareholding in the Company to Bismilla Khan Ahmadzai. Bismilla Khan Ahmadzai, as the prosecution alleges at this stage, is an

Afghan national. The application for bail which had been filed before the High Court as well as the counter affidavit which has been filed in the present proceedings suppress more than what they disclose. Be that as it may, we are of the view that the High Court was clearly not justified in granting bail and the reasons provided by the High Court, as we have already indicated above, do not reflect application of mind to the seriousness of the offence which is involved. Indicating that the respondent as an educated person with a Bachelor of Technology "may not commit any offence" is an extraneous circumstances which ought not to have weighed with the High Court in the grant of bail for an offence under the NDPS Act.

13. For the above reasons, we are of the view that the High Court has mis-applied the law to the facts in arriving at a decision for the grant of bail to the respondent. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 7 May 2019. As a consequence, the bail which has been granted by the High Court to the respondent shall stand cancelled. The respondent shall surrender forthwith as a result of the cancellation of bail by the present order of this Court."

10. No material has been brought on record by the applicant to show that there was any prior ill-will or enmity of the applicant with the police personnel concerned. Illicit trafficking is an organized crime and done adopting different modus operandi by the group of persons with their different role. So far as plea of false implication is concerned, in my view, it is stereo typed defense raised in every case, where the accused are found in the possession of contraband. Experience shows that such statements are made almost in every case, therefore, such kind of plea of false implication without any basis is not liable to be accepted at this stage.

11. If the Court laid the emphasis upon the witnesses then common people do not dare to become witness against the criminals, as they have a lot of financial and political patronage available to them as well as muscle power. Public witnesses against the criminals and drug traffickers are always in threat, therefore police personnel cannot be seen within eye of suspicion particularly when there is huge recovery of contraband and there is no prior will of police personnel with the accused and they are discharging their official duty. Huge amount of 'Ganza', 151.450 kgs cannot be planted.

12. In the light of analysis of the case as mentioned above and considering the recovery of huge quantity of Ganja as mentioned above, coupled with the fact that applicant was apprehended at the spot and was having conscious and constructive possession over the recovered Ganja, I do not find any reasonable ground in terms of Section 37 of the N.D.P.S. Act to hold that applicant is not guilty of an offence and he is not likely to commit any offence while on bail.

13. It is made clear that this finding is for a limited purpose and is confined to the question of releasing the accused applicant on bail only. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything said in this order.

14. In view of the facts and circumstances of the case and on account of the reasons mentioned above, I do not find

any good ground for enlarging the applicant on bail at this stage.

15. The bail application of the applicant is, accordingly, **rejected.**

(2022) 12 ILRA 486
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.11.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Criminal Misc. Ist Bail Application No. 51543 of 2022

Ramvilash @ Chhottan @ Chhottan Kori ....Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Ramesh Prasad

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 363, 366, 504, 506 , The Code of criminal procedure, 1973 - Section 161, 164 , The Protection of Children From Sexual Offences Act, 2012 - Section 7/8 , Hindu Marriage Act, 1955 - section 5/7 .

Maternal uncle of informant (accused-applicant) - enticed away minor daughter of informant - no medical evidence to support - statements of prosecutrix recorded under Section 161 and 164 Cr.P.C. - prosecutrix and applicant solemnized marriage - living together as husband & wife. **(Para -12)**

HELD:-Victim herself left her house and went to the applicant. She was not enticed away by him. Applicant made out a case for bail. **(Para - 11,12)**

Bail application allowed. (E-7)

List of Cases cited:-

S. Varadarajan Vs St. of Madras, 1965 AIR (SC) 942

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

1. Heard learned counsel for applicant, learned A.G.A. for State and learned counsel for the State-respondents and perused the material on record.

2. Instant application for bail has been filed by applicant-Ramvilash @ Chhottan @ Chhottan Kori supported by an affidavit of the prosecutorix seeking his enlargement on bail in Case Crime No.65 of 2020 under Sections 363, 366, 504, 506 I.P.C. and Section 7/8 POCSO Act, Police Station- Kotwali Dehat, District-Banda, during the pendency of trial.

3. Record shows that in respect of an incident, which is alleged to have occurred on 09.03.2020, an F.I.R. dated 20.03.2020 was lodged by first informant Premchand (father of prosecutrix) and was registered as Case Crime No.65 of 2020 under 363, 366, 504, 506 I.P.C. and Section 7/8 POCSO Act, Police Station-Kotwali Dehat, District-Banda.

4. In brief, as per prosecution story as unfolded in the F.I.R., it is alleged that maternal uncle of the informant i.e. accused-applicant (Ramvilash @ Chhottan @ Chhottan Kori) enticed away the minor daughter of the informant, aged about 16 years on 09.03.2020 and she (prosecutorix) had taken away some jewellary, money etc. along with her.

5. After registration of the aforesaid F.I.R., Investigating Officer proceeded with statutory investigation of afore-mentioned case crime number in terms of Chapter XII

Cr.P.C. Thereafter, statement of prosecutrix was also recorded under Section 161 Cr.P.C. by Investigating Officer wherein she has not supported the prosecution story as unfolded in the F.I.R. To the contrary, prosecutrix has stated that she herself accompanied the applicant out of her own free will. She has also stated that she has solemnized marriage with the applicant. As a consequence of above, they started living together as husband and wife. Thereafter, prosecutrix was requested for her medical examination, which was refused by her. Ultimately, the statement of prosecutrix was recorded under Section 164 Cr.P.C. wherein she re-joined her earlier statement under Section 161 Cr.P.C. Investigating Officer during the course of investigation, also recovered the mark-sheet/certificate pertaining to the High School Examination of prosecutrix wherein her date of birth is recorded as 11.07.2004, copy of the same has been annexed as Annexure 4 to the bail application.

6. Aggrieved with the above, applicant and other co-accused persons have filed a petition bearing Criminal Misc. Writ Petition No.52 of 2021 seeking stay in the aforesaid FIR and, thereafter, considering the facts of the case, a Division Bench of this Court vide order dated 11.01.2021 stayed the proceedings of the aforesaid case crime number against the applicant as well as other two accused persons, which was also extended on 12.02.2021 till 01.04.2021 and is still pending now.

7. After recording the statement of the prosecutorix under Section 161 Cr.P.C., on 13.09.2022, an application was given by the police before the court of Juvenile Justice Board, Banda and on that application on 14.09.2020, concerned Juvenile Court passed the order mentioning therein that he has no jurisdiction to the same as prosecutorix/victim is major and aged about 18 years and two months. Thereafter, victim has moved an application before the concerned police station stating therein that she did not want to go with her parents and wants to go with her mother-in-law for living their happily life. On 14.09.2020, another application has also been moved by the father of the victim before the concerned police station wherein, he has specifically stated that she (prosecutorix) is major and he has no concern with her and denied for keeping them, copies of the same have been annexed as Annexure-7 to the bail application.

8. The occurrence occurred on 09.03.2020. As such, prosecutrix was aged about 15 years and 07 months and 28 days on the date of occurrence. On the basis of above and other material collected by Investigating Officer during course of investigation, he opined to submit a charge sheet. Accordingly, he submitted charge sheet, whereby applicant has been charge sheeted under Sections under Section 363 and 366 I.P.C. and Section 7/8 POCSO Act.

9. Learned counsel for applicant submits that though the applicant is a named and charge sheeted accused but he is innocent. He has then invited the attention of the Court to the statements of prosecutrix recorded under Section 161 and 164 Cr.P.C. wherein, she has not supported the prosecution story as unfolded in the F.I.R. He therefore submits that prosecutrix had gone and accompanied the applicant out of her own free will, as such no offence as has been alleged in the aforesaid case crime number can be said to have been committed by the applicant. Prosecutrix and applicant were in love with each other. Prosecutrix has subsequently solemnized marriage with the applicant on 04.08.2022 under section 5/7 of

Hindu Marriage Act, 1955. It is lastly contended that applicant is a man of clean antecedents inasmuch as he has no criminal history to his credit except present one. Applicant is in jail since 15.09.2022. In case the applicant is enlarged on bail, he shall not misuse the liberty of bail and shall co-operate with trial. Charge-sheet having been submitted against applicant, therefore, the evidence sought to be relied upon by the prosecution against applicant, stands crystallised. As such, custodial arrest of applicant is not absolutely necessary during course of trial. On the cumulative strength of above, he submits that applicant is liable to be enlarged on bail

10. Per contra, learned counsel for the opposite party has vehemently opposed the bail but could not dispute the aforesaid facts on record.

11. The ingredients of offence under Section 363 IPC are not made out against the applicant as per the judgement of Apex Court in the case of **S. Varadarajan Vs. State of Madras, 1965 AIR (SC) 942**, since the victim herself left her house and went to the applicant. She was not enticed away by him.

12. Having heard the learned counsel for applicant, learned counsel for the opposite party, upon consideration of evidence on record, considering the aforesaid case-law, accusations made as well as complicity of applicant coupled with the fact that there is no medical evidence to support the prosecution of applicant, prosecutrix in her statements recorded under Section 161 and 164 Cr.P.C. having not supported the prosecution case, prosecutrix and applicant having solemnized marriage and are living together as husband & wife and without expressing any opinion on the merits of the case, applicant has made out a case for bail.

10. Accordingly, present bail application for bail is **allowed.**

13. Let the applicant-**Ramvilash @ Chhottan @ Chhottan Kori** involved in aforesaid case crime number be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) Applicant will not tamper with prosecution evidence.

(ii) Applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) Applicant will not indulge in any unlawful activities.

(iv) Applicant will not misuse the liberty of bail in any manner whatsoever.

The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of applicant and send him to prison.

(2022) 12 ILRA 488
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.12.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Transfer Application (Criminal) No. 122 of 2022

Karam Veer Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Paritosh Shukla, Anamika Singh, Sukh Deo Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 407 - Power of High Court to transfer cases and appeals - Indian Penal Code, 1860 - Sections 147, 148, 149 & 302 - apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary - Free and fair trial is sine qua non of Article 21 of the Constitution - apprehension must appear to the Court to be a reasonable one.(Para -12)

Transfer application by applicant - from court of District Judge, Sultanpur - to any other competent court or any other nearby District Court - apprehension -- District Judge personally biased and adamant to convict applicant - trial would not be conducted impartially and fairly - adverse and biased remarks made by District Judge – hence transfer application. **(Para - 3,5,6)**

(B) Criminal law - Power of transfer of a case - must be exercised meticulously and with precision under compelling circumstances - where on the basis of material on record it appears to the court that there is strong reason for doing so and by not transferring the case there would be miscarriage of justice - No universal or hard and fast rules - Merely making vague allegation that there is an apprehension in the mind of applicant that justice will not be done in a given case alone would not suffice.(Para - 15)

HELD:-Allegations levelled by applicant wholly vague and general in nature. Not supported by any reliable material on record. Applicant's apprehension of not getting justice quite imaginary. **(Para -16)**

Transfer application dismissed.(E-7)

List of Cases cited:-

1. Gurcharan Dass Chadha Vs St. of Raj. , AIR 1966 SC 1418

2. K.P. Tiwari Vs St. of M.P., 1994 SCC (Cri) 712

3. Captain Amarinder Singh Vs Parkash Singh Badal & ors., (2009) 6 SCC 260

4. Usmangani Adambhai Vahora Vs St. of Guj. & anr., (2016) 3 SCC 370

5. Amit Agarwal Vs Atul Gupta, 2014 (11) ADJ 414 (All.)

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard Shri Paritosh Shukla learned counsel for the applicant, Shri Rejesh Kumar Singh, learned Additional Government Advocate-1st assisted by Shri Himanshu Suryavanshi, learned counsel for the state of U.P./opposite party no.1 and perused the record.

2. In view of the order proposed to be passed, notice to opposite party no.2 is dispensed with.

3. This transfer application u/s 407 Cr.P.C. has been moved by applicant with the prayer to transfer the Sessions Trial No.121/2016, arising out of Case Crime No.0321/2015, State vs. Anurag Singh & Ors., under Sections 147, 148, 149, 302 I.P.C., Police Station Dhammour, District Sultanpur from the court of District Judge, Sultanpur to any other competent court or any other nearby District Court.

4. The brief facts giving rise to the present transfer application are that the Sessions Trial No.121/2016, State vs. Anurag Singh & Ors., is pending in the Court of District Judge, Sultanpur. The present applicant is one of the accused, who is facing the aforesaid trial. On 05.12.2022, arguments

were heard by the Court below and 15.12.2022 was fixed for delivery of judgment. In the evening of 10.12.2022, the applicant, while he was going for some personal work, saw the vehicle of informant of the aforesaid criminal case/opposite party no.2, herein, parked outside the bungalow of learned District Judge, Sultanpur, in which the informant/opposite party no.2 was sitting. The applicant stopped there and waited for a while. He noticed that one Tarkeshwar Singh, Advocate, Ex-DGC (Criminal) came out from the house of District Judge, Sultanpur and he then drove the vehicle away, in which the first informant/opposite party no.2 was sitting. According to the applicant, Tarekeshwar Singh, Advocate had worked as DGC (Criminal), who has conducted substantial part of trial of the aforesaid sessions trial on behalf of the prosecution until his retirement. Immediately after his retirement, he has filed vakalatnama on behalf of the first informant/opposite party no.2, herein. The applicant alleges that Tarekeshwar Singh is personally interested in the outcome of present trial as he is the distant relative/well wisher of the first informant/opposite party no.2. On 12.12.2022, the applicant also came to know in his village that the first informant/opposite party no.2 has managed to have a favourable judgment in his favour. Therefore, the applicant immediately approached the Administrative Judge, Sultanpur and Hon'ble The Chief Justice through e-mail. It is also stated that the co-accused has also filed an application under Section 482 Cr.P.C. bearing No.2278 of 2022 before this Court, which is still pending and this fact was also brought to the notice of learned District Judge, Sultanpur.

5. In view of the aforesaid overall facts and circumstances of this case, the applicant has apprehension that learned District Judge, Sultanpur is personally biased and adamant to convict the applicant in the aforesaid session trial. There is every possibility that in the aforesaid situation, the trial of Session Trial No.121/2016, State vs. Anurag Singh & Ors., would not be conducted impartially and fairly, particularly keeping in view the adverse and biased remarks made by the learned District Judge, Sultanpur in the open Court.

6. In the aforesaid background, the present transfer application has been filed by the present applicant.

7. Learned counsel for the applicant reiterated the aforesaid allegations and apprehensions and submitted that in the peculiar facts of this Case, the applicant apprehends that he would not get justice from the Court where Sessions Trial No.121/2016, arising out of Case Crime No.0321/2015, State vs. Anurag Singh & Ors. is pending. His further submission is that the right of fair trial implies trial, which is conducted impartially. Therefore, he submits that the instant transfer application deserves to be allowed.

8. Per contra, learned A.G.A. has opposed the aforesaid submission and prayer made by learned counsel for the applicant by submitting that except oral allegation levelled by the applicant against the learned District Judge, Sultanpur and one Tarekeshwar Singh, who has not been made a party in this application, there is no material on record to support such allegations levelled by him. It is also submitted that no details have been given by the applicant to demonstrate as to how and in what manner the District Judge, Sultanpur made biased and adverse remarks against the applicant. He, thus, submits that the present application has been moved by

the applicant for ulterior motive and on flimsy grounds just to cause delay and to exert undue pressure upon the concerned Presiding Officer. Therefore, the same is liable to be dismissed.

9. It is trite that in view of sub-section (1) of Section 407 Cr.P.C. a case can be transferred, whenever it is made to appear to High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto,or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of the code of criminal procedure,or will tend to the general convenience of the parties or witness,or is expedient for the ends of justice.

10. The Hon'ble Supreme Court on several occasions has considered the issue of transfer of cases in different circumstances.

11. The Hon'ble Supreme Court in **Gurcharan Dass Chadha Vs. State of Rajasthan AIR 1966 SC 1418,** in para no.13 has held as under:-

"13. .....***A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not office. The Court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."***

(emphasis supplied)

12. In **K.P. Tiwari Vs. State of M.P. 1994 SCC (Cri) 712** the Hon'ble Supreme Court in para no.4 has held as under:-

"4....It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive."

12. The Hon'ble Supreme Court in the case of **Captain Amarinder Singh Vs. Parkash Singh Badal and others (2009) 6 SCC 260,** has held in para nos.18, 19 and 20 as under:-

"18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other

hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether apprehension alleged is a reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.

19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C.

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the Court to be a reasonable one."

(emphasis supplied)

13. The Apex Court in case of **Usmangani Adambhai Vahora Vs. State of Gujarat and another (2016) 3 SCC 370** considering the previous judgments of the Supreme Court has held:-

"Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice."

14. This Court in case of **Amit Agarwal Vs. Atul Gupta 2014 (11) ADJ 414 (All.)** considering the scope of transfer in such a matter has held that:-

"24. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. (Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Culcutta 26)

25. Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.

26. In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary

prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice."

(emphasis supplied)

15. Thus, after having carefully examined entire material available before this Court on the touch stone of law as laid down by Hon'ble Supreme Court in **Gurcharan Dass Chadha (supra), K.P. Tiwari (supra), Captain Amarinder Singh (supra), Amit Agarwal (supra) and Usmangani Adambhai Vahora (supra)**, this Court is of the view that that the power of transfer of a case must be exercised meticulously and with precision under compelling circumstances, where on the basis of material on record it appears to the court that there is strong reason for doing so and by not transferring the case there would be miscarriage of justice. No universal or hard and fast rules can be applied for deciding a transfer application which has always to be decided on the basis of facts of each case. It is also well settled that the alleged apprehension has to be well founded. The apprehension of not getting a fair and impartial justice is required to be reasonable based on strong material and not hypothetical. Merely making vague allegation that there is an apprehension in the mind of applicant that justice will not be done in a given case alone would not suffice.

16. Adverting to the facts of the case in hand, this Court finds that the allegations levelled by the applicant as mentioned above are wholly vague and general in nature, which are not supported by any reliable material on record. The applicant's apprehension that he would not get justice is quite imaginary. The grounds set out by the applicant do not justify the transfer of case as prayed by the applicant. Therefore, this Court does not find any good ground to interfere in this matter.

17. Accordingly, the instant transfer application lacks merit, which deserves to be dismissed and the same is hereby **dismissed.**

18. Office is directed to send a copy of this order to the Court concerned, forthwith, through email/fax for necessary information and compliance.

(2022) 12 ILRA 493
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ C No. 1000602 of 1999

Bhagwan Das Chela Balram Das
...Petitioner
Versus
District Magistrate Ambedkarnagar & Ors.
...Respondents

Counsel for the Petitioner:
Rakesh Pathak, Gyanendra Kumar Pandey

Counsel for the Respondent:
Chief Standing Counsel, Prasiddha Narayan Singh, Vijai Kumar Shukla, Yogesh Singh

A. Civil Law -U.P. Land Revenue Act, 1901-Section 219-Petitioner could not indicate why the facts regarding the earlier mutation proceedings were not brought on record and that once the private respondent no. 4 disclosed about the

earlier litigation instituted by Balram Das and that was dismissed by mutation court so also the appeal with specific observation that there was no document regarding the death of Mahant Narayan Das or the manner in which the property of the temple were being administered including the manner and mode of nomination of successor and in absence of such vital document yet no rejoinder was filed contradicting the said facts rather the facts were concealed even from the mutation court who in absence of such material passed an order in favour of Bhagwan Das-there has been a conflict and rival claims by various persons claiming rights of control and Sarbarkarship to the temple properties and all claiming themselves to be the disciples of Mahant Narayan Das-the authenticity of will as set up by Bhagwan Das is also doubtful-Concealment of fact is a serious issue which amounts to playing fraud with the court-Hence, this writ petition to get the claim validated of Dhananjay Das cannot be accepted and is liable to fail.(Para 1 to 44)

B. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226, 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue arising in the case.(Para 37)

The writ petition is dismissed. (E-6)

List of cases cited:

1. Ram Chandra Singh Vs Savitri Devi & ors. (2003) 8 SCC 319

2. A.V. Papayya Sastry & ors. Vs Govt. of A.P. & ors. (2007) 4 SCC 221

3. K.D. Sharma Vs SAIL &ors. (2008) 12 SCC 481

4. Dalip Singh Vs St. of U.P. &ors. (2010) 2 SCC 114

5. Bhaskar Laxman Jadhav &ors. Vs Karamveer Kakasaheb Wagh Edu. Society &ors. (2013) 11 SCC 531

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

1. By means of the instant petition instituted by Bhagwan Das, Chela Balram Das, a challenge was laid to the order dated 11.11.1998, passed by the District Magistrate, Ambedkar Nagar, a copy of which is annexed as Annexure No.6 to the writ petition, whereby the revision preferred under Section 219 of the U.P. Land Revenue Act, 1901 was allowed and the order passed by the Additional Tehsildar, Tanda dated 13.01.1992 was set aside and the name of Mahant Narayan Das, Chela Ram Newaz was directed to be recorded in the revenue records.

2. It will be relevant to notice that initial proceedings were instituted before this Court by Bhagwan Das, Chela Balram Das, who during the proceedings had died and is now substituted by Mahant Dhananjay Das. Even the respondent no.4-Shiv Shankar Singh expired and is now represented by his son Sri Ravindra Pratap Singh.

3. The issue in the instant petition relates to the mutation in respect of the properties which are dedicated to Thakur Ji

Maharaj installed in a temple situate in Village Jiyapur, District Ambedkar Nagar.

4. The dispute arose when the erstwhile Mahant Sri Narayan Das expired in the year 1985. The dispute regarding mutation relating to the Plot No.122, situated in Village Nausanda and dedicated to the temple Thakur Ji Maharaj became alive. The records also indicate that apart from the properties situated in Village Nausanda there are several other properties which are dedicated to Thakur Ji Maharaj and the said properties were being managed by the Sarbarkar Mahant Narayan Das.

5. As per the customs and rituals upon death of the Mahant whosoever is nominated as successor Sarbarkar takes charge. In the instant case, it is alleged that upon the death of Mahant Narayan Das in the year 1985 several persons came forward to stake claim over the properties of the temple and each claiming to be the Chela of Narayan Das. Amongst such stake holders, a mutation application was moved by one Sri Balram Das alleged disciple (Chela) of deceased Mahant Narayan Das. Another application for mutation was moved by Ram Das and another by Mangal Das. Ram Das claimed himself to be disciple of Mahant Narayan Das, whereas Mangal Das claimed himself to be the disciple of Ram Newaz Das who was the Guru of deceased Mahant Narayan Das. All three applications for mutation were clubbed together and were being considered as Case No.193. Mahant Mangal Das and Ram Das withdrew their applications with the consequence that the application moved by Balram Das remained uncontested.

6. In the case of Mahant Balram Das four witnesses were examined namely Prahlad Verma, Babu Ram, the Halka Lekhpal and Bhagwan Das who is the original petitioner of this petition. It is stated that Sri Balram Das in Case No.193 made deposition to the effect that Balram Das had been nominated and was in control of the properties of the temple and as such after the death of Mahant Narayan Das, it was a legitimate claim of Balram Das to be considered as Sarbarkar of the temple property.

7. The record indicates that by means of order dated 31.03.1986 the Tehsildar did not find favour with the contentions on the ground that no written proof was submitted to establish the death of Mahant Narayan Das, moreover, the applicant of Case No.193 namely Sri Balram Das also did not appear in the witness box nor filed any document to indicate that he was nominated as the successor by Mahant Narayan Das, hence, he rejected the mutation application.

8. Being aggrieved against the said order dated 31.03.1986 Balram Das preferred an appeal under Section 210 of Land Revenue Act, 1901. The appellate court noticing an alleged agreement/compromise found that neither the said compromise as filed inspired confidence as there was nothing on record to substantiate the death of Mahant Narayan Das and it also noted that in case if Mahant Narayan Das had nominated his successor then there would have been some written document or instrument in favour of Balram Das which was also not brought on record hence in absence of such vital documents the appellate Court did not find favour with the appellant and dismissed the appeal of Balram Das by means of an order dated 28.07.1987.

9. Leaving the narrative for the moment as noticed above at this juncture, a new line of litigation was instituted by Sri

Bhagwan Das, Chela Balram Das by moving a fresh application for mutation in his own name and took a divergent plea that Mahant Narayan Das executed a will in favour of Bhagwan Das dated 07.02.1982, whereby he was nominated as his successor.

10. Bhagwan Das in support of his contentions had examined the attesting witness of the alleged will namely Sri Dwarika Das and Sri Prahlad Verma. On the basis of the said statements the Additional Tehsildar, Tanda by means of an order dated 13.01.1992 allowed the mutation application in favour of Bhagwan Das and ordered the deletion of the name of Mahant Narayan Das on the basis of the unregistered will dated 07.02.1982.

11. The private respondent no.4 namely Sri Shiv Shankar Singh moved an application for recall of the order dated 13.01.1992 which came to be rejected. Thereafter he preferred a revision before the respondent no.2 and the said revision came to be allowed by means of order dated 11.11.1998 and the name of Bhagwan Das was deleted and the properties were directed to be recorded in the name of the deceased erstwhile Mahant Narayan Das.

12. It is in the aforesaid backdrop that Sri Bhagwan Das the original petitioner filed the instant petition assailing the said order dated 11.11.1998 primarily on the ground that in a summary mutation proceedings Bhagwan Das had been able to establish that Mahant Narayan Das had executed a will in his favour nominating him as his successor and it was duly proved in accordance with law and that he was also in possession and control of the temple properties as established in the light of the statements given by the witnesses and thus the order of Tehsildar dated 13.01.1992 was not required to be interfered with but while passing the order dated 11.11.1998 the respondent no.2 not only erred in exercise of his jurisdiction but also committed an error to get the property recorded in the name of erstwhile deceased Mahant Narayan Das as the mutation could not remain in the name of a dead person.

13. The record indicates that by means of the order dated 12.03.1999, this court has passed an interim order staying the operation of the order dated 11.11.1998.

14. The private respondent no.4 has filed counter affidavit and raised certain questions regarding authenticity, genuineness of the claim made by Bhagwan Das the original petitioner. It was stated that the petitioner Bhagwan Das had not approached the Court with clean hands and that his petition suffered from concealment of material facts. It was stated that the petitioner Bhagwan Das had not disclosed the first round of litigation which had taken place wherein Sri Balram Das had staked a claim on the properties of the temple and at that point of time the original petitioner Bhagwan Das himself was pursuing the case on behalf of Sri Balram Das.

15. It was also stated in the counter affidavit that Bhagwan Das had made statement in the mutation case instituted by Sri Balram Das favouring Sri Balram Das. It was also pointed out that if Mahant Narayan Das had executed a will in favour of Bhagwan Das dated 07.02.1982 then there was no occasion for Bhagwan Das to have supported the case of Balram Das in the first round of litigation which came to be dismissed and even the appeal preferred by Sri Balram Das was dismissed. It is also

stated that Sri Bhagwan Das had made statement in the proceedings instituted by Balram Das and all these aforesaid facts including his own statement was concealed from the authorities including this Court at the time of institution of the present petition.

16. The private respondent no.4 also stated that Mahant Narayan Das knew that there was no worthy disciple who could be nominated as his successor and it is in this view of the matter that several persons namely Balram Das, Ram Das, Mangal Das had staked their claim. Since, Mangal Das and Ram Das withdrew from the race and the claim of Balram Das remained uncontested but even that came to be dismissed so also the appeal preferred by Balram Das. It is only thereafter that Bhagwan Das realised that the attempt of Balram Das had failed then Bhagwan Das staked a claim on the basis of an alleged will dated 07.02.1982 which prior to it has never seen the light of the day. It was also stated that by the aforesaid means an attempt was made to usurp the temple properties to the detriment of the deity and as such the order of mutation dated 13.01.1992 which was procured by Bhagwan Das by suppression of material facts deserves to be set aside and the order passed by the revisional Court requires no interference.

17. During pendency of this petition Bhagwan Das expired so also the original respondent no.4 and in place of Bhagwan Das, Mahant Dhananjay Das has been duly substituted who is represented by Mr. Gyanendra Kumar Pandey, learned counsel. The private respondent no.4 is now substituted by his son and is represented by Mr. Prasiddha Narayan Singh, learned counsel and Dr. Krishna Singh, learned Standing Counsel appears on behalf of the State respondent.

18. The record further indicates that apart from the factual matrix as noticed above, another Mahant namely Baba Laxmi Das also claiming to be a Chela of Mahant Narayan Das moved an application seeking his impleadment bearing C.M. Application No.82922 of 2017. In his application for impleadment it is stated that he is one of the disciples of the erstwhile Mahant Narayan Das and that in the case filed by Balram Das the said Baba Laxmi Das had also given his statement. It is also alleged that after the order dated 13.01.1992 which was procured by Mahant Bhagwan Das he sold some property of the temple and that as soon as Baba Laxmi Das became aware of the illegal acts he instituted a case before Civil Judge, Senior Division, Ambedkar Nagar bearing Case No.549/2004 and another case was filed under Section 229-B of U.P. Zamindari Abolition and Land Reforms Act before the concerned Sub Divisional Officer. On the basis of the aforesaid submissions an attempt was made to indicate that Bhagwan Das was misusing his powers and he sought his impleadment to protect the properties of the temple.

19. Significantly the said application for impleadment remained undisposed and while this matter was listed on 31.10.2022, 16.11.2022, 23.11.2022 as well as on 30.11.2022 none appeared on behalf of the Baba Laxmi Das to press the application and it is in the aforesaid backdrop that the court heard Mr. Gyanendra Pandey, learned counsel for the petitioner, learned Standing Counsel and Mr. Prasiddha Narayan Singh, learned counsel for the private respondent on 30.11.2022 when the judgment was reserved.

20. It will also be relevant to notice that this Court by means of its order dated

31.10.2022 had required the learned Standing Counsel to examine the matter and seek instructions from the District Magistrate, Ambedkar Nagar regarding the properties of Thakur Ji Maharaj including its extent. In furtherance thereof on 14.11.2022 the written instructions have been provided indicating several properties in the name of Thakur Ji Maharaj is recorded in the revenue records and are managed by the temple Sarbarkar and that there is pending litigation between persons claiming Sarbarkarship before the civil court. The said instructions have been taken on record.

21. Mr. Gyanendra Kumar Pandey, learned counsel who represents the present petitioner namely Mahant Dhanajay Das submits that it is not disputed that it is the properties dedicated to the temple Thakur Ji Maharaj and the deity installed therein. It is urged that Mahant Narayan Das was the undisputed Mahant in control of the properties who died in the year 1985. As per the petitioner Mahant Narayan Das had executed a will nominating Bhagwan Das as his successor whereas it is disputed by respondent no.4 who submits that Mahant Narayan Das had not executed any will.

22. Learned counsel for the petitioner further submitted that on the basis of the will which was placed before the Tehsildar, Tanda, it was duly proved in accordance with law and it was also found that Sri Bhagwan Das was in possession and based on this an order of mutation was passed in favour of Bhagwan Das on 13.10.1992. Further contention of the learned counsel for the petitioner is that the revisional court had no jurisdiction to set aside the order of mutation and moreover it could not make the mutation in the name of a dead person and this order is impugned in this writ petition. It is also urged that once the mutation had taken place if at all there was any dispute regarding Sarbarkarship the same could be adjudicated before the competent court but there was no requirement to interfere in the order dated 13.01.1992, passed in favour of Bhagwan Das.

23. It has also been urged by the learned counsel for the petitioner that the respondent no.4 has got no locus standi to raise any objection as he is neither the disciple of the erstwhile Mahant Narayan Das nor has any interest in the properties in question which nevertheless vests with Thakur Ji Maharaj, a deity, which is a juristic person and for the said reason the respondent no.4 had no right to assail the order dated 13.01.1992 nor the revision at the behest of respondent no.4 could have been entertained thus the revision wherein the impugned order dated 11.11.1998 was passed as it was not maintainable hence the order passed therein is also bad in the eyes of law accordingly, the writ petition deserves to be allowed.

24. Mr. Prasiddha Narayan Singh, learned counsel for the respondent no.4 could not dispute the fact that he did not have any direct locus in the dispute in question, however, he submits that his forefathers had gifted the properties to the temple and being devotees he had substantial interest to inform the court regarding the fraud being practiced at the behest of the petitioners as they had concealed the material facts while filing the present petition and in a surreptitious manner was attempting to take control of the properties of the temple which has also been sold to the detriment of the temple and the deity.

25. After the death of Bhagwan Das the person who has sought impleadment as

successor of Bhagwan Das also cannot take control of the proceedings as prima facie it has been established that the alleged will which is the basis of the claim of Bhagwan Das was fictitious so no rights could flow from Bhagwan Das to the person substituted i.e. Mahant Dhananjay Das. Accordingly, in the aforesaid circumstances till such time the issue regarding the right of Sarbarkarship is settled by the competent court, the properties of temple may be protected by passing appropriate orders.

26. Dr. Krishna Singh, learned Standing Counsel appearing on behalf the State also submitted that though certain proceedings are pending before the Civil Court but in view of the interim order granted by this Court staying the operation of the order dated 11.11.1998 Bhagwan Das remained in control and he executed a registered will deed in favour of Dhananjay Das and on the basis of the said will name of Dhananjay Das has been mutated vide order dated 31.05.2019 against which Baba Laxmi Das has moved an application for recall and in the said proceedings the order of mutation passed in favour of Dhanajaya Das has been stayed. It has further been stated that there is no clear verdict in favour of any person having rights to manage the properties from a regular court rather rights are being controlled in light of orders passed in summary proceedings.

27. Having taken note of the aforesaid factual matrix, this court finds that it is not disputed that the properties belong to a juristic person namely Thakur Ji Maharaj. The property of the temple needs to be preserved and protected for the benefit of deity.

28. Mr. Gyanendra Kumar Pandey, learned counsel for the petitioner could not explain as to why and in what circumstances Bhagwan Das was pursuing the case on behalf of Balram Das for mutation if Bhagwan Das had a will in his favour dated 07.02.1982 and why the said will was not placed and mad the basis of right of Bhagwan Das till the proceedings instituted by Balram Das came to be dismissed by the appellate court in 1987 and for the first time in the year 1992 on the basis of an alleged will dated 07.02.1982 did Bhagwan Das get his name mutated.

29. Mr. Pandey, learned counsel for the petitioner could not indicate why the facts regarding the earlier mutation proceedings were not brought on record and that once the private respondent no.4 in his counter affidavit had disclosed about the earlier litigation instituted by Balram Das and that it was also dismissed by mutation court so also the appeal with specific observation that there was no document regarding the death of Mahant Narayan Das or the manner in which the property of the temple were being administered including the manner and mode of nomination of successor and in absence of such vital document yet no rejoinder was filed contradicting the said facts rather the facts were concealed even from the mutation court who in absence of such material passed an order in favour of Bhagwan Das on 31.01.1992.

30. Mr. Pandey, learned counsel for the petitioner also did not indicate the pending status as well as the out come of the proceedings which were instituted by the rival contestant Baba Laxmi Das and it was known only through the learned Standing Counsel who informed that the matter is still pending before the appropriate Court and the matter was fixed

on 09.12.2022, but the learned Standing Counsel could not give the exact details or the stage at which the said suit was pending. The fact of proceedings pending before the Sub Divisional Officer and Civil Court was mentioned in the application for impleadment of Baba Laxmi Das even then the petitioner did not bring the facts on record nor denied the same.

31. Admittedly, the respondent no.4 has no right in the property and what this court finds is that by means of instant mutation proceedings control is being sought in respect of the temple properties vested with the deity which is nothing but an attempt to claim the management and control by resorting to suppression of material facts and misrepresentations. There is nothing on record to establish the scheme of administration regarding the temple and its properties. There is no material brought on record by either the petitioner or the respondents including the State respondents to indicate the rules, bye laws or the customs and rituals by which the temple properties are being administered and how the Sarbarkarship is passed on from one Sarbarkar to another. It is also quite true that the last undisputed Mahant namely Sri Narayan Das expired in the year 1985 but since thereafter there has been a conflict and rival claims by various persons claiming the rights of control and Sarbarkarship to the temple properties and all claiming themselves to be the disciples of Mahant Narayan Das. This court further finds that there are a large number of properties of Thakur Ji Maharaj and the issue regarding successor of Mahant Narayan Das, the authenticity of the will as set up by Bhagwan Das dated 07.02.1982 is also under cloud and is doubtful for the reasons as already noticed above, that in the first round of litigation when Balram Das was staking a claim, the original petitioner of this petition namely Bhagwan Das was pursuing the case favouring Balram Das and only after the dismissal of the case of Balram Das, did Bhagwan Das stake his claim and that too by concealing the aforesaid facts in his case and also before this court in the writ petition.

32. Concealment of fact is a serious issue which amounts to playing fraud with the court. In this regard it will be relevant to notice certain decisions of the Apex Court wherein this issue has been considered, some of which are as follows:

33. In ***Ram Chandra Singh Vs. Savitri Devi and others; (2003) 8 SCC 319*** the Hon'ble Supreme Court has held as under:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from

which the representations proceeded may not have been bad.

19. In Derry v. Peek, [1889] 14 A.C. 337, it was held:

In an 'action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit."

20. In Kerr on Fraud and Mistake, at page 23, it is stated:

"The true and only sound principle to be derived from the cases represented by Slim v. Croucher is this: that a representation is fraudulent not only when the person making it knows it to be false, but also when, as Jessel, M.R., pointed out, he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with Derry v. Peek. A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be honestly believed in. "A consideration of the grounds of belief", said Lord Herschell, "is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so."

21. In Bigelow on Fraudulent Conveyances at page 1, it is stated:

"If on the facts the average man would have intended wrong, that is enough."

It was further opined:

"This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of the prevalent confusion in regard to 'moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as 'fraud upon the law'. What is fraud upon the law? Fraud can be committed only against a being capable of rights, and 'fraud upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question."

22. Recently this Court by an order dated 3rd September, 2003 in Ram Preeti Yadav vs. U.P. Board of High School & Intermediate Education & Ors. reported in JT 2003 (Supp. 1) SC 25 held:

"Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See Derry vs. Peek [1889] 14 A.C. 337) In Lazarus Estate vs. Berly [1971] 2 W.L.R. 1149 the Court of Appeal stated the law thus:

"I cannot accede to this argument for a moment "no Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by

fraud. Fraud unravels everything". The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever."

In S.P. Chengalvaraya Naidu vs. Jagannath 1994 (1) SCC 1 this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

24. In Arlidge & Parry on Fraud, it is stated at page 21:

"Indeed, the word sometime appears to be virtually synonymous wit "deception", as in the offence (now repealed) of obtaining credit by fraud. It is true that in this context "fraud" included certain kind of conduct which did not amount to false pretences, since the definition referred to an obtaining of credit "under false pretences, or by means of any other fraud". In Jones, for example, a man who ordered a meal without pointing out that he had no money was held to be guilty of obtaining credit by fraud but not of obtaining the meal by false pretences: his conduct, though fraudulent, did not amount to a false pretence. Similarly it has been suggested that a charge of conspiracy to defraud may be used where a "false front" has been presented to the public (e.g. a business appears to be reputable and creditworthy when in fact it is neither) but there has been nothing so concrete as a false pretence. However, the concept of deception (as defined in the Theft Act 1968) is broader than that of a false pretence in that (inter alia) it includes a misrepresentation as to the defendant's intentions; both Jones and the "false front" could now be treated as cases of obtaining property by deception."

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application f any equitable doctrine including res-judicata.

26. In Smt. Shrisht Dhawan vss. M/s. Shaw Brothers 1992 AIR(SC) 1555], it has been held that:

"Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct."

27. In S.P. Chengalvaraya vs. Jagannath [1994 (1) SCC 1] this Court in no uncertain terms observed:

"...The principles of "finality of litigation" cannot be passed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.... A fraud is an act of deliberate deception with the design of security something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are

relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

28. In Indian Bank vs. Satyam Fibers (India) Pvt. Ltd. [1996 (5) SCC 550], this Court after referring to Lazarus Estates (supra) and other cases observed that 'since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order".

It was further held:

"The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers, which are resident in all Courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business."

29. In Chittaranjan Das vs. Durgapore Project Limited & Ors. 99 CWN 897, it has been held:

"Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied within such a situation.

It is now well known that a fraud vitiates all solemn acts. Thus, even if the date of birth of the petitioner had been recorded in the service returns on the basis of the certificate produced by the petitioner, the same is not sacrosanct nor the respondent company would be bound thereby.""

34. In ***A.V. Papayya Sastry and others Vs. Government of A.P. and others; (2007) 4 SCC 221*** the Hon'ble Supreme Court has held as under:

"21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed; "Fraud avoids all judicial acts, ecclesiastical or temporal".

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502, Lord Denning observed:

"No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."

24. In Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p.644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

27. In S.P. Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. & Ors. (1994) 1 SCC 1 : JT 1994 (6) SC 331, this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there was no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as 'wholly perverse', Kuldip Singh, J. stated:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan- dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation".

(emphasis supplied)

29. The Court proceeded to state: "A litigant, who approaches the court, is bound to produce all the documents

executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would he guilty of playing fraud on the court as well as on the opposite party".

30. The Court concluded: "The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants".

31. In Indian Bank v. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550 : JT 1996 (7) SC 135, referring to Lazarus Estates and Smith v. East Elloe Rural District Council, 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888, this Court stated;

"22. The judiciary in India also possesses inherent power, specially under Section 151 C.P.C., to recall its judgment or order if it is obtained by Fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the Decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the Constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business".

(emphasis supplied)

32. In United India Insurance Co. Ltd. v. Rajendra Singh and others., (2000) 3 SCC 581 : JT 2000 (3) SC 151, by practising fraud upon the Insurance Company, the claimant obtained an award of compensation from the Motor Accident Claims Tribunal. On coming to know of fraud, the Insurance Company applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground that it had no power to review its own award. The High Court confirmed the order. The Company approached this Court."

35. In ***K.D. Sharma Vs. Steel Authority of India Limited and others; (2008 12 SCC 481,*** the Hon'ble Apex Court has held as under:

"34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.

35. The underlying object has been succinctly stated by Scrutton, L.J., in the leading case of R.V. Kensington Income Tax Commissioners, (1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136 in the following words:

"...it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- it says facts, not law. He must not misstate the law if he can help it;

the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts; and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement".

(emphasis supplied)

36. A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating "We will not listen to your application because of what you have done". The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it.

37. In Kensington Income Tax Commissioner, Viscount Reading, C.J. observed:

"...Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the applicant was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit".

(emphasis supplied)

38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play `hide and seek' or to `pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts"."

36. In ***Dalip Singh Vs. State of Uttar Pradesh and others; (2010) 2 SCC 114*** Hon'ble the Supreme Court has held as under:

"1. For many centuries, Indian society cherished two basic values of life i.e., `Satya' (truth) and `Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to

ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

3. In Hari Narain v. Badri Das AIR 1963 SC 1558, this Court adverted to the aforesaid rule and revoked the leave granted to the appellant by making the following observations:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue and misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterizes as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

4. In Welcome Hotel and others v. State of Andhra Pradesh and others etc. AIR 1983 SC 1015, the Court held that a party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case.

5. In G.Narayanswamy Reddi and other v. Governor of Karnataka and another AIR 1991 SC 1726, the Court denied relief to the appellant who had concealed the fact that the award was not made by the Land Acquisition Officer within the time specified in Section 11-A of the Land Acquisition Act because of the stay order passed by the High Court. While dismissing the special leave petition, the Court observed:

"2....Curiously enough, there is no reference in the Special Leave Petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the Special Leave Petitions are liable to be rejected. It is well settled in law that the relief under Article

136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the Special Leave Petitions."

6. In S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others JT 1993 (6) SC 331, the Court held that where a preliminary decree was obtained by withholding an important document from the court, the party concerned deserves to be thrown out at any stage of the litigation.

7. In Prestige Lights Ltd. v. State Bank of India (2007) 8 SCC 449, it was held that in exercising power under Article 226 of the Constitution of India the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty bound to place all the facts before the court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain petition filed under Article 226 of the Constitution. This Court referred to the judgment of Scrutton, L.J. in R v Kensington Income Tax Commissioners (1917) 1 K.B. 486, and observed:

"In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

37. In ***Bhaskar Laxman Jadhav and others Vs. Karamveer Kakasaheb Wagh Education Society and others; (2013) 11 SCC 531*** the Hon'ble Supreme Court has held as under:

"42. While dealing with the conduct of the parties, we may also notice the submission of learned counsel for respondent No.1 to the effect that the petitioners are guilty of suppression of a material fact from this Court, namely, the rejection on 2nd May 2003 of the first application for extension of time filed by the trustees and the finality attached to it. These facts have not been clearly disclosed to this Court by the petitioners. It was submitted that in view of the suppression, special leave to appeal should not be granted to the petitioners.

43. Learned counsel for the petitioners submitted that no material facts have been withheld from this Court. It was submitted that while the order dated 2nd May 2003 was undoubtedly not filed, its existence was not material in view of subsequent developments that had taken place. We cannot agree.

44. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision making to the Court. True, there is a mention of the order dated 2nd May 2003 in the order dated 24th July 2006 passed by the JCC, but that is not enough disclosure.

The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2nd May 2003 was passed or that it has attained finality.

45. We may only refer to two cases on this subject. In Hari Narain v. Badri Das, AIR 1963 SC 1558 stress was laid on litigants eschewing inaccurate, untrue or misleading statements, otherwise leave granted to an appellant may be revoked. It was observed as follows:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, special leave granted to the appellant ought to be revoked. Accordingly, special leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent."

46. More recently, in Ramjas Foundation vs. Union of India, (2010) 14 SCC 38 the case law on the subject was discussed. It was held that if a litigant does not come to the Court with clean hands, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum. It was said:

"The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

38. From the aforesaid extracts the principle which is culled out is clear that any person who does not approach the court with clean hands is not entitled to claim any relief and rather such person can be thrown out at any stage of litigation.

39. As noticed above, that learned counsel for the petitioner could not explain regarding the concealment made by Bhagwan Das relating to the earlier litigation of Balram Das as it was very material to the litigation at hand which was triggered after the death of erstwhile Mahant Narayan Das. It is also to be noticed that even while the instant proceedings were pending before this Court and Sri Dhananjaya Das sought his substitution in place of Bhagwan Das yet no attempt was made to bring the facts on record regarding the pendency of the suit which was filed by Baba Laxmi Das both before the Civil Court as well as before the Sub Divisional Magistrate under Section 229-B of U.P.Z.A. & L.R. Act, both of which are substantive proceedings.

40. In the aforesaid backdrop where the issue as to who is entitled to manage the properties as Sarbarkar is yet to be considered which needless to say cannot be decided by the mutation court and has to be decided by the appropriate regular court

and till date there is no verdict. The manner in which the proceedings have been taken forward by Bhagwan Das and now by Sri Dhananjay Das also does not inspire much confidence. Moreover, Sri Dhananjay Das cannot be permitted to indirectly get his claim validated from this court through this writ petition which was instituted by Bhagwan Das and his claim for the reasons aforesaid was not found genuine. Dhananjay Das has to get his claim adjudicated before a regular forum where matter is pending. Hence this writ petition to get the claim validated of Dhananjay Das cannot be accepted and is liable to fail.

41. Since the property in question is dedicated to the temple and its deity which is a juristic person, this court while exercising its powers of superintendence and locus parentis which confers the court with ample power to ensure that the properties of temple/deity is duly protected and not subjected to waste, hence in the aforesaid circumstances this court issues the following directions:

(i). The District Magistrate, Ambedkar Nagar shall act as the Administrator and immediately take control of the properties of Thakur Ji Maharaj temple situated in Village Jiyapur and at places Mauja Aurangabad, Huseypur, Nausanda, Khansapur, Tehsil Tanda, District Ambedkar Nagar and shall administer the properties, maintain its accounts in respect of all the offerings and income of the temple and properties after preparing a proper inventory and accounts in presence of two respectable persons of the village and three persons connected with the temple including Dhananjay Das and Laxmi Das and shall place the inventory and temple accounts before this court in the aforesaid petition along with affidavit of the District Magistrate.

(ii). Any party who has an interest in the Sarbarkarship including the present petitioner Sri Dhananjay Das may get their rights duly adjudicated from a competent court of law.

(iii). The District Magistrate concerned shall also appoint a Government Counsel to participate and oversee the proceedings which are already pending i.e. a suit before the Civil Court and one before the Sub Divisional Officer instituted by Baba Laxmi Das, and also keep the District Magistrate informed about its progress to ensure fair contest of the proceedings and that the Court concerned before whom such matters are pending shall examine that no compromise/ settlement is arrived at, which may have any detrimental effect on the rights of the deity, Thakur Ji Maharaj and that proceedings are concluded fairly in accordance with law.

(iv). None of the properties of Thakur Ji Maharaj deity shall be sold or alienated by any of the parties to the litigation without prior permission of this court.

(v). This arrangement shall continue which shall be subject to any order passed by the competent court declaring and upholding the order of Sarbarkarship and brought to the notice of this court and only thereafter the charge of the properties of Thakur Ji Maharaj temple shall be handed over to the duly recognized Sarbarkar by this court being satisfied.

(vi). The Courts wherein the matter is pending i.e. Civil Judge and the Sub Divisional Officer shall also expedite the matter pending before it to take it to its logical conclusion, after affording full opportunity of hearing, but without granting any unnecessary adjournment to the parties to the proceedings.

(vii). Appropriate entries and the endorsement of the order be made in the revenue records.

(viii). The District Magistrate, Ambedkar Nagar shall furnish its report indicating the developments, progress of the pending litigations and measures taken by him relating to the assets/liabilities and income of the temple before this court periodically.

42. For this limited monitoring **the matter shall now be listed on 03rd April, 2023.**

43. A copy of this order shall be communicated to the District Magistrate, Ambedkar Nagar through the Senior Registrar of this Court.

44. Subject to the aforesaid directions, the instant writ petition at the behest of the petitioner/Sri Dhananjay Das is ***dismissed.*** Costs are made easy.

(2022) 12 ILRA 511
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ C No. 1005704 of 2013

Ram Bachan Smarak High School ...Petitioner
Versus
Addl. Commissioner Nyayik Lucknow Division Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Mahendra Pratap Pandey, Avinash Pandey

Counsel for the Respondent:
C.S.C.

A. Civil Law -Indian Stamp Act, 1899-Section 47-A, 56(1)-In the instant case, the term incorporated in the lease-deed, was for a period of thirty years and as such, the stamp duty payable was clearly in terms of the Schedule-I Article 35(a)(v) of the Act, 1899 and not in terms of the Schedule-I Article 35(a)(vi) of the Act, 1899 as has been imposed by the competent authority by the impugned order-the matter has not been considered in the proper perspective while rejecting the appeal by the appellate authority-Thus, the impugned orders are legally unsustainable in the eyes of law.(Para 1to 18)

B. Renewal of lease is in the nature of grant of fresh lease. the terms and conditions incorporated in the lease have to be examined as a whole and effect has to be given to each and every term incorporated therein. Renewal of lease has been construed to be nothing but grant of lease for fresh period. Here, in the present case term of lease was 30 years and after expiry of the same lessee could request the lessor for execution of new lease deed by way of renewal. Same could not have been clubbed to be 40 years whereas the said renewal period was also specified for a period of 10 years.(Para 16)

The writ petition is allowed. (E-6)

List of Cases cited:

1. BPCL Vs Commr , Kanpur Div. Kanpur &ors.., CMWP No. 43796 of 2005

2. Gopal Swaroop Chaturvedi Vs St. of U.P. & ors. (2007) 10 RD 574

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing counsel appearing for the State respondents.

2. By means of the present petitioner, the petitioner has prayed for the following reliefs:-

"(I) Issue a writ, order or direction in the nature of certiorari quash the impugned order dated 19.1.2013 passed by Additional Commissioner Nyayik opposite party no.1 in appeal no.242/2010-11 under section 56 (1) of Indian Stamp Act and order dated 11.6.2010 & order dated10.5.2011 passed by opposite party no.3 A.D.M. (East) Lucknow in case no.7010/589/2003 contained in ***Annexure NO.1, 2 & 5*** *to this writ petition."*

3. The case set forth by the petitioner is that a registered lease-deed was executed on 18.6.2003 a copy of which is Annexure No.3 to the petition. The said lease-deed was for a period of 30 years. Clause 5 of lease-deed provided that Lessee shall have one option for same period and it will be determined on the basis of the mutual consent of the parties by executing a separate lease-deed after expiry of lease period.

4. Proceedings were initiated against the petitioner under Section 47-A of Indian Stamp Act, 1899 contending that less stamp duty had been paid on the said lease-deed and the petitioner was liable to pay additional stamp duty.

5. The petitioner put in appearance before the competent authority and contended that the stamp duty paid by the petitioner was in terms of Schedule I-B-Article 35 (a) (v) of the Act, 1899 which provides that where the lease purports to be for a term exceeding twenty years but not exceeding thirty years then the same duty as a conveyance for a consideration equal six times the amount or value of the average annual rent reserved, shall be payable.

6. The competent authority, vide impugned order dated 11.6.2010 a copy of which is Annexure No.2 to the petition, was of the view that as Clause 5 of the lease-deed also contained a renewal term as such the lease-deed cannot be construed for a period of thirty years rather, would be exceeding the period of thirty years and consequently, the provisions of Schedule-I-B Article 35 (a) (vi) would be applicable that where the lease-deed purports to be for a term exceeding thirty years or in perpetuity then the same duty as the conveyance No.23 clause (a) for a consideration equal to the market value of the property would be payable. On the basis of the same, the petitioner has been required to pay additional stamp duty along with penalty and interest.

7. Being aggrieved, the petitioner filed application dated 30.4.2011 for recall of the order dated 11.6.2010 passed in Case No.70 of 2010 (State Vs. Ram Charan Smarak High School) under Stamp Act. The said application has been rejected by the year dated 10.5.2011 a copy of which is Annexure No.5 to the petition.

8. Being aggrieved, the petitioner filed an appeal against the orders dated 11.6.2010 and 10.5.2011 but the appellate authority concurred with the view of the prescribed authority and dismissed the appeal, vide order dated 19.1.2013 a copy of which is Annexure No.1 to the petition.

9. The argument of the learned counsel for the petitioner is that when from the lease-deed itself it clearly emerges that the lease-deed was for a period of thirty years but also had a clause for the same

period to be determined on the basis of mutual consent of parties but that required executing a separate lease-deed, as such, the lease-deed itself has to be construed for a period of thirty years and not beyond that and thus, the stamp duty as paid on the basis of the Schedule-I-B Article 35 (a) (v) of the Act, 1899, was correctly paid.

10. It is contended that the competent authority has patently erred in law in interpreting clause-5 of the said lease-deed to hold that as Clause-5 of the lease-deed also contains a renewal clause as such, the lease-deed has to be construed as having been executed for a period exceeding thirty years so as to attract the stamp duty payable in terms of Schedule-I-B Article 35 (a) (vi) of the Act, 1899.

11. In this regard, reliance has been placed on the judgment of this Court dated 3.3.2008 passed in **Civil Misc. Writ Petition No.43796 of 2005 (Bharat Petroleum Corporation Limited. Vs. Commissioner, Kanpur division Kanpur and others.)**. Placing reliance on the aforesaid judgment of **Bharat Petroleum Corporation Limited (supra)**, the argument is that this Court in the aforesaid case has held that when a particular period is indicated in the lease-deed and even if the provisions of renewal is there, then ipso facto the lease period could not be construed beyond the period what is indicated in the lease-deed and said renewal clause is to be read separately.

12. It is thus argued that considering the law laid down in the case of **Bharat Petroleum Corporation Limited (supra),** the orders passed by the competent authority as well as passed by the appellate authority are patently bad in the eyes of law and merit to be set aside.

13. On the order hand, learned standing counsel contents on the basis of the averments contained in the counter affidavit argues that though the lease initially was for the period of thirty years but Clause 5 of the deed also contains the clause that the Lessee shall have one option for the same period to be determined on the basis of mutual consent of parties by executing a separate lease-deed as such the same is to be necessarily construed as a lease-deed exceeding the period of thirty years and as such the authority has correctly proceeded to direct the petitioner to pay the additional stamp duty considering Schedule-I-B Article 35 (a) (vi) of the Act, 1899 and that Schedule-I-B Article 35 (a) (v) of the Act, 1899 over which the reliance has been placed by the learned counsel for the petitioner, shall not be applicable.

14. Having heard learned counsel for the parties and having perused the record what emerges is that a lease-deed was executed on 18.6.2003. The stamp duty was paid in terms of the Schedule-I-B Article 35 (a) (v) of the Act, 1899. Proceedings were initiated against the petitioner under the Act, 1899 and the authority by means of the order dated 11.6.2010 has held that as clause-5 of the lease-deed also contains a clause of extension for the same period i.e. exceeding 30 years as such, the stamp duty is to be ascertainable and payable as per Schedule-I-B Article 35 (a) (vi) of the Act, 1899 and consequently, the impugned orders have been passed. The recall application as well as the appeal filed by the petitioner have also been rejected by means of the order dated 10.5.2011 and 19.1.2013.

15. The point for consideration before this Court is that where the lease-deed has

been executed for the period of thirty years but the clause in the lease-deed also provides for an option for renewal exceeding certain period as to whether additional period would be construed as the period for which the stamp duty is to be paid or it is for initial period for which the lease-deed has been executed which is to be considered for payment of stamp duty.

16. The said issue has been considered by this Court in the case of **Bharat Petroleum Corporation Limited (supra)** wherein this Court has held as under:-

"After respective arguments have been advanced, factual position which emerges is to the effect that in the present case lease deed had been executed and the period for which said lease was executed is clearly mentioned therein to be 30 years with effect from 01.10.2001 and the rent was payable by 15th day of every month. Upon expiration or sooner of the said period, lessor was obliged to deliver vacant possession of the plot and remove therefrom all buildings structures and plant and all its other properties therein at its own cost and restore the said land in its original condition and if the lessee was desirous to get the said lease renewed on expiration of its term, then he was obliged to give notice to the lessor in writing prior to the expiration of the term hereby granted and was obliged to pay the rent and taxes duly observed and performed all the terms, covenant, conditions and stipulations and then lessor was obliged to grant them a renewed registered lease deed of the property in question for further period of ten years commencing from the date of expiration. In the present case period of lease has been construed to be 40 years, whereas lease deed which has been referred to in the present case clearly mentions that the period of lease was 30 years and gave right to the lessor to get the lease deed renewed on the same terms and conditions for a further period of ten years. ***Once 30 years period was clearly mentioned therein and the provision of renewal was there, then ipso facto, lease period could not have been construed to be 40 years as has been sought to be done in the present case, whereas period of lease is fixed and the provision of renewal has been incorporated and the said renewal period was also specified for a period of 10 years.***

Division Bench of this Court in the case of Gopal Swaroop Chaturvedi v. State of U.P. and others, 2007 (102) RD 574 has taken the view that ***renewal of lease is in the nature of grant of fresh lease and further while considering such issue has held that the terms and conditions incorporated in the lease have to be examined as a whole and effect has to be given to each and every term incorporated therein. Renewal of lease has been construed to be nothing but grant of lease for fresh period. Here, in the present case term of lease was 30 years and after expiry of the same lessee could request the lessor for execution of new lease deed by way of renewal. Same could not have been clubbed to be 40 years and thus treating the same to be within the ambit and scope of Article 35 (c) (ii) of Scheduled I-B of the Stamp Act.*** *The view taken by the authority concerned in the present case that lease is for a period of 40 years, as therein arrangement has been made for further period of ten years, is not a correct view, as the lease in question is for a period of 30 years only with the condition that it can be further renewed for a period of 10 years, but it cannot be read as 40 years and the stamp duty cannot be*

charged accordingly." (emphasis by this Court)

17. A perusal of the judgment passed by this Court in the case of **Bharat Petroleum Corporation Limited (supra)** would indicate that while passing the said judgment, reliance has been placed on the Division Bench judgment of this Court in the case of **Gopal Swaroop Chaturvedi v. State of U.P. and others, 2007 (102) RD 574,**wherein it has been held that the renewal of the lease is in the nature of grant of fresh lease and while considering such issue the terms and conditions incorporated in the lease have to be examined as a whole and effect has to be given to each and every term incorporated therein. It was also held that the renewal of the lease has to be construed as nothing but grant of lease for fresh period.

18. Accordingly, keeping in view the judgment of this Court in the case of **Bharat Petroleum Corporation Limited (supra)** along with the case of Gopal Swaroop Chaturvedi (supra), what emerges is that admittedly, the lease-deed executed by the petitioner, was for the period of thirty years but clause-5 also provided for a renewal for the same period with the mutual consent of parties. However, the mutual consent was required for execution of a separate lease-deed. As such, once the lease-deed itself stipulates that it was executed for a period of thirty years yet also contains a renewal clause as such keeping in view the law laid down by the Division Bench of this Court in the case of **Gopal Swaroop Chaturvedi (supra)** as well as **Bharat Petroleum Corporation Limited (supra)**, the renewal has to be read separately inasmuch as, the lease-deed was to be examined as a whole and the effect has to be given to each an every term incorporated therein. In the instant case, the term incorporated in the lease-deed, was for a period of thirty years and as such, the stamp duty payable was clearly in terms of the Schedule-I Article 35 (a) (v) of the Act, 1899 and not in terms of the Schedule-I Article 35 (a) (vi) of the Act, 1899 as has been imposed by the competent authority by the impugned order dated 11.6.2010. As the said matter has not been considered in the proper perspective while rejecting the appeal filed by the petitioner by the appellate authority dated 19.1.2013 as such, it is apparent that both the orders impugned order dated 11.6.2010 and 19.1.2013 are legally unsustainable in the eyes of law.

19. Keeping in view the aforesaid discussion, the instant writ petition deserves to be allowed and is allowed. The impugned orders dated 11.6.2010 and 19.1.2013, copy of which are Annexure No.2 and Annexure No.1 to the writ petition are set aside. Consequently, there may not be any occasion for setting aside the order dated 10.5.2011 by which the recall application has been rejected.

Consequences to follow.

(2022) 12 ILRA 515
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ-A No. 8534 of 2018

Ravi Kumar Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Yadav, Sri Siddharth Khare

Counsel for the Respondents:

A.S.G.I., Sri Om Prakash Srivastava, Sri Ratan Agarwal, Sri Vivek Ratan Agrawal

A. Service Law – Impersonation while seeking employment - Appointment/Salary – Principles of Natural Justice - Opportunity of hearing - The selections at public employment more particularly in banking industry are required to be fair and of a sterling nature. Employment to persons who have impersonated in the recruitment process or selection proceedings would demolish the very sanctity of the recruitment process and institution itself and as such, it is necessary that persons who have been selected have clear credentials and have been fairly selected in recruitment process. This is not a mere matter of administrative procedure but constitutional obligation that public bodies have to act fairly and reasonably. A fair and reasonable process of selection to posts subject to the norm of equality of opportunity u/Articles 14 and 16 is a constitutional requirement. A person who has resorted to unfair means in the recruitment process cannot be permitted to join the post. (Para 20)

The question with regard to a candidate having resorted to unfair means in recruitment process is to be examined by the appropriate authority. The examination in this respect is to be based on cogent and material evidence. The process of an enquiry should be just, fair and reasonable and principles of natural justice are required to be followed where an individual case is being examined by authority concerned. (Para 21)

In the present case, impugned order has been passed solely on the basis of handwriting expert report without the handwriting expert being called for to participate in the enquiry proceedings nor was an opportunity given to petitioner to confront with the handwriting expert. The methodology adopted by the respondent in coming to the conclusion is not fair and in fact, identity could have been established by other modes and as such, respondents should have called upon the examining body to participate in the enquiry proceedings so that a fair conclusion could be drawn. (Para 17)

B. Once the foundation of the enquiry proceedings are itself bad in law, subsequent orders are not tenable under law - The show cause notice itself was bad in law - Once a finding has been recorded by the authority concerned that the petitioner has resorted to impersonation then issuing a show cause notice to petitioner was of no consequence as the authority concerned has already taken a decision against the petitioner and as such, filing of reply to show cause notice would have been a futile exercise. (Para 14)

The candidate against whom the allegations of impersonation have been levelled by the employer has a right to confront the handwriting expert. In the garb of providing an opportunity to the candidate, the opinion of handwriting expert cannot be acted upon without there being corroboration of the same. (Para 32)

C. The opinion of the handwriting expert cannot be said to be a conclusive evidence specifically when the handwriting expert has not been produced in enquiry proceedings. (Para 32)

The handwriting expert report is only an evidence of opinion and not of fact and the same is a weak piece of evidence regarding proof of handwriting or signature, and as such, corroboration is always required so that it can be established that the person who has participated in the qualifying examination was a bonafide candidate. There were other material available which could have established the identity of the petitioner as the person who participated in the recruitment process. (Para 16, 34, 35)

The Union Bank of India doubted the credential of the petitioner on basis of signature being different in the call letter with the signature available with the Bank and as such, matter was referred to handwriting expert for examination. Other documents which were sent to the

handwriting expert were not considered by handwriting expert as they were photocopy of original document and as such handwriting expert has not given any opinion on those documents. (Para 23, 31)

The handwriting expert's opinion only provides criteria for reaching the correct conclusion but his opinion requires to be appreciated like any other evidence on record. The report of the handwriting expert cannot be presumed to be conclusive. The handwriting expert's opinion is fallible or liable to errors like any other witness. (Para 35)

The report of handwriting expert is of an advisory character. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor for consideration along with other material that may be available in a given case. **The report given by handwriting expert does not go in evidence automatically.** (Para 36)

Claim of petitioner should not have been rejected on the ground of impersonation specifically when other mode of proving identity of petitioner as valid participant in the qualifying examination was available to the respondent Bank by way of photograph and thumb impression on the call letter and attendance sheet. (Para 15)

The identity of the petitioner is required to be established so that the examination is fair and free. The presumption that the examination was fair and free is in favour of the petitioner as the examining body has never recorded any finding against the petitioner. It is for the Bank to bring the material and cogent evidence against the petitioner to establish that the petitioner has never participated in the examination and such **a procedure can only be permitted when the officer of the examining body, who participated in the examination and the handwriting expert and other expert, everybody is permitted to participate in the proceedings.** The Bank is required to examine the participation of the petitioner in the examination process by **verifying all the modes and material available for validation of the petitioner's presence at the examination centre**. (Para 48)

The respondents by doubting the candidature of the petitioner is in fact challenging the examination process and the verification conducted by Invigilators and examining body during examination process with regard to presence of the petitioner at the time of examination. Once the examining body has not reported any fault in the examination process and has cleared the candidate for selection then doubting the presence of the petitioner at the time of examination would require the examining body to be part of the enquiry process and to further examine the various identification process established by the examining body at the time of examination. In the present case, no such procedure has been followed by the respondent Bank and the Bank has not proceeded in accordance with law. (Para 48)

Remanded back to the Higher Authority than AGM. Writ petition allowed. (E-4)

Precedent followed:

1. Himachal Pradesh Electricity Board Ltd. Vs Mahesh Dahiya, (2017) 1 SCC 768 (Para 14)

2. M/s Bcits Pvt. Ltd. Vs Purvanchal Vidyut Vitran Nigam Ltd. & anr., (2022) ILR 7 All. 102 (Para 14)

3. Sushil Kumar Gautam Vs St. of U.P. & ors., Writ-A No. 15075 of 2010, decided on 22.08.2022 (Para 16)

4. U.O.I. & ors. Vs Devendra Kumar Chaudhary & ors., (2018) 0 Supreme (All) 961 (Para 16)

5. Ran Vijay Singh & ors. Vs U.O.I. & ors., Writ Petition No. 2813 of 2017, decided on 16.04.2018 (Para 16)

6. U.O.I. & ors. Vs Ran Vijay Singh & ors., Special Appeal No. 1045 of 2018, decided on 08.05.2019 (Para 16)

7. Rajesh Kumar Vs U.O.I. & ors., Writ-A No. 56499 of 2011, decided on 05.11.2014 (Para 16)

8. Murari Lal Vs St. of M. P., AIR 1980 SC 531 (Para 31)

Present writ petition assails order dated 09.02.2018, passed by Assistant General Manager (Human Resource), Department of Personnel Manpower Planning & Recruitment Division, Central Office, Mumbai.

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard Shri Siddharth Khare, learned counsel for the petitioner and Shri Vivek Ratan Agarwal, learned counsel for the respondents.

2. The present writ petition is preferred challenging the order dated 9.2.2018 passed by respondent no 4. Further prayer has been made in the writ petition for directing the respondent authorities to appoint the petitioner as the Single Window Operator-A/Clerk in the respondent department and to pay his regular monthly salary every month.

3. The Institute of Banking Personnel Selection notified a common recruitment process for recruitment in clerical grade for the 19 Banks including the respondent-Union Bank of India. The advertisement notified the time schedule under which 01.09.2014 was specified as the last date for online registration and 17.11.2014 as the date for downloading call letters for examination in December 2014. The result were to be declared in February 2015.

4. The petitioner in pursuance to the aforesaid advertisement submitted his application for participating in the above-mentioned recruitment process. Petitioner was issued admit card for appearing in the written examination scheduled to be held on 13.12.2014 in which petitioner was required to appear in the said examination at the examination centre being Dr. Rizvi College of Engineering, Kaushambi.

5. The petitioner participated in the online examination held on 13.12.2014. Result of aforesaid examination was declared by examining body being Institute of Banking Personnel Selection and petitioner was shown to have qualified written examination. Petitioner was also shortlisted for interview by Examining Body.

6. The petitioner participated in the interview and thereafter in final result, petitioner was shown to be selected under the OBC category for appointment in Union Bank of India. The copy of final result of the petitioner is annexed as annexure 5 to writ petition.

7. In pursuance to above-mentioned selection of petitioner, Assistant General Manager, Union Bank of India issued an offer of appointment to the petitioner on 25.04.2015. The candidates recruited for the State of Uttar Pradesh were required to report before the Field General Managers' Office at Lucknow on or before 30.05.2015. Petitioner reported at the Lucknow Office and completed all formalities.

8. On 28.12.2015 petitioner was issued a communication by the Assistant General Manager of respondent Bank to the effect that during the course of reporting of candidature of petitioner it was found that there existed variance in the signature of petitioner on different pages upon which specimen of handwriting and thumb impression was obtained from petitioner and same was forwarded to the handwriting

expert for enquiry. Subsequent to the receipt of the communication dated 28.12.2015 by the petitioner there has been no communication to the petitioner and as such, petitioner preferred Writ Petition No.42948 of 2017.

9. The above-mentioned writ petition was finally disposed of by order dated 24.10.2017 while noticing the contention of counsel for the respondent bank that a fact-finding enquiry is being conducted by respondent bank in which opinion of handwriting expert has been called and bank has yet to take a final view in the matter. The aforesaid order dated 24.10.2017 further directed respondent bank to complete the enquiry within a period of two months after affording the petitioner adequate opportunity of hearing and after confronting the petitioner with the material considered adverse to him.

10. Respondents supplied the handwriting expert report along with documents on the basis of which, expert has expressed his opinion. On 08.01.2018 hearing in the enquiry proceedings/concluded and on 09.02.2018 an order has been passed by the respondent authorities rejecting the candidature of petitioner. It is order dated 9.2.2018 which is subject matter of challenge in the present writ petition.

11. It is submitted by learned counsel for petitioner that selection by Institute of Banking Personnel Selection was notified for common recruitment process for recruitment in Clerical Cadre for 19 Banks including Union Bank of India. The petitioner applied online for registration in the aforesaid examination and thereafter participated in the examination and the result was declared, in which petitioner was shown to have been successful. Petitioner was allotted appointment in the Clerical Cadre in Union Bank of India. The petitioner had duly reported to the respondent bank and completed all the formalities. When the appointment was not granted to the petitioner, petitioner approached this Court wherein learned counsel for the Bank informed this Court that a fact finding enquiry is being conducted by the Bank in which the opinion of handwriting expert has been called and the Bank is yet to take a final view in the matter. Considering the facts and submission of learned counsel for the Bank, the aforesaid writ petition being Writ-A No.42948 of 2017 (Ravi Kumar Yadav Vs. Union of India and 4 others) was disposed of with the direction to complete the enquiry within a period of two months from today after giving opportunity of hearing and also after confronting the petitioner with the material considered adverse to him.

12. It is further submitted that respondent-Bank did not found selection of petitioner to be fair and being suspicious, Bank referred signature of petitioner to the handwriting expert and handwriting expert has submitted report on 16.5.2017. According to opinion of handwriting expert, signature on call letter does not match with admitted signature and as such, Bank issued a show cause notice dated 6.10.2017 calling upon petitioner to show cause as to why candidature for appointment in the Bank should not be cancelled. Petitioner participated in enquiry proceedings and thereafter impugned order dated 9.2.2018 has been passed by the Assistant General Manager (HR), Competent Authority thereby holding that the identity of the petitioner could not be established as the person who has

participated in the qualifying examination conducted by the Institute of Banking Personnel Selection.

13. Learned counsel for the petitioner while challenging the impugned order submits that the show cause notice dated 6.10.2017 was issued with finding that petitioner has resorted to impersonation while seeking employment in Bank. In aforesaid show cause notice, respondent bank has relied upon the handwriting expert report.

14. Learned counsel for the petitioner submits that once a finding has been recorded by the authority concerned that the petitioner has resorted to impersonation then issuing a show cause notice to petitioner was of no consequence as the authority concerned has already taken a decision against the petitioner and as such, filing of reply to show cause notice would have been a futile exercise. In this respect, petitioner has relied upon the judgments of the Apex Court in cases of **Himachal Pradesh State Electricity Board Limited Vs. Mahesh Dahiya, (2017) 1 SCC 768 and M/s Bcits Pvt. Ltd. Vs. Purvanchal Vidhyut Vitran Nigam Ltd. and another, (2022) 0 Supreme (All) 747**, to submit that the show cause notice itself was bad in law. On the aforesaid basis, learned counsel for petitioner submits that once the foundation of the enquiry proceedings are itself bad in law, subsequent orders are not tenable under law.

15. Learned counsel for the petitioner has further submitted that petitioner had provided thumb impression and the photograph while appearing in the examination and call letters also contained photograph of the petitioner and further when the petitioner participated in the qualifying examination, petitioner was identified by the examiner and thereafter, petitioner was permitted to participate in the examination proceedings. He submits that there was no compliant made by the Examining Body that the petitioner has resorted to impersonation. Qualifying examination was conducted by an independent body and the results were sent to various Banks. The examining body and persons, who were at the place of examination i.e. Invigilator or the Centre Superintendent has not been testified nor a report is submitted by examining body that petitioner has impersonated in recruitment process. It is further urged that claim of petitioner should not have been rejected on the ground of impersonation specifically when other mode of proving identity of petitioner as valid participants in the qualifying examination was available to the respondent Bank by way of photograph and thumb impression on the call letter and attendance sheet.

16. The next submission of learned counsel for the petitioner is that the handwriting expert report is the only an opinion and the same is a weak piece of evidence and as such, corroboration is always required so that it can be established that the person who has participated in the qualifying examination was a bonafide candidate. In this respect, learned counsel for the petitioner has relied upon the judgments passed by this Court in **Writ-A No.15075 of 2010 (Sushil Kumar Gautam Vs. State of U.P. and others)** decided on 22.8.2022, **Union of India and others Vs. Devendra Kumar Chaudhary and others (2018) 0 Supreme (All) 961, Writ Petition No.2813 of 2017 (Ran Vijay Singh and others Vs. Union of India and others)** decided on 16.4.2018, **Special Appeal No.1045 of 2018 (Union**

of India and others Vs. Ran Vijay Singh and others) decided on 8.5.2019 and **Writ -A No.56499 of 2011 (Rajesh Kumar Vs. Union of India and others)** decided on 5.11.2014. Learned counsel for the petitioner further urged that there were other material available which could have established the identity of the petitioner as the person who participated in the recruitment process.

17. On the aforesaid basis, learned counsel for petitioner submits that impugned order has been passed solely on the basis of handwriting expert report without the handwriting expert being called for to participate in the enquiry proceedings nor an opportunity was given to petitioner to confront with the handwriting expert. On the aforesaid basis, learned counsel for the petitioner submits that the methodology adopted by the respondent in coming to the conclusion is not fair and in fact, identity could have been established by other modes and as such, respondents ought to have considered the identity of the petitioner on the basis of other modes of identification available and should have called upon the examining body to participate in the enquiry proceedings so that a fair conclusion could be drawn.

18. Learned counsel for the respondent-Bank submits that in the present case petitioner has impersonated himself in qualifying examination and thereafter has been selected and sent for appointment to the respondent-Bank by the examining body. However while examining the credentials of petitioner, it was found that signatures of petitioner on call letter and attendance sheet are different from the signature with the Bank and as such, matter was sent to Central Forensic Science Laboratory for handwriting examination. The Central Forensic Science Laboratory has submitted a report against petitioner and on the aforesaid basis, candidature of petitioner has been rejected, as he is not bonafide candidate.

19. On a pointed query being made to learned counsel for respondent-Bank whether the examining body was part of the enquiry proceedings, he fairly submits that the examining body was not a part of enquiry proceedings and the order has been passed on basis of handwriting expert report. He has further fairly stated that handwriting expert never participated in enquiry proceedings.

20. The selections at public employment more particularly in banking industry are required to be fair and of a sterling nature. Employment to persons who have impersonated in the recruitment process or selection proceedings would demolish the very sanctity of the recruitment process and institution itself and as such, it is necessary that persons who have been selected have clear credentials and have been fairly selected in recruitment process. This is not a mere matter of administrative procedure but constitutional obligation that public bodies have to act fairly and reasonably. A fair and reasonable process of selection to posts subject to the norm of equality of opportunity under Articles 14 and 16 is a constitutional requirement. A person who has resorted to unfair means in the recruitment process cannot be permitted to join the post.

21. The question with regard to a candidate having resorted to unfair means in recruitment process is to be examined by the appropriate authority. The examination in this respect is to be based on cogent and

material evidence. The process of an enquiry should be just, fair and reasonable and principles of natural justice are required to be followed where an individual case is being examined by authority concerned.

22. In the present case, selection proceedings for clerical cadre were undertaken by various Bank through a common examining body being Institute of Banking Personnel Selection. The said examining body after completing the selection proceedings have forwarded the name of petitioner for appointment to the respondent-Union Bank of India.

23. The Union Bank of India doubted the credential of the petitioner on basis of signature being different in the call letter with the signature available with the Bank and as such, matter was referred to handwriting expert for examination. The handwriting expert by report dated 16.5.2017 has opined that the admitted signature do no match with the questioned signature no.1 (Q1). Questioned signature no.1 (Q1) were signature of petitioner on call letter. Other documents which were sent to the handwriting expert were not considered by handwriting expert as they were photocopy of original document and as such handwriting expert has not given any opinion on those documents.

24. The only document which form the foundation for handwriting expert to form an opinion against petitioner was call letter which is at page 92 of the writ petition where signature of petitioner is provided and aforesaid call letter is countersigned by Invigilator. A perusal of aforesaid call letter would further demonstrate that photograph and thumb impression of petitioner is also provided in the aforesaid call letter. Invigilator has further certified candidate's signature and left thumb impression as having been obtained in the presence of Invigilator. Invigilator has further verified the photograph of petitioner on call letter.

25. The aforesaid call letter further provided a condition in Clause 2 of the call letter that a photocopy of photo identity proof should be submitted along with call letter to Invigilator in the examination hall failing which the candidate will not be permitted to appear for the test. The aforesaid clause further provided that call letter along with the photocopy of the photo identity proof duly stapled together should be submitted to Invigilator in the examination hall. The aforesaid clause further provided that candidates should put left thumb impression clearly and sign in the respective space provided in call letter in the presence of the Invigilator.

26. Further, attendance sheet of examination held on 13.12.2014 has also been filed at page 93 of the writ petition, where the photograph and thumb impression apart from the signature of the petitioner is also available.

27. The respondents by impugned order while examining the suitability of the petitioner for appointment on the post in question has come to the conclusion that it could not be established that the person who has signed the online examination call letter only appeared in the interview and further reported at FGMO, Lucknow for document verification upon his selection for the post.

28. The respondent authority while passing the impugned order has proceeded to rely upon the handwriting expert report

and has recorded a finding that the signatures on the call letter for online examination submitted before the examining body are different from all other signatures and other documents. The authority who has passed the impugned order in fact has proceeded to compare the signatures to decide that the signatures of petitioner on call letter differ from the signature on other document. The authority concerned has further recorded a finding that the petitioner has not submitted any documentary evidence to corroborate the claim with regard to identity and presence at the time of examination.

29. It is to be noted that examination was conducted by a examining body which is an independent authority. It is not a case of respondent-Bank that any case of any impersonation has been reported by aforesaid examining body to the Bank. It is only the Bank at the time of issuing the appointment letter that the credentials of the petitioner were verified and on the failure of the matching of the signatures, the present impugned order has been passed.

30. A perusal of the call letter and attendance sheet of examination filed along with writ petition goes to show that it contains signature, photograph and thumb impression of candidate. It is not in dispute between parties that photograph, thumb impression and signature of the candidate are the means by which the identity of a candidate at examination can be ascertained.

31. In the present case, while passing impugned order, respondent's have relied upon a handwriting expert report to ascertain whether petitioner has participated in recruitment process and is a bonafide candidate. The handwriting expert report has indicated that signature on the call letter does not match with the admitted signature. The report of a handwriting expert is an opinion. The opinion is based on the documents produced before the handwriting expert for examination. The art of handwriting recognition is not a perfected proposition. The Apex Court in **Murari Lal Vs State of Madhya Pradesh AIR 1980 SC 531** has observed as under:

"But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses - the equality of credibility or incredibility being one which an expert shares with all other witnesses -, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness. His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty 'is to furnish the judge with the necessary scientific criteria

for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence".

32. The opinion of the handwriting expert cannot be said to be a conclusive evidence specifically when the handwriting expert has not been produced in enquiry proceedings. The candidate against whom the allegation of impersonation have been levelled by the employer has a right to confront the handwriting expert. In the garb of providing an opportunity to the candidate, the opinion of handwriting expert cannot be acted upon without there being corroboration of the same.

33. A Division Bench of this Court in **Union of India Vs. Devendra Kumar Chaudhary and others (2018) 0 Supreme (All) 961** has observed as under :-

"63. The next question would be, "whether report of Forensic Expert could have been treated to be a conclusive evidence to hold applicant-respondent guilty of impersonation justifying punishment of removal."

64. The authority of SSC to seek opinion from Forensic Expert in respect of handwriting and competence of Forensic Expert to submit its report or opinion cannot be doubted, but when aforesaid opinion or material is relied on as an evidence in a disciplinary proceeding against a Government servant, he is entitled to cross examine Author of said opinion since it is only a piece of evidence expressing opinion of such Expert in a process where Government servant was not a party and, therefore, he is entitled to examine Author of such opinion, otherwise ex-parte report submitted by Forensic Expert cannot be a valid piece of evidence to be relied in a departmental inquiry.

65. When a document is relied, may be an opinion of an Expert, it only means that such an Expert has given such opinion but about correctness of the opinion, unless Author is allowed to be examined by person against whom such opinion has been expressed, and thereafter such person is permitted to lead his own evidence in defence to contradict the opinion of Forensic Expert, it cannot be said that a valid piece of evidence has been considered in departmental inquiry. In a departmental inquiry mere production of a document cannot be treated to be a conclusive evidence to prove the fact mentioned in the said document by treating the facts stated therein, true, unless Author of such document owns it in a quasi judicial inquiry proceedings and allowed to be cross examined by affected party. We are fortified in taking this view by Apex Court's judgment in M/s Bareilly Electricity Supply Co. Ltd., Vs. The Workmen and others, AIR 1972 SC 330 where Court in para 14 of judgment has observed:

"But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the question that naturally arises is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or

of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the Evidence Act are not strictly applicable except in so far as Section 11 of the Industrial Disputes Act, 1947 and the rules prescribed therein permit it, it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witness who have executed them, if they are alive and can be produced. Again if a party wants an inspection, it is incumbent on the Tribunal to give inspection in so far as that is relevant to the enquiry. The applicability of these principles are well recognised and admit of no doubt."

34. The opinion of a handwriting expert is an opinion evidence and cannot take place of substantive evidence. Before acting upon the opinion of handwriting expert one must seek corroboration either by direct evidence or other material. The opinion of handwriting expert is a weak evidence regarding proof of handwriting or signature. The evidence regarding handwriting can be arranged in the following order on the strength of reliability :

a) Author himself stating that it is in his handwriting or signature.

b) Person who has seen author doing particular writing or signature stating that particular person has scribed document or signature.

c) Persons who is acquainted with handwriting of purported author.

d) Expert opinion of handwriting expert opinion.

35. The handwriting expert opinion must always be received with great caution specifically in a case when there is no substantial corroboration. The opinion of handwriting expert is an evidence of opinion and not of fact. The handwriting expert opinion only provides criteria for reaching the correct conclusion but his opinion requires to be appreciated like any other evidence on record. The report of the handwriting expert cannot be presumed to be conclusive. The handwriting expert opinion is fallible or liable to errors like any other witness.

36. The report of handwriting expert is of a advisory character. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor for consideration along with other material that may be available in a given case. The report given by handwriting expert does not go in evidence automatically.

37. The petitioner's identity as to whether he has participated in the examination conducted by the examining body can be identified by other modes: photograph of the petitioner available on the call letter, which is not disputed by the respondent Bank. Further identity of

petitioner can also be identified by thumb impression given by petitioner in attendance sheet which is also a material evidence, which may indicate towards the presence of petitioner in examination proceedings. In present case, respondents have not obtained any report with regard to thumb impression on call letter and attendance sheet. The identity of the petitioner could have been verified and corroborated through verification of thumb impression on call letter and attendance sheet.

38. It is also to be noted that call letter and attendance sheet also contained the photograph of petitioner. The handwriting expert has only given report with respect to one document (Q1) despite the fact that the signatures at eight places were sent for his opinion on various documents. Handwriting expert has refused to express any opinion on Q2 to Q8 documents which contain signature of petitioner on the ground that the aforesaid documents were reproduction copy and not the original documents.

39. In the present case, the recruitment process was carried on by an independent agency being Institute of Banking Personnel Selection. The aforesaid independent examining body has forwarded the name of petitioner to respondent bank after completion of recruitment process. It is not the case of respondent bank that independent examining body has reported any impersonation at the behest of petitioner in the examination/selection process. Petitioner is a selected candidate who is said to have passed the selection process conducted by an independent examining body.

40. Once the selection process was carried on by an independent body then there cannot be any presumption that all staff/employees of the examining body had failed to correctly identify the petitioner. It is not in dispute between the parties that the examination was held at an examination centre appointed by the examining body. It is also not in dispute between the parties that the examination was held at the examination centre under the strict vigilance of the Invigilators.

41. It is to be noted that the Invigilator and Centre Superintendent has never reported the fact that petitioner has not participated in the examination proceedings or he has resorted to any means whereby he is not bonafide candidate. When such a report has not been given by the examining body then while questioning the process of examining body with regard to identification of candidate as a person who has not participated in the examination, it was incumbent on the respondent Bank to have included the examining body, Invigilator and other persons, who participated in the examination, to join the enquiry proceedings.

42. A bare perusal of the call letter annexed at page 92 of writ petition would demonstrate that candidate was required to sign the call letter in the presence of the Invigilator at the time of examination. Further as per call letter, thumb impression of the candidate is required to be affixed in the presence of Invigilator at the time of examination. The said call letter further provided that candidate's signature and left thumb impression is to be certified to have been obtained in presence of Invigilator. The call letter further provides that photographs are required to be verified by the Invigilator. It is not in dispute between parties that the Invigilator has put in his signature on the call letter and as such, as

per the condition of call letter he has certified the thumb impression, signature as being endorsed in his presence. The aforesaid letter has further verified the photograph of the petitioner on call letter.

43. The call letter further contain a stipulation that the photocopy of photo identity proof should be submitted along with the call letter to the Invigilator in the examination hall. The Clause 2 of the call letter is quoted hereinbelow :-

"2. The photocopy of the photo identity proof should be submitted along with the call letter to the Invigilators in the examination hall failing which he/she will not be permitted to appear for the test. The call letter along with the photocopy of photo identity proof duly stapled together should be submitted to the Invigilator in the examination hall failing which the candidate will not be permitted to appear for the test. Do not forget to write your Registration No. and Roll No. on the photo copy of Photo Identity proof. Candidates should put their Left Thumb Impression clearly and sign in the respective space provided on the call letter in the presence of the Invigilator."

44. It is not the case of respondent Bank that the examining body or the Invigilator at the examination hall has reported any discrepancy with regard to candidature of petitioner or his identity at the examination centre. Various other material were available for deciding the identity of the petitioner in the examination process. The handwriting expert who has submitted the report has not participated in the enquiry proceedings conducted by the respondent Bank nor any opportunity was granted to the petitioner to cross-examine the handwriting expert. The other means available to the respondents for identification of the petitioner like the thumb impression of the petitioner on the various documents and the photograph of the petitioner on call letter and attendance sheet were neither examined by the respondents nor any finding has been recorded.

45. The examination in question was conducted by an independent examining body and no report was called from the aforesaid independent examining body nor the aforesaid independent examining body was asked to join the enquiry proceedings. The bonafide of the petitioner could have been established by the Invigilators who were present at the time of examination and who have identified the signature, thumb impression and photograph of the petitioner. All the materials which goes to prove the identity of petitioner should have been taken into consideration by the respondents while passing the impugned order.

46. The identification of the petitioner in present case can also be made from the photograph and thumb impression. The report of handwriting expert is only an opinion which even if accepted by the Bank is a weak piece of evidence and should have been corroborated by holding a detailed enquiry proceedings, where the officers of the examining body should have also been permitted to participate and petitioner should have been permitted to confront the handwriting expert and other persons, who were involved in the examination.

47. Insofar as issuance of show cause notice to the petitioner is concerned, petitioner at that point of time never challenged the show cause notice but he

participated in the proceedings and after participation when the result of the enquiry is against the petitioner, he has turned around and has now challenged the show cause notice on the ground that the show cause notice itself contained a finding that the petitioner has resorted to impersonation while seeking employment. The petitioner ought to have challenged the show cause notice at that very point of time. The challenge to the aforesaid show cause notice subsequently when the order is passed against the petitioner specifically when no such allegation was raised against the enquiry officer during pendency of the enquiry proceedings will not help the petitioner. The petitioner during enquiry proceedings has not raised any doubt with regard to any bias in enquiry proceedings as a result of show cause notice. The show cause notice only gave a prime facie view of the authority. After the issuance of show cause notice to the petitioner an enquiry proceedings have been held in which the petitioner has participated without any objection. Once an order has been passed by the authority concerned, the petitioner cannot challenge the show cause notice on the ground of bias as the petitioner was required to raise the objection at the earliest opportunity.

48. The identity of the petitioner is required to be established so that the examination is fair and free. The presumption that the examination was fair and free is in favour of the petitioner as the examining body has never recorded any finding against the petitioner. It is for the Bank to bring the material and cogent evidence against the petitioner to establish that the petitioner has never participated in the examination and such a procedure can only be permitted when the officer of the examining body, who were participated in the examination and the handwriting expert and other expert, everybody is permitted to participate in the proceedings. The Bank is required to examine the participation of the petitioner in the examination process by verifying all the modes and material available for validation of the petitioner's presence at the examination centre as discussed herein above. The respondents by doubting the candidature of the petitioner is in fact challenging the examination process and the verification conducted by Invigilators and examining body during examination process with regard to presence of the petitioner at the time of examination. Once the examining body has not reported any fault in the examination process and has cleared the candidate for selection then doubting the presence of the petitioner at the time of examination would require the examining body to be part of the enquiry process and to further examine the various identification process established by the examining body at the time of examination. In the present case, no such procedure has been followed by the respondent Bank and the Bank has not proceeded in accordance with law.

49. Since the impugned order is not tenable under law and further the petitioner has raised doubts on the respondent No.4, both the counsel for the petitioner as well as respondent Bank agrees that the matter may be sent back to the higher authority than person who has issued a show cause notice. Learned counsel for the respondent-Bank submits that the higher authority is General Manager of Union Bank of India and as such, the matter may be referred to the General Manager for decision afresh.

50. Under the circumstances, impugned order dated 9.2.2018 passed by respondent No.4-Assistant General

Managaer (HR), Competent Authority, is set aside and the matter is remanded back to the Higher Authority i.e General Manager of the Bank/respondent No.3 than the Authority, who has issued a show cause notice.

51. Liberty is granted to the respondent-Bank to proceed afresh against the petitioner in accordance with law and as per the observation made in the order.

52. The writ petition is, accordingly, **allowed**.

(2022) 12 ILRA 529
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2022

BEFORE

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

Writ-A No. 11644 of 2018

Awadesh Kumar & Ors.
...Tenants-Petitioners
Versus
Rameshwar Dayal (Deceased) & Ors.
...Landlords/Respondents

Counsel for the Petitoners:
Sri B.N. Agarwal, Sri Sanjay Agrawal, Ms. Sufia Saba

Counsel for the Respondents:
Sri Atul Dayal (Senior Adv.), Sri Ayush Khanna

A. Land Law – Tenancy – *Bona fide* need – Comparative hardship - The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) - Section 21(1)(a) – Jurisdiction - The tenants cannot be permitted to urge a new ground, before this Court, based on a case that was never taken before the two Authorities below. It is, therefore, held that the Authorities below have rightly opined that the Act would to the demised shop and further that there is relationship of landlord and tenant between parties. (Para 19, 28)

The tenants have urged that the Act of 1972 is not applicable to the demised shop, inasmuch it is the landlord's admission in the notice to quit (Para 5) dated 09.04.2010 and in the plaint giving rise to Suit No. 3 of 2012, instituted before the Judge, Small Cause Court that it does not apply. This Court has also been taken through the contents of the plaint, giving rise to Suit No. 3 of 2012. **It must be remarked here that it was the tenant's case before the Authorities below as well that the Act does not apply, but the basis to claim that was very different from that urged by the tenants here.** (Para 23)

A perusal of the notice does show that there is an assertion in Para 5 that the Act does not apply, but this point was not raised before the two Authorities of fact below. It cannot be permitted to be raised for the first time before this Court in writ proceedings. **Also, the averment in Para 5 of the notice to quit dated 09.04.2010 apart, the plaint giving rise to S.C.C. Suit No. 3 of 2012, does not show at all that it was ever pleaded by the tenants that the Act does not apply.** (Para 27)

The term of the lease was initially for a period of 30 years, reckoned from the year 1955. This lease deed has been twice renewed for the same period of time. There is enough evidence by way of admission and documents on record to show that the tenants, who do not renounce their character as such, were tenants, to whom the demised shop was let out by the landlord. **There is no relationship of landlord and tenant between the Nagar Palika Parishad, Konch and the tenants. It cannot possibly be so, on the basis of given St. of evidence, which the two Authorities below have correctly appreciated.** (Para 25)

It has been held concurrently by the two Authorities below that the land, whereon the demised shop stand was leased to the

landlord's father by the Nagar Palika. **The Authorities below have also drawn a distinction between the 'owner' and 'landlord' to hold that the Nagar Palika might be the owner, but not the landlord.** The tenancy originally stood in the name of the tenants' father, Balram Soni, from whom the tenants have inherited it. The fact that there is a relationship of landlord and tenant for the aforesaid reason between parties, cannot be denied, which too, the tenants have attempted to do, albeit unsuccessfully, before the Authorities below. (Para 24, 26)

The suit is clearly one based on a cause of action of default under the Act, upon a wholesome reading of the plaint. **If at all the tenants had to seriously urge that the landlord had admitted in his pleadings or elsewhere like the notice to quit, that the Act did not apply, the point had to be raised before the Authorities below and the landlord confronted with the same.** The necessity arising, he had to be cross-examined the way it was done with reference to the other issues raised by parties, regarding which witnesses were produced. Nothing of the kind was done, because the point was never raised. (Para 28)

B. Relationship of landlord and tenant - It is by now well settled that in case of the death of the sitting tenant, in case of a non-residential building, all his heirs inherit the tenancy no doubt, but they do so as joint tenants; not as tenants in common. Therefore, the heirs of the deceased-tenant, vis-à-vis the landlord, inherit a single tenancy and not divisible rights. Notice to one or impleadment of one for the purpose of bringing an action to evict or release proceedings is good against all the joint tenants. It is not necessary to implead every heir of the deceased-tenant as a party to the proceedings. (Para 29)

The tenants having inherited the tenancy from their father upon his death, it has been held that the failure to join the tenant's mother was hardly of consequence. (Para 19)

C. *Bona fide* need - The tenants have no right to tell the landlord how and in what manner, he should go about satisfying his *bona fide* need. It is not for the tenant to dictate terms to the landlord as to how else he can adjust himself without getting possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlord, it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself. (Para 40)

The tenant cannot object nor can raise such a plea that the landlord has other accommodation from which he can do the business. It is true that there is evidence on record to show that the landlord has shops in two or three localities and some of them, the landlord has acknowledged with candor, to be vacant. These shops are located in Mohalla Jawahar Nagar. There is no evidence that the other shops are vacant and available. (Para 39, 41)

The tenant says that the landlord has a number of shops available with him, where his son can set up independent business. That is precisely what the tenant cannot tell the landlord. Once the landlord's son is proven to be not gainfully employed in independent business, it is the landlord's right to seek release of any of the shops that he owns for his son's need. The landlord cannot be driven to ask his son to set up business in a vacant shop of his, which is not the landlord's choice. (Para 40)

The evidence on record, which the Authorities below have noticed, squarely attracts the principle, where the landlord, who has a *bona fide* need, cannot be instructed by the tenant to satisfy it elsewhere in a manner that the tenant suggests. (Para 42)

D. Comparative hardship - The two Authorities below have taken note of the fact that **the tenants have not made efforts to find alternative accommodation during all this period of time, which tilts the balance of comparative hardship against them.** The Appellate Authority has taken particular note of the fact that the tenant in his cross-examination has said that even if the landlord were to offer him another shop, he would not vacate the

demised shop. This stand of the tenants, the Appellate Authority has regarded as malicious. (Para 44)

This Court is of opinion that the issue of comparative hardship has been rightly answered against the tenants by the Authorities below. Quite apart, this Court in a writ petition u/Article 226 of the Constitution generally ought not to interfere with concurrent findings of fact recorded by the Authorities below, unless shown to be perverse or manifestly illegal. That is not the case here. (Para 45)

Writ petition dismissed. (E-4)

Precedent followed:

1. Harish Tandon Vs A. D. M., Allahabad, U.P. & ors., (1995) 1 SCC 537 (Para 29)

2. Sarla Ahuja Vs United India Insurance Company Ltd., (1998) 8 SCC 119 (Para 40)

3. Ram Kumar Vs IVth A. D. J., Kanpur & ors., 2004 SCC OnLine All 726 (Para 41)

4. Mohd. Ayub & anr. Vs Mukesh Chand, (2012) 2 SCC 155 (Para 42)

Present writ petition assails order of release dated 01.04.2016, passed by the Prescribed Authority and judgment and order dated 15.02.2018, passed by the learned District Judge, affirming all the findings of the Prescribed Authority.

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

This is a tenants' writ petition assailing an order of release under Section 21(1)(a) of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) (for short, "the Act') passed concurrently by the two Authorities below.

2. An application for the release of a shop, situate in Mohalla Lajpat Nagar, Bazar Manik Chowk, Konch, District Jalaun, was moved by Rameshwar Dayal son of Sri Munga Lal before the Prescribed Authority/ Civil Judge (Jr. Div.), Konch, District Jalaun against the three tenant-petitioners, Awadesh Kumar, Jitendra Kumar and Mukesh Kumar, all sons of the late Balram Soni. The boundaries of the shop aforesaid are detailed at the foot of the release application, instituted before the Prescribed Authority. This shop shall hereinafter be referred to as "the demised shop'.

3. The application for release under Section 21(1)(a) of the Act was moved by Rameshwar Dayal against the three tenant-petitioners on the ground of his *bona fide* need, which shall hereinafter be detailed.

4. Pending proceedings before the Appellate Authority, Rameshwar Dayal died and was substituted by his heirs and LRs, who are landlord-respondents nos. 1/1, 1/2, 1/3, 1/4 and 1/5 to this petition. Rameshwar Dayal (since deceased) and represented by his heirs and LRs on record, shall hereinafter be referred to as "the landlord', unless the context requires individual reference, in which case the landlord concerned will be referred to by his name. The application for release instituted by the landlord before the Prescribed Authority, Jalaun at Orai was registered as P.A. Case No. 4 of 2012. The case of the landlord was that the demised shop, the boundaries whereof are detailed in Paragraph No. 1 of the application (also at the foot thereof) was in the tenancy occupation of the tenant-petitioners' father, Balram son of Hariram Soni.

5. The landlord asserted that the tenant-petitioners' father held the demised shop as his tenant. The three tenant-

petitioners, Awadesh Kumar, Jitendra Kumar and Mukesh Kumar, who shall hereinafter be referred to as "the tenants' (unless the context requires individual reference, in which case the tenant-petitioner(s) concerned shall be mentioned by name) succeeded to the tenancy occupation of the demised shop upon their father's death on 16.04.2006. The tenants are in arrears of rent, which is payable at the rate of Rs.225/- per month, amounting to Rs.2700/-, due since before 01.04.2006. The tenants are defaulters.

6. According to the landlord, amongst the tenants, Awadesh Kumar was managing a tea shop in partnership with one Gopi Chand Saxena at Mohalla Naya Gandhi Nagar, Konch. Likewise, the other tenant, Jitendra Kumar has established his business under the name and style of Balaji Jewellers in a shop situate at Town Ait. The third tenant, Mukesh Kumar had migrated to Pune, Maharashtra, where he was employed as a worker in a factory and permanently domiciled there. The demised shop is lying locked. The tenants, therefore, have no use for the demised shop at all, which has lost all purpose and utility for them. The landlord requires the demised shop for his younger son, Mukesh Kumar, who is aged about 30 years, educated and unemployed still. Mukesh Kumar has married 8 years ago and is living separately. The landlord desires to settle his son aforesaid in the jewellers' business, utilizing the demised shop, which is suitable for the purpose.

7. The need of the landlord compared to the tenants is weightier. The tenants would not face any hardship in vacating the demised shop, because they do not need it, whereas the landlord would face extreme hardship in case release were refused. This is so as the landlord does not have any alternative shop for the purpose of establishing his son, Mukesh Kumar in business.

8. It was also averred in the application for release that on 20.09.2012, the landlord caused a notice to quit to be served upon the tenants, asking them to vacate the demised shop and handover vacant possession upon the expiry of 30 days from the date of receipt, but the tenants upon service got the same answered through their Counsel *vide* reply dated 15.10.2012, premised on incorrect facts and disclosing an untenable stand. The provisions of the Act are applicable to the demised shop. It is on the basis of the said case that the landlord sought release of the demised shop in his favour.

9. The tenants filed a written statement dated 10.04.2013, wherein they acknowledged their status as tenants and pleaded that their father was earlier the tenant in the demised shop. Now, the tenants held those rights. The assertion about one of the tenants being a partner with Gopi Chand Saxena in a shop at Gandhi Nagar, Konch was denied. It was asserted that Gopi Chand Saxena was a tenant of some kind of a structure situate to the west of the demised shop along with Awadesh Kumar, described in vernacular as a "*Dhala*', which was rented to them by the Nagar Palika Parishad, Konch at the rate of Rs.120/- per year. Gopi Chand Saxena and Awadesh Kumar were partners in business managed in the *Dhala* aforesaid, which was distinct and different from the demised shop. The tenants pleaded that it was falsely claimed by the landlord that Gopi Chand Saxena was a partner along with Awadesh Kumar in the demised shop.

10. It was denied that the landlord's son, Mukesh Kumar was unemployed. The receipt of notice served by the landlord was also acknowledged, but not the contents thereof. It was also refuted that the provisions of the Act apply to the demised shop. About the inapplicability of the Act, the stand taken in Paragraph No.7 of the written statement was that the Act does not apply, because the owner and landlord of the demised shop is not Rameshwar Dayal, but the Nagar Palika Parishad, Konch.

11. In the additional pleas, it was asserted that the landlord had earlier instituted S.C.C. Suit No. 3 of 2012, Rameshwar Dayal vs. Awadesh Kumar and others on 16.01.2012 before the Judge, Small Cause Court, wherein they had impleaded the tenants' mother, Smt. Bhagwan Devi as a defendant, acknowledging her to be a tenant in the demised shop. It was asserted that she was not impleaded as a party to the present application, rendering it bad for non-joinder of a necessary party. The stand that was further taken in the written statement was that the landlord's case that they are owners and landlords of the demised shop is incorrect. The true owner and landlord of the demised shop is the Nagar Palika Parishad, Konch, in whom the ownership of the said shop vests. The landlord of the demised shop being the Nagar Palika Parishad, Konch, which is a local authority, the provisions of the Act were not applicable. In consequence, proceedings for release under Section 21(1)(a) of the Act were not maintainable.

12. There is then an assertion by the tenants to the effect that the Nagar Palika Parishad, Konch is established by the quinquennial tax assessment register for the years 1995-2000 to be the owner and landlord of the demised shop. The said record further shows that the landlord's father, Munga Lal son of Mukta Prasad was a lessee of the demised shop. On the foot of the said assertions, it is pleaded that the landlords have no *locus standi* to maintain proceedings for release, because it is the Municipal Board, Konch, which alone can initiate proceedings to evict the tenants.

13. The boundaries of the demised shop were also claimed to be incorrectly described by the landlord. The tenant has further asserted that the landlord has already instituted a suit for eviction against the tenants, wherein an application under Order XV Rule 5 CPC is pending disposal. The case of *bona fide* need of the landlord has been denied. It is pleaded that the landlord is an Advocate by profession as the notice dated 09.04.2010 served by him shows. His son, Mukesh Kumar does not require the demised shop at all, because he is not unemployed. The need set up by the landlord, therefore, is artificial, which cannot be the basis of granting an application under Section 21(1)(a) of the Act.

14. It is the tenants' case that in Mohalla Jai Prakash Nagar, the landlord owns two shops and a house, where one shop is lying vacant. In the same locality, the landlord has purchased a new shop in the name of his wife, Smt. Shakuntala, which is lying vacant. There is an averment that if at all "the so called son' of the landlord requires a shop for purpose of business, he can utilize the vacant shop, newly purchased. The tenant has also asserted that the landlord has four other shops in Mohalla Patel Nagar, Town Konch, out of which two are in the occupation of his sons, Sanjay Soni and Mukesh Soni, who carry on the business of

jewellers for the past many years therein. As such, the landlord's son, Mukesh Kumar cannot be said to be without livelihood. The tenants, on the other hand, have no other shop to earn their livelihood, except the demised shop. Amongst the tenants, Awadesh Kumar and Jitendra Kumar are married men, who have in their family their wives and four children. Mukesh Kumar, amongst the tenants, is unmarried. The tenants' mother is still alive. They are a family of ten souls, all of whom are dependent upon the demised shop for sustenance.

15. It is in the last asserted by the tenants that comparative hardship lies in their favour as they would suffer greater hardship in the event of release than that which the landlord would face in the event of refusal of the application.

16. The landlord by way of documentary evidence, filed a copy of the notice dated 20.09.2012, paper No. 9-Ga, the registered postal receipt and the acknowledgment, paper No. 10-Ga-1, a copy of the lease deed, paper No. 27-Ka-1, the Board Resolution, paper No. 28-Ga1, a copy of the plaint giving rise to O.S. No. 132/10, paper No. 29-Ga-1, a copy of the written statement filed in Suit No. 132/10, paper No. 30-Ga-1, a copy of the written statement filed in O.S. No. 39/12, paper No. 31-Ga-1, receipt bearing paper No. 55-Ga-1, acknowledgment, paper No. 56-Ga-1, reply notice, paper No. 57-Ga-1 and a copy of the order passed in Suit No. 439/12, paper No. 58-Ga-1. Apart from these documents, the landlord led oral evidence in form of affidavits of PW-1, Rameshwar Dayal, PW-2, Banke Bihari Soni and PW-3, Ashutosh Kumar Gupta. These witnesses were cross-examined with the permission of the Court.

17. The tenants produced in their documentary evidence through a list, paper No. 43-Ga-1, a copy of the plaint giving rise to S.C.C. Suit No. 03/2012, paper No. 44-Ga-1, copy of the written statement, paper No. 45-Ga-1, a copy of the sale deed dated 23.03.2013 executed by Laxmi Devi in favour of Mukesh Kumar, Paper No. 46-Ga-1, a copy of the sale deed executed by Shailesh Sonkar in favour of Shakuntala wife of Rameshwar and a sanctioned plan for Mukesh's house, paper No. 47-Ga-1. Through another list, paper No. 59-Ga-1, a copy of the sale deed executed by Mukesh Kumar in favour of Kamlesh Kumar, paper No. 60-Ga-1 and a copy of the sale deed executed by Mukesh Kumar in favour of Harcharan, paper No. 61-Ga-1 were filed. Apart from these documents, the tenants produced oral evidence on affidavit, comprising affidavits of DW-1, Awadesh Kumar, DW-2, Hanif and DW-3, Gopi Chand Saxena. The witnesses were cross-examined with permission of the Court.

18. The Prescribed Authority framed the following issues, in terms of which the parties' case was considered by it (translated into English from Hindi):

"(1) Whether in the present case, the provisions of Act No. 13 of 1972 do not apply?

(2) Whether the relationship of landlord and tenant exists between the applicant and the opposite party?

(3) Whether the applicant has bona fide need for the shop in dispute?

(4) Whether the applicant would face greater hardship in comparison to the opposite party?

(5) Whether the opposite party deserves to be evicted from the shop in dispute?"

19. The Prescribed Authority in substance held that the tenants had taken the

demised shop on rent from the landlord and was paying rent to Rameshwar Dayal. As such, Rameshwar Dayal was the landlord, *vis-a-vis* the tenants. The Prescribed Authority held that the tenants' case that the land, on which the demised shop was constructed, was taken on lease from the Nagar Palika Parishad, Konch, would not make the Nagar Palika Parishad the landlord *vis-a-vis* the tenants. Thus, the provisions of the Act would apply to the demised shop and it would not be exempt from the operation of the Act by virtue of Section 2(1). The question of relationship of landlord and tenant was answered accordingly, bearing in mind the distinction between the well defined concepts of owner and landlord of an immovable property. The tenants having inherited the tenancy from their father upon his death, the Prescribed Authority also held that the failure to join the tenants' mother, was hardly of consequence. This was so, because the tenants, which may include their mother, were joint tenants, and proceedings against one were competent against all. The issue of *bona fide* need and comparative hardship were answered in favour of the landlord and against the tenants.

20. On the aforesaid findings, the Prescribed Authority allowed the release application and directed the tenants' eviction upon usual terms as to payment of two years' rent as compensation by the landlord *vide* judgment and order dated 01.04.2016. The aforesaid judgment was impugned in appeal before the District Judge, Jalaun at Orai. The appeal was registered before the learned District Judge as Rent Appeal No. 4 of 2016. It was heard and dismissed by the learned District Judge *vide* judgment and order dated 15.02.2018, affirming all the findings of the Prescribed Authority.

21. Aggrieved, the tenants have preferred the present writ petition.

22. Heard Mr. B.N. Agarwal, learned Counsel for the tenants and Mr. Atul Dayal, learned Senior Advocate assisted by Mr. Ayush Khanna, learned Counsel appearing for the landlords.

23. The learned Counsel for the tenants has much emphasized the point that the provisions of the Act are not applicable to the demised shop. He submits that the two Authorities below have written palpably erroneous findings on the said issue, which is jurisdictional and vitiates the release order. It is argued that the Act not being applicable, the application for release is not maintainable. Learned Counsel for the tenants has urged that the Act is not applicable to the demised shop, inasmuch it is the landlord's admission in the notice to quit dated 09.04.2010 and in the plaint giving rise to Suit No. 3 of 2012, instituted before the Judge, Small Cause Court that it does not apply. Learned Counsel for the tenants has drawn the attention of this Court to Paragraph No. 5 of the notice to quit, where there is an assertion that the Act does not apply. This Court has also been taken through the contents of the plaint, giving rise to Suit No. 3 of 2012. It must be remarked here that it was the tenant's case before the Authorities below as well that the Act does not apply, but the basis to claim that was very different from that urged by the learned Counsel for the tenants here.

24. Before the Authorities below, the case was that the Nagar Palika Parishad was the owner and landlord of the demised shop and a building, of which a Local Authority is the landlord, is exempt from operation of the Act. The Act is not applicable. Both the Authorities below, on the basis of evidence on record, came to the conclusion that the aforesaid stand of the

tenants was far from tenable. It has been held concurrently by the two Authorities below that the land, whereon the demised shop stand was leased to the landlord's father by the Nagar Palika. The demised shop was constructed by the landlord's father, Munga Lal and let out to the tenants. The Authorities below have opined that the Nagar Palika may be the owner of the underlying land, on which the demised shop stands, but so far as the demised shop is concerned, the landlord is the owner thereof and the landlord as well.

25. It appears to us that there is hardly a cavil about the fact that the land, whereon the demised shop stands, was given on lease for 30 years by the Nagar Palika to the landlord's father, Munga Lal. A copy of the lease deed was filed on record before the Authorities below as Paper No. 27-Ga-1. The term of the lease was initially for a period of 30 years, reckoned from the year 1955. This lease deed has been twice renewed for the same period of time. There is enough evidence by way of admission and documents on record to show that the tenants, who do not renounce their character as such, were tenants, to whom the demised shop was let out by the landlord. There is no relationship of landlord and tenant between the Nagar Palika Parishad, Konch and the tenants. It cannot possibly be so on the given state of evidence, which the two Authorities below have correctly appreciated.

26. Before the Authorities below, the tenants went inconsistent to say that they were tenants, but held the demised premises on behalf of the Nagar Palika Parishad, Konch, who are the landlord. There is not the slightest evidence on record to show any contract of tenancy between the tenants and the Nagar Palika. There is no rent agreement or receipt to establish it. The tenants raised the aforesaid plea before the Authorities below to escape the jurisdiction of the Authorities under the Act by attempting to project the Nagar Palika as the owner and the landlord of the demised shop. In the opinion of this Court, the Authorities below rightly repelled the said case pleaded by the tenants, which is preposterous to its face. The Authorities below have also drawn a distinction between the "owner' and "landlord' to hold that the Nagar Palika might be the owner, but not the landlord. That is a far-fetched remark, because the Nagar Palika is certainly not the owner of the demised shop, which has been constructed by the landlord's father, from whom the landlord has inherited it. The tenancy originally stood in the name of the tenants' father, Balram Soni, from whom the tenants have inherited it. The fact that there is a relationship of landlord and tenant for the aforesaid reason between parties, cannot be denied, which too, the tenants have attempted to do, albeit unsuccessfully, before the Authorities below.

27. Before this Court, the tenants have urged it for the first time that the Act does not apply for a different reason. The reason is the admission in the notice to quit dated 09.04.2010 and the plaint in S.C.C. Suit No. 3 of 2012. A perusal of the notice does show that there is an assertion in Paragraph No. 5 that the Act does not apply, but this point was not raised before the two Authorities of fact below. In our opinion, therefore, it cannot be permitted to be raised for the first time before this Court in writ proceedings. Also, the averment in Paragraph No. 5 of the notice to quit dated 09.04.2010 apart, the plaint giving rise to S.C.C. Suit No. 3 of 2012, does not show at all that it was ever pleaded by the tenants

that the Act does not apply. The pleadings in the plaint giving rise to S.C.C. Suit No. 3 of 2012 show that one shop was let out to the tenants on 14.09.1975, and, later on, an adjoining one on 13.02.1991, when it was vacated.

28. Upon the representation of the tenants that they would enhance rent, the landlord's father, Balram got the partition wall between the two shops removed and carried out major repairs, leading to the demised shop being a new one in the year 1991. It is perhaps from the said averment that the tenants have been inspired into urging before this Court that the landlords have pleaded in the plaint, giving rise to S.C.C. Suit No. 3 of 2012, that the Act does not apply. A careful reading of the plaint does not at all show it to be the landlord's case that the Act does not apply. The suit is clearly one based on a cause of action of default under the Act, upon a wholesome reading of the plaint. If at all the tenants had to seriously urge that the landlord had admitted in his pleadings or elsewhere like the notice to quit, that the Act did not apply, the point had to be raised before the Authorities below and the landlord confronted with the same. The necessity arising, he had to be cross-examined the way it was done with reference to the other issues raised by parties, regarding which witnesses were produced. Nothing of the kind was done, because the point was never raised. Therefore, before this Court, the tenants cannot be permitted to urge a new ground based on a case that was never taken before the two Authorities below. It is, therefore, held that the Authorities below have rightly opined that the Act does not apply and further that there is relationship of landlord and tenant between parties.

29. The next point that has been urged is that the original tenant was Balram Soni, who left behind him as his heirs and LRs not just the tenants, but their mother, Bhagwan Devi as well. It is urged that Bhagwan Devi was impleaded as a party-defendant to S.C.C. Suit No. 3 of 2012 instituted by Rameshwar Dayal against the tenants, but for some inexplicable reason that course was not adopted while bringing the present release proceedings. It is urged that in the case of a commercial accommodation, every heir of the original tenant inherits the tenancy under Section 3(a)(2) of the Act. It is by now well settled that in case of the death of the sitting tenant, in case of a non-residential building, all his heirs inherit the tenancy no doubt, but they do so as joint tenants; not as tenants in common. Therefore, the heirs of the deceased-tenant, *vis-a-vis* the landlord, inherit a single tenancy and not divisible rights. Notice to one or impleadment of one for the purpose of bringing an action to evict or release proceedings is good against all the joint tenants. It is not necessary to implead every heir of the deceased-tenant as a party to the proceedings. This position is beyond cavil after the decision of the Supreme Court in **Harish Tandon v. Addl. District Magistrate, Allahabad, U.P. and others, (1995) 1 SCC 537**. In **Harish Tandon** (supra), it has been held:

"22. The attention of the learned Judges constituting the Bench in the case of H.C. Pandey v. G.C. Paul [(1989) 3 SCC 77] was not drawn to the view expressed in the case of Mohd. Azeem v. Distt. Judge [(1985) 2 SCC 550 : (1985) 3 SCR 906] . There appears to be an apparent conflict between the two judgments. It was on that account that the present appeal was referred to a Bench of three Judges. According to us, it is difficult to hold that after the death of the original tenant his heirs become tenants-in-common and each

one of the heirs shall be deemed to be an independent tenant in his own right. This can be examined with reference to Section 20(2) which contains the grounds on which a tenant can be evicted. Clause (a) of Section 20(2) says that if the tenant is in arrears of rent for not less than four months and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand, then that shall be a ground on which the landlord can institute a suit for eviction..... We are of the view that if it is held that after the death of the original tenant, each of his heirs becomes independent tenant, then as a corollary it has also to be held that after the death of the original tenant, the otherwise single tenancy stands split up into several tenancies and the landlord can get possession of the building only if he establishes one or the other ground mentioned in sub-section (2) of Section 20 against each of the heirs of original tenant. One of the well-settled rules of interpretation of statute is that it should be interpreted in a manner which does not lead to an absurd situation.

23. It appears to us, in the case of H.C. Pandey v. G.C. Paul [(1989) 3 SCC 77] it was rightly said by this Court that after the death of the original tenant, subject to any provision to the contrary, the tenancy rights devolve on the heirs of the deceased tenants jointly. The incidence of the tenancy is the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs and there is no division of the premises or of the rent payable therefor and the heirs succeed to the tenancy as joint tenants."

30. In this view of the matter, this Court finds no infirmity in the holding of the two Authorities below.

31. This brings to the forefront the issue of *bona fide* need, which has again been concurrently answered in favour of the landlord by the two Authorities below. The learned Counsel for the tenants has been unsparing in his criticism of the findings that the Authorities below have recorded on the issue of *bona fide* need.

32. It is argued that the findings of the Authorities below, including the Appellate Authority, are vitiated on the issue of *bona fide* need for non-consideration of material evidence on record. The learned Counsel for the tenants has argued that the finding of the Appellate Authority, in particular, is vitiated, because he did not consider the report of the Civil Court *Amin* and the sanctioned map, which was directed to be kept on file *vide* order dated 25.08.2017, both relating to the demised shop and the constructions made above it by the landlord. It is urged that if the said document taken into consideration, the conclusions of the Appellate Authority would be different. It is next submitted that from the evidence on record, it is pellucid that the landlord's son has his business in the Sarrafa Bazar. He is not employed. Besides, there are a number of other vacant shops available with the landlord, where he can house his son's business, if he desires to establish an independent one.

33. The learned Counsel for the landlord has refuted above submissions and says that the landlord's son, Mukesh Kumar is unemployed. The two Authorities below, on the basis of evidence of record, have opined that the landlord's son, though educated, is unemployed. No doubt, the landlord has admitted in his cross-examination that he has shops in different localities, but most of these are occupied. He has two shops in Mohalla Jai Prakash

Nagar, where he has his residential house. Both the shops are not vacant. The landlord has admitted that he has purchased a plot of land by the roadside, but there is no construction raised thereon. In Mohalla Patel Nagar, the landlord has acknowledged that he has four shops. Out of these, in two, his elder son carries on his jewellers business and the other two are occupied by tenants. It is the landlord's specific case, by which he has stood in his cross-examination, that his younger son, Mukesh does not work in the shop along with his elder brother, Sanjay. The landlord has further admitted that he had five shops in Mohalla Jawahar Nagar. One of the said shops has been sold out. This leaves a residue of four with the landlord. The Appellate Authority has opined that the *bona fide* need of the landlord's younger son is there, who is unemployed and has a family. It has been further opined that merely because the landlord has other premises or plots, his release application cannot be rejected.

34. This Court has carefully considered the matter and noticed the stand of the landlord in the cross-examination. The stand of the tenants too will be shortly noticed. The foremost question to be considered is whether the landlord's son is indeed unemployed. The landlord has said it on affidavit that Mukesh is unemployed and a married man, who is in need of a source of livelihood. His elder brother is settled in the jewellers' business and that is Mukesh's aspiration too. There is no reason to disbelieve the landlord's assertion that his son Mukesh is unemployed. There is no evidence brought on record to establish that Mukesh is engaged in some gainful occupation.

35. In his affidavit dated 17.08.2015, Awadesh Kumar has stated that Mukesh Kumar does not require the demised shop and he is not unemployed. Rather, he is gainfully employed. Mukesh Kumar has eight vacant shops in Mohalla Jawahar Nagar, newly constructed, that are situate close to the main market. Mukesh Kumar is free to establish his business in the said shops. It is also said in Paragraph No. 9 of his affidavit that the landlord has purchased a new shop in the name of his wife at Mohalla Jai Prakash Nagar and already has another two there, out of which one is vacant. In any of the said shops, Mukesh Kumar can conveniently establish his business. It is also said in the same paragraph of his affidavit by Awadesh Kumar that in Mohalla Patel Nagar, the landlord has four shops, where in two of these, his sons, Sanjay Soni and Mukesh Kumar are engaged in the jewellers' trade. In his cross-examination, this witness has said that Mukesh is married and he has two shops in Mohalla Patel Nagar. The landlord's elder son, Sanjay and Mukesh do business together. Both the brothers and their families live together.

36. Appreciating the aforesaid evidence, the Authorities below have opined that Mukesh Kumar is not gainfully employed. It is clear that the tenant has not been able to point out how Mukesh is gainfully employed. There is a distinction between the availability of accommodation with the landlord, where an adult member of his family can establish his business and the fact that the member of his family, for whose requirement the landlord seeks release of an accommodation, is actually in gainful employment. The inference of *bona fide* need is to be drawn from the latter fact and not the former. If the landlord is able to show that an adult member of his family is not in gainful employment, or even in stable gainful employment, that is

independent, it is not for the tenant to show and say that another accommodation, that is available with the landlord, can be utilized for the purpose. Here, there is no positive evidence against the landlord's categorical assertion to the effect that Mukesh Kumar is in actual gainful and stable employment of his own.

37. The tenant, Awadesh has acknowledged in his cross-examination that the two brothers, Sanjay and Mukesh carry on business together in two shops that the landlord had in Mohalla Patel Nagar. The landlord, to the contrary, has stated that it is only Sanjay, who has his business there. Even if the tenant's assertions were to be accepted as correct, Mukesh and Sanjay are carrying on business in Patel Nagar together and not independently. Therefore, Mukesh has a right to establish an independent business at a place of his choice. For the said purpose, the landlord has a right to claim his *bona fide* and seek release of the demised shop.

38. The learned Counsel for the tenants has drawn the Court's attention to the sale deed of a plot, purchased by Mukesh Kumar in Mohalla Jawahar Nagar, to show that his occupation is indicated in the sale deed as *'dukandaari'*. From the said document, the Authorities below have not drawn any inference and this Court does not think that even if the Authorities below considered it, they could hold Mukesh to be gainfully employed. Given Mukesh's station in life, it is but natural to describe his occupation as business on any legal document, that requires it to be spelt out. It cannot be read or understood as evidence of his gainful employment, which the tenant wants the Court to do.

39. It is true that there is evidence on record to show that the landlord has shops in two or three localities and some of them, the landlord has acknowledged with candor, to be vacant. These shops are located in Mohalla Jawahar Nagar. There is no evidence that the other shops are vacant and available. Given the fact that the landlord has four shops in Jawahar Nagar, a look at the tenant's cross-examination is startling. In answer to a question in the nature of an offer to him to take another shop from the landlord instead of demised shop, he has stated:

"यदि वादी मुझे कोई दुकान दे तब भी मैं दुकान खाली नहीं करुंगा।"

40. This part of the tenant's cross-examination has been taken note of the Appellate Authority on the issue of comparative hardship. This Court is of opinion that on the issue of *bona fide* need, the aforesaid stand of the tenant is very relevant. It is reflective of *mala fides* and obduracy. The tenants have no right to tell the landlord how and in what manner, he should go about satisfying his *bona fide* need. It is precisely in this context that the principle under reference has been laid down. The tenant says that the landlord has a number of shops available with him, where his son can set up independent business. That is precisely what the tenant cannot tell the landlord. Once the landlord's son is proven to be not gainfully employed in independent business, it is the landlord's right to seek release of any of the shops that he owns for his son's need. The landlord cannot be driven to ask his son to set up business in a vacant shop of his, which is not the landlord's choice. In this connection, reference may be made to the decision of the Supreme Court in **Sarla Ahuja v. United India Insurance Company Ltd., (1998) 8 SCC 119,** where in the statutory context of a similar

provision in the Delhi Rent Control Act, it has been held:

"14. The crux of the ground envisaged in clause (e) of Section 14(1) of the Act is that the requirement of the landlord for occupation of the tenanted premises must be bona fide. When a landlord asserts that he requires his building for his own occupation, the Rent Controller shall not proceed on the presumption that the requirement is not bona fide. When other conditions of the clause are satisfied and when the landlord shows a prima facie case, it is open to the Rent Controller to draw a presumption that the requirement of the landlord is bona fide. It is often said by courts that it is not for the tenant to dictate terms to the landlord as to how else he can adjust himself without getting possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlord, it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself."

41. Again, very pertinent remarks are to be found in the holding of this Court in **Ram Kumar v. IVth Addl. District Judge, Kanpur and others 2004 SCC OnLine All 726**. In **Ram Kumar** (supra), it is observed:

"9. The finding of the Appellate Court that since the landlord had several other plots and buildings, he could easily accommodate his son in any of these buildings and plots, is patently erroneous and cannot be a ground for denying the relief claimed by the petitioner. It is settled law that if there are several buildings owned by the landlord, it is always open to the landlord to chose any building which he likes or which he thinks to be best for the business. The tenant cannot object nor can raise such a plea that the landlord has other accommodation from which he can do the business. Similar view was expressed by the Supreme Court in M.M. Qasim v. Manohar Lal Sharma, [1981 (3) SCC 36.] as well in N.S. Datta v. VIIth Addditional District Judge, Allahabad. [1984 ARC 113.]"

42. To like effect is the holding of the Supreme Court in **Mohd. Ayub and another v. Mukesh Chand, (2012) 2 SCC 155.** The proposition on which the Authorities below have concurrently held against the landlord, is too well settled to brook doubt. The evidence on record, which the Authorities below have noticed, squarely attracts the principle, where the landlord, who has a *bona fide* need, cannot be instructed by the tenant to satisfy it elsewhere in a manner that the tenant suggests.

43. In this Court's opinion, the finding of the two Authorities below is based on a reasonable and plausible view of the matter, which does not call for interference.

44. So far as the issue of comparative hardship is concerned, the two Authorities below have taken note of the fact that the tenants have not made efforts to find alternative accommodation during all this period of time, which tilts the balance of comparative hardship against them. The Appellate Authority has taken particular note of the fact that the tenant in his cross-examination has said that even if the landlord were to offer him another shop, he would not vacate the demised shop. This stand of the tenants, the Appellate Authority has regarded as malicious.

45. In these circumstances, this Court is of opinion that the issue of comparative

hardship has been rightly answered against the tenants by the Authorities below. Quite apart, this Court in a writ petition under Article 226 of the Constitution generally ought not to interfere with concurrent findings of fact recorded by the Authorities below, unless shown to be perverse or manifestly illegal. That is not the case here.

46. In the circumstances, this petition **fails** and is **dismissed**.

47. The interim order is hereby vacated.

48. However, considering the facts that the tenants have been in occupation of the demised shop for a considerable period of time, they are allowed six months time to handover peaceful and vacant possession of the shop in dispute provided they execute an undertaking before the Prescribed Authority, Jalaun, embodying the following terms within one month of the date of receipt of a certified copy of this order:

(1) The tenants shall handover peaceful and vacant possession of the demised shop to the landlord on or before 16.05.2023.

(2) During the period of six months that the tenants remain in occupation, they will not sublet the shop, damage or disfigure it in any manner whatsoever.

49. In the event, an undertaking, as above directed, is not filed before the Prescribed Authority by the tenants within the time allowed or undertaking is violated, the release order shall become executable **forthwith**.

(2022) 12 ILRA 542
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.12.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Appl. U/s 482 No. 3088 of 2022

Jai Ram Lal Verma ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Himanshu Raghave

Counsel for the Opp. Party:
Anurag Kumar Singh

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 120-B, 409, 420, 468, 471 - Prevention of Corruption Act, 1988-Sections 13(2) r/w 13(1)(d)-quashing of- criminal proceedings on the ground that in the departmental proceedings the accused has been exonerated-on allegation of commission of offence, charge-sheet has been filed in criminal conspiracy with co-accused to cheat the government under MNREGS's funds and in furtherance of the said criminal conspiracy, he caused a wrongful loss to the government exchequer to the tune of Rs. 11,15,340/-the accused was reinstated in service and retired from the post of CDO-Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of Code of Criminal Procedure-The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding-the findings against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution-Thus,

the criminal proceedings cannot be quashed.(Para 1 to 25)

B. It is trite that the standard of proof required in criminal proceedings is higher than that required before adjudicating authority and in case the accused is exonerated before the adjudicating authority whether his prosecution on same set of facts can be allowed or not is the precise question which falls for determination in this case.(Para 23)

The application is dismissed. (E-6)

List of Cases cited:

1. Amrawati & anr. Vs St. of U.P. (2004) 57 ALR 290

2. Lal Kamlendra Pratap Singh Vs St. of U.P. (2009) 3 ADJ 322 SC

3. Radheshyam Kejriwal Vs St. of W. B. & anr. (2011) 3 SCC 581

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

5. CBI Vs V.K. Bhutiani (2009) 10 SCC 674

6. St. (NCT of Delhi) Vs Ajay Kumar Tyagi (2012) 9 SCC 685

7. Om Narayan Tiwari Vs St. of U.P. OnLine (2020) AIR All 2702

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

1. Heard Mr. Himanshu Raghave, learned counsel for the accused-applicant, as well as Mr. Anurag Kumar Singh, learned counsel for the respondent - Central Bureau of Investigation (hereinafter referred to as the "CBI") and gone through the record.

2. The present application under Section 482 CrPC has been filed for quashing of the proceedings in Criminal Case No.342/2015, arising out of CBI Case No.RC0062014A007, under Sections 120-B IPC read with Sections 409, 420, 468 and 471 of the Indian Penal Code, 1860 (hereinafter referred to as the "IPC") and Sections 13(2) read with Sections 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the "PC Act") (State Vs. Jairam Lal Verma and others), pending in the Court of learned Special Judge, A/C, CBI, Court No. 5, Lucknow.

3. Writ Petition No.12802 (M/B) of 2011 came to be filed by one public spirited person, Mr. Sachchidanand Gupta, alleging therein large scale financial bungling, gross irregularities and misappropriation of Mahatma Gandhi National Rural Employment Guarantee Scheme (hereinafter referred to as the "MNREGS") funds in several districts, including Mahoba by Block Development Officers of four blocks, namely, Charkhari, Kabrai, Jaitpur and Panwari in connivance with the officers/officials of Government of Uttar Pradesh and M/s Aman Enterprises, Lucknow. It was held that M/s Aman Enterprises, Lucknow supplied 247 canvas movable work-sheds wroth Rs. 46,95,964/- @ Rs. 19,012/- which was at exorbitant price in four blocks of district Mahoba and thereby a huge wrongly pecuniary loss was caused to the government exchequer and corresponding gain to the government officials and private agencies during the period 2007-2008 and 2009-2009.

4. This Court, vide order dated 31.01.2014, directed the CBI to register a case and investigate the offence. Pursuant to directions of this Court, the FIR in question came to be registered by the CBI.

5. During the course of investigation, the CBI found that the accused-applicant,

who was posted as Chief Development Officer in District Mahoba (since retired), while functioning on the said post, entered into criminal conspiracy with co-accused, Raj Kamal Goyal, a private person, Anil Kumar Jaiswal, the then Regional Manager, Uttar Pradesh Upbhokta Sahkari Sangh Limited (hereinafter referred to as the "UPUSSL"), Lucknow Regional Office, Lucknow with an object to cheat the government of the funds allocated under the MNREGS and in furtherance of the said conspiracy, they caused loss to the government exchequer to the tune of Rs. 11,15,340/-

6. The CBI, in its investigation, further found that canvas movable worksheds form part of work-site facilities which were to be provided by various executive agencies at the place of execution of works to give shade to the labourers as per para 3.4.1 of Notification No.107/38-7/2006-8 NREGA dated 08.02.2007 issued by Rural Development Section-7 of Government of Uttar Pradesh. These canvas movable worksheds should have been purchased by respective end user agencies i.e. gram panchayats. The order dated 01.08.2008 issued by the Government of Uttar Pradesh specifically prohibited district authorities from making centralized purchase of such items.

7. Investigation, by the CBI, further revealed that the UPUSSL is a co-operative firm established under the Uttar Pradesh Co-operative Societies Act, 1965, now registered under Multi State Cooperative Societies Act, 2002 had issued circular from time to time to lay down general guidelines and circulars. Directions were issued by UPUSSL, Head Office, Lucknow vide Circular dated 21.12.2006 regarding supply of different materials from branches/depot of UPUSSL of entire Uttar Pradesh.

8. It is important to note that District Mahoba does not fall under the Lucknow Regional Office of UPUSSL. The CBI, in its investigation, found that the Regional Branch of UPUSSL, situated at Lucknow, in contravention to above noted Circular dated 21.12.2006, suo moto offered to supply canvas movable worksheds and other work-site facilities under MNREGS in District Mahoba vide their letter dated 15.03.2008, which was addressed to Chief Development Officer, Mahoba. The rates quoted were Rs. 16,900/- per piece of canvas movable workshed of the dimension 10x12x7 feet (exclusive of taxes). It was found that the aforementioned letter dated 15.03.2008 was handed over to the present accused-applicant by co-accused, Raj Kamal Goyal on 28.03.2008. The present accused-applicant in furtherance to criminal conspiracy with Raj Kamal Goyal on the same day instructed PD, DRDA, Mahoba for placing supply orders dated 28.03.2008 in favour of UPUSSL, Lucknow for centralized purchase of canvas movable worksheds at district level in utter violation of extant financial rules & regulations of Government of Uttar Pradesh. For such purchase, tender procedure ought to have been followed, but the accused-applicant neither proceeded for tender proceedings nor he got conducted any market survey to ascertain the actual price of canvas movable worksheds which ultimately caused a wrongful loss to the government exchequer to the tune of Rs. 11,15,340/-.

9. The CBI, after investigating the offence, filed charge-sheet bearing no.2167 of 2015 on 31.08.2015 under Sections 120-B IPC read with Sections 409, 420, 468 and

471 IPC read with Sections 13(2) and 13(1)(d) of the PC Act.

10. The learned trial Court took cognizance and issued summons vide order dated 05.10.2015 to the accused-applicant to appear and face rhe trial. The accused-applicant did not appear in pursuance of the summons issued and, therefore, non-bailable warrants of arrest dated 02.11.2015 were issued against the accused-applicant.

11. The accused-applicant filed 482 Application No.5606 of 2015 to quash the charge-sheet as well as summoning order dated 05.10.2015 and order dated 02.11.2015 by means of which non-bailable warrants of arrest were issued. This Court vide order dated 23.11.2015 disposed of the said application with the direction to Magistrate/Trial Court concerned to make expeditious disposal of bail application moved by the accused-applicant in the light of principle laid down by the seven Judges Bench of this Court in the case of **Amrawati & Anr Vs. State of U.P.** reported in **[2004 (57) ALR 290]** and affirmed by the Supreme Court in the case of **Lal Kamlendra Pratap Singh Vs. State of U.P.** reported in **[2009 (3) ADJ 322 (SC)]** subject to condition that the accused-applicant shall appear before Magistrate/Trial Court concerned within one month from today and shall move bail application in accordance with law.

12. The applicant was enlarged on bail by this Court vide order dated 11.03.2016 passed in Bail No.377 of 2016

13. The discharge application moved by the applicant under Section 227 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "CrPC") in the Court of Special Judge, CBI, Lucknow was rejected vide order dated 10.11.2016. The said order, rejecting the discharge application, was challenged before this Court by way of filing Criminal Revision No.11 of 2017, however, the same was dismissed vide order dated 05.01.2017.

14. The learned trial Court has framed charges vide order dated 20.02.2018 under Sections 120-B IPC read with Sections 409, 420, 468 and 471 IPC and Sections 13(2) read with Sections 13(1)(d) of the PC Act against the present accused-applicant and co-accused, Anil Kumar Jaiswal.

15. Now, the present application has been filed for quashing of the criminal proceedings on the ground that in the departmental proceedings the accused-applicant has been exonerated. The departmental proceedings were initiated against the accused-applicant and charge-sheet dated 16.04.2010 was issued by the government. The inquiry officer submitted the inquiry report dated 04.08.2010, exonerating the accused-applicant of all charges. The accused-applicant was reinstated in service by Office Memorandum issued by the Secretary, Gramya Vikas dated 13.10.2010 and thereafter he was transferred/posted as Chief Development Officer, Santkabir Nagar vide order dated 27.11.2010. The accused-applicant had retired from the post of Chief Development Officer, Santkabir Nagar on 31.12.2011.

16. The learned counsel for the accused-applicant has submitted that since the accused-applicant was exonerated on merit in the departmental proceedings, initiated against him, the continuation of the trial in pursuance to the charge-sheet filed by the CBI would be an abuse of process of the Court. To buttress his

submission, the learned counsel for the accused-applicant has placed reliance on the following judgments:-

i. (2011) 3 SCC 581 (Radheshyam Kejriwal Vs. State of West Bengal and another); and

ii. (2020) 9 SCC 636 (Ashoo Surendranath Tewari Vs. Deputy Superintendent of Police, EOW,CBI and another.

17. Mr. Anurag Kumar Singh, learned counsel for the respondent - CBI has submitted that the departmental proceedings and the impugned criminal proceedings are entirely different in nature. The departmental inquiry did not include the offence under the IPC and PC Act. In the present case, on allegation of commission of offence, charge-sheet has been filed and the charges have been framed against the accused-applicant that he, in criminal conspiracy with co-accused, Raj Kamal Goyal, a private person, and Anil Kumar Jaiswal with an object to cheat the government under MNREGS's funds and in furtherance of the said criminal conspiracy, he caused a wrongful loss to the government exchequer to the tune of Rs.11,15,340/-. It is further submitted that there is enough evidence available against the accused-applicant for commission of the offence and the trial Court, after considering the evidence on record, has framed the charges.

18. The learned counsel for the respondent - CBI has, therefore, submitted that if the accused-applicant has been exonerated in the departmental proceedings it would itself not render the criminal proceedings against the accused-applicant invalid or abuse of process of the Court. It is further submitted that the investigation had revealed that on receipt of complaint of irregularities in centralized purchase from several districts, Mr. Anurag Yadav, Additional Commissioner, Rural Development Department, Government of U.P., Lucknow vide DO Letter No.790/NREGS-90/08 dated 28.05.2008 issued to all District Magistrates of Uttar Pradesh highlighted about its seriousness. By this letter, all the District Magistrates were directed to furnish details of such purchases made in their districts, if any, by 30.05.2008. The District Magistrates were also directed to furnish information by 30.05.2008 in case no such purchases had been made in the past.

19. The learned counsel for the respondent - CBI has further submitted that from the investigation it could be revealed that decision to rescind the supply order placed with UPUSSL was prompted by such tough stand of State Administration with regard to centralized purchases. The accused, including the present accused-applicant, got alarmed of the events and promptly acted to rescind the order issued for centralized purchases by DRDA, Mahoba. It is also submitted that no gram panchayats had issued proposals for procurement of canvas movable worksheds which was required as per MNREGA Act, Scheme and Guidelines and no purchase orders were issued by any gram panchayats at any point of time and supplies were imposed upon them. The learned counsel for the respondents - CBI has, therefore, submitted that it is trite law that the standard of proof in a departmental proceeding, being based on preponderance of probability, is somewhat lower than the standard of proof in a criminal proceeding where the case has to be proved beyond reasonable doubt.

20. The only question, which is involved in the present case, is that whether on the basis of exoneration in the departmental proceedings, the criminal proceedings ought to be quashed. The Supreme Court in ***(2009) 10 SCC 674 (Central Bureau of Investigation Vs. V. K. Bhutiani)*** has dealt with the issue and held that the exoneration in the departmental proceedings *ipso facto* would not result into quashing of the criminal prosecution. However, if the prosecution against an accused is solely based on findings in the departmental proceedings and those findings are set-aside by the superior authority in hierarchy, the same very foundation goes and prosecution may be quashed. However, the same principle would not apply in case the departmental proceedings and the criminal proceedings are held at two different entities and they are not in the same hierarchy. In *Central Bureau of Investigation Vs. V. K. Bhutiani's* case (supra), the Central Vigilance Commission had almost exonerated the delinquent employee and the High Court, placing reliance on report of the Vigilance Commission, had quashed the criminal proceedings against *V. K. Bhutiani*, the Supreme Court has held that the report of Central Vigilance Commission may be a relevant factor, but it cannot be held to be *"be all or end all"* in the matter for prosecuting accused persons of such serious offence.

21. In the case reported in ***(2012) 9 SCC 685 (State (NCT of Delhi) Vs. Ajay Kumar Tyagi)***, the Supreme Court has set-aside the order of the High Court whereby the criminal proceedings against an accused were quashed on premise of accused-delinquent had been exonerated in the departmental proceedings. In paragraph-25 of the said judgment, it has been held as under:-

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

22. This Court in the case reported in ***AIR OnLine 2020 All 2702 (Om Narayan Tiwari Vs. State of Uttar Pradesh)*** has held that the two proceedings, criminal and departmental, are entirely different. They operate in different fields and they have different objectives. In service jurisprudence, the purpose of enquiry proceeding is to deal with the delinquent employee departmentally and impose penalty in accordance with the service rules. The rule, relating to appreciation of evidence and proof in the two proceedings, is also not similar. In criminal law, burden of proof is on the prosecution to prove the guilt without reasonable doubt, on the other hand, penalty can be imposed on the delinquent employee on a finding recorded on the basis of preponderance of probability. Paragraphs 23 to 29 of the said judgment, which are relevant, are extracted hereunder.

"23. On having considered the law, reverting to Ashoo Tiwari case relied by the learned counsel for the applicant. The Supreme Court relying on Radheyshyam Kejriwal Vs. State of West Bengal and another6 (for short "Radheyshyam Kejriwal case), set aside the judgment of the High Court and Special

Judge and discharged the appellant from the offence under the Penal Code. The facts, therein, was that the employer SIDBI did not consider it a fit case, consequently, declined permission to prosecute the appellant. The Chief Vigilance Commission (CVC) after having gone through the arguments put forth by the CBI and SIDBI during the course of joint meeting was of the opinion that the appellant may have been negligent without any criminal culpability.

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

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

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

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

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

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

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

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

(vi) The finding in the adjudication proceedings in favour of 8 the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

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

26. The Court finally concluded:

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

27. In nutshell, to recapitulate, in Radhey Shaym Kejriwal, the statutory adjudicating authority did not find prima facie case to impose penalty for violation of the Act. The prosecution based on the same material was held unjustified and abuse of the process of the Court. In Ashoo Tiwari,

CVC agreed with the competent authority of SIDBI, after hearing the CBI, that complicity and culpability of the appellant was not found. The Court relying on para 38(vii) of Radhey Shaym Kejriwal and having regard to the detail CVC order was of the considered opinion that the "chances of conviction in a criminal trial involving the same facts appear to be bleak".

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

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

23. In *Radheshyam Kejriwal Vs. State of West Bengal and another* case (supra), it has been held that the standard of proof in a criminal case is much higher than that of the adjudication proceedings under the PMLA and if the Enforcement Directorate had not been able to prove its case in the adjudication proceedings and the appellant has been exonerated on the same allegation, the determination of the facts in adjudication proceedings could not be said to be irrelevant in the criminal case. Paragraphs 26, 29 and 31 of the said judgment, which have been relied on in the judgment in the case of *Ashoo Surendranath Tewari Vs. Deputy Superintendent of Police, EOW,CBI and another* (supra), are extracted hereunder:-

"26. We may observe that the standard of proof in a criminal case is much higher than that of the adjudication proceedings. The Enforcement Directorate has not been able to prove its case in the adjudication proceedings and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, in our opinion, the determination of facts in the adjudication proceedings cannot be said to be irrelevant in the criminal case. In B.N. Kashyap the Full Bench had not considered the effect of a finding of fact in a civil case over the criminal cases and that will be evident from the following passage of the said judgment :(AIR p.27)

".....I must, however, say that in answering the question, I have only referred to civil cases where the actions are in personam and not those where the proceedings or actions are in rem. Whether a finding of fact arrived at in such proceedings or actions would be relevant in criminal cases, it is unnecessary for me to decide in this case. When that question arises for determination, the provisions of Section 41 of the Evidence Act, will have to be carefully examined."

29. We do not have the slightest hesitation in accepting the broad submission of Mr. Malhotra that the finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication proceedings cannot necessarily be held guilty in a criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case the entire burden to prove beyond all reasonable doubt lies on the prosecution.

31. It is trite that the standard of proof required in criminal proceedings is higher than that required before adjudicating authority and in case the accused is exonerated before the adjudicating authority whether his prosecution on same set of facts can be allowed or not is the precise question which falls for determination in this case."

24. In paragraph-38 of the judgment in *Radheshyam Kejriwal Vs. State of West Bengal and another* case (supra), the ratio has been culled out from various decisions in respect of adjudication proceedings under the PMLA and criminal prosecution, which reads as under:-

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

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

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

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

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

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

(vi)The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

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

25. Thus, it is important to mention here that *Radheshyam Kejriwal* was not a case of departmental proceedings and criminal proceedings, but it was the case of adjudication proceedings under the PMLA and criminal proceedings against the person. In adjudication proceedings under the PMLA, it is the specialized Court of competent jurisdiction which evaluates the evidence in respect of adjudication and then records its findings. However, in the departmental proceedings, it is a trained judicial mind which records the finding of guilt or exoneration. The findings of disciplinary authority or inquiry officer are based on preponderance of probability. I am of the view that the judgment in *Radheshyam Kejriwal Vs. State of West Bengal and another's* case (supra) cannot

be of any application wherein the delinquent employee gets exonerated in departmental proceedings and he is facing departmental proceedings and criminal proceedings.

26. In view thereof, I am of the view that the whole premise of the learned counsel for the accused-applicant that since the accused-applicant has been acquitted in the departmental proceedings, the criminal proceedings are to be quashed, has no merit and substance and, thus, this application is hereby **dismissed.**

(2022) 12 ILRA 551
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Appl. U/s 482 No. 8755 of 2022

Praveen Singh & Ors. ...Applicants
Versus
State of U.P. ...Opp. Parties

Counsel for the Applicants:
Sri Nipun Singh, Sri Vivek Chaubey

Counsel for the Opp. Party:
G.A., Sri Amit Rai, Sri Atharva Dixit, Sri Aushim Luthra, Sri Imran Ullah, Sri Sanjeev Kumar Yadav, Sri Manish Kumar Vikkey, Sri Rajiv Nanda, Sr. Advocate

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 326, 307, 323, 324, 504 & 506-Quashing of summoning order-In the present case, opposite party has not approached the Court with clean hands-initially agreeing amicably settle the disputes, later changed his stand, exerted pressure upon the Court to decide the matter finally and approached the Apex Court without waiting for final decision in the matter-applicants who are victimized on false accusations due to personal grudge of opposite party who managed the FIR and other documents at Bijnor while he was present at Dehradun-FIR had been lodged for settling money dispute-Thus, it is a fit case for exercising power u/s 482 Cr.P.C. keeping in mind that no greater damage can be done to the reputation of a person than dragging him in a criminal cases, continuance of prosecution would be nothing but an abuse of process of law.(Para 1 to 84)

B. It is settled canon of law that the Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilizing the institution of justice for unjust means. Thus, it would be only proper for the Court to deny any relief to a litigant who attempts to pollute the stream of justice by coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court time and public money to achieve his ends.(Para 79)

The application is allowed. (E-6)

List of Cases cited:

1. St. of M.P. Vs Kalyan Singh (2019) 4 SCC 268

2. Harshendra Kumar D. Vs Rebatilata Koley &ors. (2011) 3 SCC 351

3. St. of M.P. Vs Laxmi Narayan & ors. (2019) 5 SCC 688

4. Chandran Ratnaswami Vs K.C. Palanisamy (2011) 3 SCC 351

5. Rajesh Tiwari & ors. Vs Nandkishor Roy (2010) 8 SCC 442

6. Dr. Monica Kumar & anr. Vs St. of U.P. & ors. (2008) AIR SCW 4618

7. R.P. Kapur Vs St. of Punj. (1960) 3 SCR 388

8. Janta Dal Vs H.S. Chowdhary (1992) 4 SCC 305

9. Raghubir Saran (Dr) Vs St. of Bih. (1964) 2 SCR 366

10. St. of Karnataka Vs M. Devendrappa (2002) JT 1 SC 213

11. Zandu Pharmaceutical Works Ltd. Vs Md. Sarful Haque (2004) 9 SC 486

12. Manoj Mahavir Prasad Khaitan Vs Ramgopal Poddar & anr. (2010) 10 SCC 676

13. St. of Haryana Vs Bhajan Lal (1992) Supp 1 SCC 335

14. St. of W.B. Vs Committee for Protection of Democratic Rights, W.B. (2010) 3 SCC 571

15. Hareram Satpathy Vs Tikaram Agrawala & ors. (1978) 4 SCC 58

16. Nupur Talwar Vs CBI, Delhi & anr. (2012) 2 SCC 188

17. CBI Vs Ravi Shankar Srivastava IAS & anr.(2006) 7 SCC 188

18. St. of Ori. Vs Debendra NathPadi (2005) 1 SCC 568

19. Ramveer Upadhyay & anr. Vs St. of U.P & anr. (2022) SCC Online SC 484

20. Rathish Babu Unnikrishnan Vs St. (Govt. of Nct of Delhi) & anr. (2022) SCC Online SC 513

21. Md. Allauddin Khan Vs St. of Bih. & ors. (2019) 0 Supreme SC 454

22. Rajeev Kaurav Vs Balasahad & ors. (2020) 0 Supreme SC 143

23. St. of Karnataka Vs L. Muniswamy &ors. (1977) 2 SCC 699

24. St. of Haryana &ors. Vs Bhajan Lal &ors. (1992) Supp. 1 SCC 335

25. Dr. Monica Kumar & anr. Vs St. of UP ors. (2003) AIR SCW 4618

26. CBI Vs Ravi Shankar Srivastava (2006) 7 SCC 1888 Act anr.

27. Rathish Babu Unnikrishnan Vs St. (Govt. of NCT of Delhi) & anr. (2022) SCC Online SC 513

28. Prashant Bharti Vs St. of NCT of Delhi (2013) 9 SCC 293

29. Parbatbhai Ahir Vs St. of Guj. (2017) 9 SCC 641

30. St. of Haryana Vs Bhajan Lal (1992) AIR 604,

31. Anand Kumar Mohatta Vs St. (Govt of NCT of Delhi) AIR (2019) SC 210 : 2018 SCC Online SC 2447

32. IOC Vs NEPC India Ltd. & ors. (2006) 6 SCC 736

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Nipun Singh and Mr. Vivek Chaubey, learned counsel for the applicants, Mr. Rajiv Nanda, Senior Advocate assisted by Mr. Manish Kumar Vikkey, Mr. Sanjeev Kumar Yadav and Mr. Amit Rai, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned AGA for the State and perused the records.

2. The present application under Section 482 Cr.P.C. has been filed to quash the summoning order dated 07.03.2022 passed by Additional Chief Judicial Magistrate, Court No.1, District-Bijnor as well as the entire proceedings of F.R. Case No.63/2021 (Misc. Case No.87/2022)(Pramod Kumar Baliyan vs. Praveen Singh and others), arising out of Case Crime No.419/2021, under Sections 326, 307, 323, 324, 504, 506, 120B IPC, Police Station-Haldaur, District-Bijnor, pending before the court of learned

Additional Chief Judicial Magistrate, Court No.1, District-Bijnor.

3. For the dispute between the parties, an FIR was lodged by the opposite party no.2 through an application under Section 156(3) Cr.P.C. moved on 22nd November, 2022. The present case was presented on 26th March, 2022 and came up before the Court for argument for the first time on 20th April, 2022. The Co-ordinate Bench of this Court, after hearing the matter at length passed the following order on 20th April, 2022:-

"Heard learned counsel for the applicants, Sri Imran Ullah, learned counsel for the opposite party no.2 learned A.G.A. for State and perused the material on record.

In view of submissions made by learned counsel for the applicants, matter requires consideration.

Opposite party no.2 may file counter affidavit within one week. Rejoinder affidavit, if any, may be filed within one week thereafter.

Put up this case on 10.05.2022 as fresh."

4. On the next date, i.e. 08.07.2022, as the parties were ready to amicably settle the dispute, therefore, the following order was passed:-

"Put up as fresh on 18.07.2022 at 02.00 p.m.

Till 18.07.2022, no coercive action shall be taken against the applicants in F.R. Case No. 63 of 2021 (Misc. Case No. 87 of 2022) arising out of Case Crime No. 419 of 2021 under sections 326, 307, 323, 324, 504, 506 and 120-B IPC, Police Station Haldaur, District Bijnor."

5. On 18th July, 2022, the case was adjourned on the request of learned counsel for the opposite party no.2, therefore, the following order was passed:-

"Mr. Atharva Dixit, Advocate on behalf of Mr. Manish Tiwari, learned Senior Counsel for opposite party no.2 submits that Mr. Senior counsel is engaged in some other Court, therefore, the matter may be posted for 25.07.2022.

As prayed, put up as fresh on 25.07.2022 at 2:00 PM.

Interim order, if any, is extended till the next date of listing."

6. On 25th July, 2022, the applicant nos.1, 2 and 4 as well as opposite party no.2 were present and after hearing their respective counsels, the following order was passed in their presence:-

"Heard Mr. Nipun Singh and Mr. Vivek Chaubey, learned counsel for the applicants, Mr. Manish Tiwari, Senior Advocate assisted by Mr. Atharva Dixit, learned counsel for the opposite party no.2 and Mr. Pankaj Kumar Srivastava, learned A.G.A. for the State.

Today, Mr. Pramod Kumar Baliyan, opposite party no.2 is present before this Court. Applicant no.1 Praveen Singh, applicant no.2 Virendra Singh and applicant no.4 Jubair are also present before this Court and have been identified by their respective counsels.

Learned counsels for the parties state that the parties are ready to settle the dispute amicably, therefore, the matter may be posted for 3rd of August, 2022.

Put up this matter as fresh on 03.08.2022 at 2:00 PM in Chamber.

The applicants as well as opposite party no.2 shall be present before this Court on the next date i.e. 03.08.2022.

The applicant nos.1, 2 and 4 will inform about this order to applicant no.3

that he has to be present before this Court on the next date fixed.

Till the next date of listing, no coercive action shall be taken against the applicants in Case Crime No.419 of 2021, under Sections 326, 307, 323, 324, 504, 506 and 120B I.P.C., Police Station-Haldaur, District Bijnor."

7. Again on 03rd August, 2022, the following order was passed:-

"Heard Mr. Nipun Singh and Mr. Vivek Chaubey, learned counsel for the applicants and Mr. Atharva Dixit, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned AGA for the State.

On the last occasion, i.e 25.07.2022, the applicants as well as opposite party no.2 were directed to be present before this Court as the parties had agreed to amicably settle the dispute.

Today, in compliance of the earlier order dated 25.07.2022, the applicants, namely, Praveen Singh, Virendra Singh, Arun Khanna and Jubair are present before this Court, who have been identified and their signatures have also been attested by their counsel.

However, learned counsel for the opposite party no.2 informs that a message has been sent to him through E-mail stating therein that the opposite party no.2 is suffering from spinal injuries and has been advised for bed rest till 12.08.2022, therefore, he is unable to appear before this Court. In the said message, he has also mentioned that five days back, he had requested to elder brother of applicant, namely, Mr. Zubair to withdraw the complaints, which have been filed by them and their associates against him before the court of ADJ-VII, Dehradun, the S.P., Bijnor, the court of ADJ-III, Dehradun and Bar Council of Uttarakhand. He has also mentioned that his request was denied by elder brother of applicant, namely, Mr. Zubair and expressed his view as to how compromise could be possible in such a situation.

The applicants, who are present before this Court, have given their explanation for denying to withdraw the case stating that, as agreed, the memorandum of understanding for settlement in the matter was to be placed before this Court after which the cases were to be withdrawn, therefore, there was no question of conceding to the request made by the opposite party no.2 for withdrawal of the case as that would have amounted to disrespect of the Court.

In such situation, on the request of learned counsel for the opposite party no.2, put up this case as fresh on 24.08.2022 at 02:00 p.m. in Chamber.

The applicants as well as opposite party no.2 shall be present before this Court on the next date fixed, i.e. 24.08.2022.

In case, the opposite party no.2 does not turn up on that date, the Court will proceed to hear this matter taking cognizance of the fact that the opposite party no.2 had given his consent for settlement of the matter in order to get case withdrawn against him.

It is made clear that the Court had directed the parties to be present before this Court today so that all the deliberations regarding compromise may be made before this Court, for the same reason, the parties are directed to be present on the next date fixed.

Interim order, granted earlier, is extended till the next date of listing.

This order has been passed in the presence of learned counsel for the parties as well as applicants, who are present before this Court."

8. On 24th August, 2022, as the counsel for the opposite party no.2

informed that opposite party was not willing to settle the dispute, therefore, on 24.08.2022, a detailed order was passed and the matter was posted for 28.09.2022 at 02:00 p.m. to be heard on merits. The order dated 24.08.2022 is as follows:-

"The lawyers are abstaining from work due to strike.

The matter is being taken up in Chamber as parties are present as directed by order dated 03.08.2022.

Pursuant to the order dated 03.08.2022, the applicants namely, Praveen Singh, Virendra Singh, Arun Khanna and Jubair are present before this Court, in Chamber.

The opposite party no.2, Mr. Pramod Kumar Baliyan is also present.

The applicants as well as opposite party no.2 cannot be identified as the lawyers are on strike today and are not appearing before the Court.

The opposite party no.2 submits that he has changed his counsel and has engaged some other counsel but the Vakalatnama of the newly engaged counsel is not on record. He further submits that he does not want to compromise with the applicants in the present case.

Earlier, on 08.07.2022, learned counsel for the parties had taken time to inquire from their respective clients as to whether they want to amicably settle the dispute which is between a senior lawyer and junior lawyer as well as law students. Therefore, the matter was posted for the next date i.e. 18.07.2022 and interim protection was given to the applicants. On 18.07.2022, on the request of learned counsel for the opposite party no.2, the matter was posted for 25.07.2022.

Lastly, when the matter was again posted for 25.07.2022, Mr. Pramod Kumar Baliyan, opposite party no.2 was present in person and was ready to amicably settle the dispute, hence, the matter was posted for 03.08.2022 as one of the applicants, applicant no.3 Mr. Arun Khanna, was not present on that date. On 03.08.2022, the opposite party no.2 was not present before this Court due to reasons as mentioned in the order dated 03.08.2022.

The applicants present before this Court, inform that opposite party no.2 has moved an application before concerned S.S.P. for lodging frivolous case against them, after order dated 03.08.2022.

The statement of the opposite party no.2 goes to show that he avoided the Court on 03.08.2022 in order to buy time to move an application before the S.S.P. concerned against the applicants.

In view of above, let the matter be posted as fresh on 29.08.2022 at 2:00 PM to be heard on merits.

Interim order, granted earlier, is extended till the next date of listing."

9. On 29th August, 2022, the matter was heard at length and in order to bring all the affidavits on record as filed by the parties, the matter was posted for further hearing on 05.09.2022 and case was finally heard on merits.

10. Brief facts as placed by the learned counsel for the applicants are that for the incident alleged to have occurred on 08.11.2021, an FIR was lodged by opposite party no.2, namely, Pramod Kumar Baliyan, which was registered as Case Crime No.419 of 2021, under Sections 386, 120B, 326, 307, 323, 324, 504, 506 IPC, Police Station-Haldaur, District-Bijnor on 02.12.2021. The aforesaid case was lodged at the instance of opposite party no.2 by way of application filed under Section 156(3) Cr.P.C. on 22.11.2021. As per the FIR, Pramod Kumar Baliyan aged about 52 years, permanent

resident of Village-Murliwala, Police Station-Afzalgarh, District-Bijnor, is practicing at Dehradun. The applicants, namely, Zubair Ahmed (Applicant No.4), Praveen Singh (Applicant No.1), Virendra Singh (Applicant No.2) used to give cases to the opposite party no.2 on commission basis since last so many years. On account of lockdown and closure of courts, they could not provide cases on commission basis to opposite party no.2. The aforesaid applicants misbehaved with opposite party no.2 forcing him to pay advance money to them and when the opposite party no.2 failed to provide money, they extended life threat to opposite party no.2 and Arun Khanna (applicant no.3) and co-accused-Ehatsam Ansari also extended help to the aforesaid applicants in extending life threat to the opposite party no.2. It has further been alleged that in the morning of 08.11.2021, opposite party no.2 along with one Rakesh Kumar, resident of Village Murliwala, Police Station-Afzalgarh, District-Bijnor was going to Village Nangaljat, at about 05:00 a.m., when the opposite party no.2 reached near Village Bhagawa, he was chased by one Sky Blue Santro Car bearing registration No.UK 7 BA 0170. After stopping the opposite party no.2, the aforesaid five persons, namely, Jubair (applicant no.4), resident of Lakkhibagh Colony, Dehradun, Praveen Singh (applicant no.1), resident of Bhagat Singh Colony, Dehradun, Virendra Singh (applicant no.2), resident of Alakhnanda Vidarland No.1, Nakrauda, Dehradun, Ehatsan Ansari (co-accused), resident of Azad Colony, Near 15 BT, Dehradun and Arun Khanna (applicant no.3), resident of 31, Chander Nagar, Dehradun, came out of the car and Zubair (applicant no.4) fired upon the opposite party no.2, which was fortunately missed, then, Ehatsam Ansari, after taking the countrymade pistol from Zubair again fired upon him after reloading the country made pistol. Praveen Singh (applicant no.1) also assaulted multiple times over the head and chest of opposite party no.2 by khookri, in which opposite party no.2 sustained deep wound on the head and cut on his chest. Virendra Singh (applicant no.2) assaulted the opposite party no.2 by baseball stick, hitting on his nose, resulting into fracture of his nose bone. On hue and cry being raised by opposite party no.2, people from nearby, namely Moola Singh son of Balvir Singh, resident of Village Ravti, Rakesh Kumar, Manoj Kumar sons of Shyam Lal, resident of Village Nangaljat, Dalvir Singh son of Balraj Singh, resident of Village Agupura, District Bijnor came on the spot. Thereafter, the opposite party no.2 was brought to the Government Hospital, Kotwali Dehat, where he was medically treated and was, later on, referred to District Bijnor. The x-ray of his head, nose and hand was conducted wherein his nose bone was found to be fractured.

11. For the aforesaid incident, an application U/s 156(3) Cr.P.C. was filed before the court of learned Additional Chief Judicial Magistrate, Bijnor on 22.11.2021 and the court concerned directed the concerned SHO of Police Station-Haldaur to conduct an inquiry and submit the report. The report dated 26.11.2021 was submitted by the concerned SHO, perusal of which goes to show that the villagers of Vill-Bhagawa stated that no such incident had taken place, informing the concerned Inspector that in case, any such incident of using firearm would have taken place, the villagers would have come to know about the same on hearing noise of the firearms.

12. The concerned Magistrate ignoring the said police report directed for registering the case, hence the FIR was registered on 02.12.2021 as Case Crime No.419 of 2021 against as many as five

named accused persons including the present applicants and co-accused Ehatsam Ansari. The investigating officer, after carrying out thorough investigation, considering the statements of the villagers and the call details of the applicants as well as alleged witnesses, submitted final report/closure report on 29.12.2021, against which a protest petition was filed, which was accepted by the concerned court below and summoned the applicants vide impugned order dated 07.03.2022, under Sections 326, 307, 323, 324, 506, 120B IPC. Hence, this application has been filed.

13. Learned counsel for the applicants submits that the opposite party no.2 has filed the present case in order to settle his personal grudge and while arguing the matter on merits, he has placed the detailed facts, which is as under:-

a) An application under Section 156(3) Cr.P.C. was filed by the opposite party no.2 on 22.11.2021 for the incident dated 08.11.2021. On the aforesaid application, the concerned Magistrate directed the SHO, Police Station-Haldaur to conduct an inquiry and submit a report. Thereafter, the report so submitted by the Investigating Officer on 26.11.2021, shows that no such incident had taken place as narrated in the application U/s 156(3) Cr.P.C. moved by the opposite party no.2. Ignoring the said police report, learned court below has directed for lodging of the FIR on which the FIR came to be registered as Case Crime No.419 of 2021 on 02.12.2021.

b) As per the prosecution case, opposite party no.2 sustained as many as five injuries as he was examined by one Dr. Pramod Kumar at Primary Health Centre, Kotwali Dehat, Bijnor at 6.35 AM on 08.11.2021. As per the medical report, opposite party no.2 by himself went to the doctor for his medical examination. **There is no whisper as to the role of Rakesh Kumar, who was accompanying the opposite party no.2 on motorcycle at the time of incident.**

c) As per the supplementary medical report dated 12.11.2021, injury no.5 was found to be grievous in nature and rest of the injuries were found to be simple in nature as opined by Dr. Pramod Kumar in his supplementary medical report.

d) The Investigating Officer during the course of investigation recorded the statements of as many as 15 independent witnesses, who are resident of the nearby villages, where the alleged incident is said to be taken place. The aforesaid witnesses informed the Investigating Officer that no such incidence as alleged by the opposite party no.2 had ever taken place as it was not possible that the villagers could not hear the noise of firearm being used, that too in the early morning. The statements of four other witnesses, as mentioned in the FIR, namely, Moola Singh, Rakesh Kumar, Manoj Kumar and Dalvir Singh were also recorded. The witness, Rakesh Kumar was the one, who was going along with the opposite party no.2 on his motorcycle and the witness Moola Singh resident of Village Ravti, P.S. Himpur Dipa, District Bijnor, stated that he was going to his relative's place at Village Takpura, Police Station Haldaur, District Bijnor and while, he was passing through Village Baghawa, the alleged incident had taken place. Witness, Manoj Kumar, resident of Village Nangaljat, P.S. Haldaur, Bijnor, has stated that he was going to his tubewell which is near to village Baghawa on the main road, when the aforesaid incident as alleged by the opposite party no.2 had taken place. The third witness Dalvir Singh, resident of Village Agupura, P.S. Najibabad, District Bijnor has stated that he was going to the

matrimonial home of his aunt's daughter at about 5:00 AM, when he saw the alleged incident. Therefore, the aforesaid three witnesses including Rakesh Kumar, who was accompanying the opposite party no.2 on motorcycle have supported the prosecution case.

e) The Investigating Officer, after completing the investigation, considering the statements of independent witnesses (villagers, who were residents of nearby villages), considering the call details of applicants, opposite party no.2 and his alleged witnesses, did not find any credible evidence regarding the fact that any such incidence had taken place and submitted the final report/closure report on 29.12.2021. The opposite party no.2 challenged the aforesaid final report by filing protest petition and the court concerned vide order dated 07.03.2022 has rejected the final report and summoned the applicants to face the trial u/s 326, 307, 323, 324, 506 and 120B IPC. Therefore, the applicants have filed the present application u/s 482 of Cr.P.C., whereby challenging the said order including the entire proceedings of instant case.

14. Learned counsel for the applicants has challenged the aforesaid proceedings on the following grounds:-

a) The criminal prosecution against the applicants is a clear abuse of process of law as the allegations made in the F.I.R. are so absurd and inherently, improbable on the basis of which no prudent person can ever reach to a conclusion for proceedings against the accused applicants.

b) Opposite Party no.2 has filed the present case in order to settle his personal vendetta out of sheer revenge and anguish as applicants and other co accused Ehatsam Ansari Advocate has started their independent practice and disowned themselves from opposite party no.2. It is admitted case of the opposite party no.2 that the applicants and other co-accused persons used to give cases to him on commission basis. It is when the applicants started providing case to another counsel, the opposite party no.2 being annoyed has filed the aforesaid case in order to wreck vengeance and harass the applicants. It would be appropriate to quote paragraph no.24 of the application u/s 482 of Cr.P.C., which is reproduced herein below:-

"That the true fact is that the applicant no.1, 2 and 3 were doing their internship with the opposite party no.2 and during their internship, many cases were referred to the opposite party no.2 by them, which is also admitted by the opposite party no.2 in the F.I.R., but because of his bad behavior, the applicant no.1, 2 and 3 have left opposite party no.2 and have joined the applicant no.4 for their further internship, which was not accepted by the opposite party no.2 and further the opposite party no.2 was regularly threatened the applicants to implicate in a false case, which was resulted into the implication of the applicants in the present case as well as in other several cases."

c) In the counter affidavit, the contents of paragraph no.24 have been replied in the said manner, which is reproduced herein below:-

"That the contents of paragraph no.24 of the affidavit is partly correct and partly denied because the applicants used to refer cases to the deponent however when the deponent was unable to pay the applicants money owing to the covid-19 pandemic the accused persons

took the grave step and attacked him in order to extort money."

d) The opposite party no.2 being the permanent resident of District Dehradun, having roaring practice at District Courts, Dehradun, misused his power and post and had got multiple F.I.R.s including the present one lodged against the applicants on totally false, incorrect and concocted facts. The Aadhar card annexed by the opposite party no.2 clearly shows that he is the permanent resident of Dehradun and just in order to file the present case he is hiding his identity showing himself permanent resident of District Bijnor.

e) All applicants and co-accused Ehatsam Ansari Advocate are also the permanent residents of Dehradun and they have no concern in any manner from District Bijnor, but in order to create a false and fabricated case at Bijnor, a false story has been manufactured to falsely implicate the applicants by managing the chance witnesses, doctor and as well as the concerned court in lodging the present F.I.R. against the applicants.

f) When all the parties are residing at Dehradun, there was no point or occasion to chase the opposite party no.2 to Bijnor and commit the alleged crime. This shows that district Bijnor has been chosen intentionally and deliberately to harass the applicants as it would be very difficult for applicants to visit Bijnor and to contest the cases over there as he threatened the applicants to stop their practice.

g) In the alleged incident dated 08.11.2021, the opposite party no.2 as alleged that he has sustained serious injuries, but on the same day, not only the presence of the opposite party no.2 was recorded by the Additional District Judge, Court No.3, Dehradun at Dehradun in Misc. Case No.598/2021 and 629/2021, but also his statement was duly recorded by the court in its order dated 8.11.2021. This clearly shows without any doubt that the opposite party no.2 was present at District Court, Dehradun on the date of alleged incident and, therefore, it is highly improbable that after having allegedly sustained serious injuries, the opposite party no.2 is working in the courts at Dehradun.

h) The opposite party no.2 filed multiple MACT cases in Dehradun MACT on 09.11.2021, 10.11.2021, 11.11.2021, 12.11.2021, 15.11.2021, 16.11.2021 and 22.11.2021. The status of the cases filed by the opposite party no.2 on 09.11.2021, 10.11.2021, 11.11.2021 and 15.11.2021 have been brought on record at page no.85 to 95 of the main application. The details of cases filed by the opposite party no.2 are reproduced herein below:-

a. ***CNR No.UKDD01-004860-2021 filed on 09.11.2021, before the 5th Additional District Judge, Dehradun***

b. ***CNR No.UKDD01-004896-2021 filed on 10.11.2021, before the District Judge, Dehradun***

c. ***CNR No.UKDD01-004894-2021 filed on 10.11.2021, before the 5th Additional District Judge, Dehradun***

d. ***CNR No.UKDD01-004940-2021 filed on 11.11.2021, before the 5th Additional District Judge, Dehradun***

e. ***CNR No.UKDD01-004939-2021 filed on 11.11.2021, before the 5th Additional District Judge, Dehradun***

f. ***CNR No.UKDD01-004998-2021 filed on 15.11.2021, before the 5th Additional District Judge, Dehradun***

g. ***CNR No.UKDD01-005009-2021 filed on 15.11.2021, before the 5th Additional District Judge, Dehradun***

h. ***CNR No.UKDD01-005030-2021 filed on 16.11.2021, before the 5th Additional District Judge, Dehradun***

i. CNR No.UKDD01-005175-2021 filed on 22.11.2021, before the 5th Additional District Judge, Dehradun

j. CNR No.UKDD01-005177-2021 filed on 22.11.2021, before the 5th Additional District Judge, Dehradun

i) The applicants have brought on record the order dated 22.11.2021 passed by the court of 3rd Additional District Judge, Dehradun, in which co-accused Ehatsam Ansari Advocate filed application for release of claim amount awarded to the claimant by MAC Tribunal in case no.651/2021 being application no.12C & 13C, which came to be objected by the opposite party no.2 by filing his detailed objection that without obtaining NOC, co-accused Ehatsam Anwari has filed his Vakalatnama and application for release of Claim amount awarded to claimant.

j) The court of Additional District Judge-III, Dehradun rejected the objections of O.P no.2 by allowing the application no.12C & 13C moved by co-accused Ehatsam Ansari, Advocate by allowing him to accept the awarded amount on behalf of the claimant vide order dated 22.11.2022. In the objections or in arguments before the court of ADJ-III, Dehradun, the opposite party no.2 did not disclose at all about any such incident alleged to have taken place on 8.11.2021.

k) The aforesaid order dated 22.11.2021 prompted the opposite party no.2 to file an application u/s 156(3) Cr.P.C falsely implicating the applicants and co-accused Ehatsam Ansari Advocate, because on the same day i.e. 22.11.2021, application u/s 156(3) Cr.P.C. was moved by the opposite party no.2 before the court of 1st ACJM, Bijnor, however again the presence of the opposite party no.2 was recorded at Dehradun in order dated 22.11.2011.

l) Unfortunately, as soon as the opposite party no.2 came to know that investigation is going against him, he lodged another FIR on 18.12.2021 arising out of Case Crime No.853/2021, under Sections 500, 501, 506 IPC and Section 67 of the I.T. Act, 2008 at P.S.-Kotwali, District-Bijnor against all the applicants. On 06.02.2022, another FIR was lodged by the opposite party no.2 against the applicants, registered as Case Crime No.52/2022, under Sections 379, 382, 506, 120B IPC, P.S.-Noorpur, District-Bijnor, showing the date of incident as 22.12.2021. The aforesaid FIR was also lodged by the opposite party no.2 in the similar fashion wherein it has been alleged that the opposite party no.2 was going alongwith Rakesh Kumar on the motorcycle at about 2:00 PM on 22.12.2021. The applicants again went all the way to District Bijnor from Dehradun for settlement where Jubair Ahmad (applicant no.4), Praveen Singh (applicant no.1), Virendra Singh (applicant no.2) and Arun Khanna (applicant no.3), after breaking the diggi of motorcycle stole Rs.18,000/- and after showing the country made pistol, giving life threat to the opposite party no.2 and Rakesh Kumar, while running away, the applicants also stole proofs, documents, pendrive relating to the present case apart from Rs.18,000/-. The opposite party no.2 further alleged that the applicants threatened to kill him, his witnesses and entire family, if all cases are not withdrawn.

m) Another FIR came to be lodged as Case Crime No.32/2022 at P.S. Rehar, District Bijnor, under Sections 323, 324, 394, 504, 506 IPC lodged by Sri Hariom Singh, on 11.03.2022 who is the junior of opposite party no.2 and also filed the objection on the release application of the claim amount along with opposite party no.2, which was decided on 22.11.2021, in a similar fashion, the allegations are as follows:-

a. The complainant Hariom Singh Advocate (junior of O.P no.2) was going to Nainital along with his client Tejpal Singh, where the applicants no.1, 2 and 4 chased the car of complainant at about 4.30 AM on 02.02.2022 and the applicants no.1, 2 and 4 after coming out from the car, after snatching Rs.30,000/-, assaulted Hariom by hitting multiple times on his head and chest causing deep wound.

b. Again in the similar fashion, the complainant Sri Hariom, Advocate allegedly went to the nearest hospital at Dhampur, where the doctor was not available and therefore, they went to the same Kotwali Dehat Hospital, where the injuries of opposite party no.2 was examined. A copy of the F.I.R. lodged by Sri Hariom Singh has been annexed as Annexure No.SA-6 to the supplementary affidavit filed by the applicants.

n) **It is pertinent to mention here that Kotwali Dehat hospital is the same hospital where opposite party no. 2 was also medically examined.**

o) On 04.01.2022, another criminal complaint was filed against the applicants before the same court of ACJM, Bijnor under Sections 354B, 365, 376, 342, 504, 506 IPC through one Rinki, wherein she alleged that she was allegedly raped by applicants. The aforesaid complaint dated 04.01.2022 has been annexed as Annexure No.SA-6 to the supplementary affidavit filed by the applicants.

p) The opposite party no.2 is hell-bent to take revenge from the applicants as the applicants have dared to change their choice by engaging another counsel on commission basis in place of opposite party no.2, for which the opposite party no.2 has gone to the extent of falsely implicating the applicants in several cases.

15. Learned counsel for the applicants has drawn the attention of the Court by placing certain facts, pointing out the conduct of opposite party no.2, while appearing before this Court that this matter came up for hearing before this Court on 20.04.2022 and while arguing the case, one of the submissions of the counsel for the applicants was that opposite party no.2 was not only present in the District Court, Dehradun but his statement was also recorded in the court proceedings on the date of occurrence, i.e. 08.11.2021 of present alleged offence, which is not possible as is evident from the copy of proceedings of District Court, Dehradun in Misc. Case Nos.598/2021, 629/2021 and 651/2021. The counsel for the opposite party no.2, Mr. Imran Ullah informed the court on the instructions of opposite party no.2, who was also present in the court that the said order has been corrected as there was mistake in the order in recording the presence and statement of opposite party no.2 and on such statement, the Hon'ble Court was pleased to grant one week time to the opposite party no.2 to file counter affidavit in light of the arguments advanced before this Hon'ble Court by fixing the matter on 10.05.2022 as fresh. The order dated 20.04.2022 already reproduced herein above.

16. Unfortunately, the matter could not be taken up on 10.05.2022 and finally, the matter came up for hearing before this Court on 08.07.2022, on which date, the matter was argued at length, but as the same could not be concluded, the Court was pleased to fix the matter on 18.07.2022 at 2:00 PM on the request of the counsels for both the parties, on which date, Mr. Manish Tiwari, Senior Advocate, appeared alongwith Atharv Dixit, Advocate after replacing Sri Imran Ullah, Advocate, which was for the reason that the statement given by Sri Imran Ullah, Advocate, that the order has been corrected on the instructions

of opposite party no.2, was incorrect, which is clear from the counter affidavit in which after the order dated 20.04.2022 as mentioned aforesaid, the opposite party no.2 filed correction application through his junior counsel Sri Hariom. On intervention by the Court, parties were ready to settle the dispute amicably. In the supplementary affidavit filed by the applicants, the applicants have also apprised the Court by filing Annexure no.SA-1&2 that the applicants are objecting to the correction application and the opposite party no.2 and his junior counsel is avoiding the hearing of correction application. Relevant paragraphs of the supplementary affidavit are being reproduced hereunder:-

"3. That when it comes to the knowledge of the applicants that the opposite party no.2with the help of his junior filed the aforesaid correction application, then without any further delay, on 17.05.2022, the applicants filed their objection. A copy of the objection filed by the applicants dated 17.05.2022 is being annexed as Annexure No.SA-1 to this Affidavit.

4. That after filing objection, the next date fixed was 15.06.2022 and on 15.06.2022, the opposite party no.2 took the adjournment and the next date fixed was 19.07.2022, on which date again the opposite party no.2 has filed his adjournment. Copies of the order sheet showing non-appearance of the opposite party no.2 are collectively being annexed as Annexure No.SA-2 to this Affidavit."

17. The aforesaid matter again came up for hearing before the Hon'ble Court on 18.07.2022 on which date adjournment was sought upon which the Hon'ble Court was pleased to fix 25.07.2022. On 25.07.2022, the matter was again heard by this Court and during the course of arguments, both the counsels requested the Court to mediate the atter for amicable settlement of the dispute. As all the parties, except applicant no.3, were present before the Court during the course of arguments and on the request of counsels of both the parties, the matter was placed on 03.08.2022 at 2:00 PM for settlement. The said date was fixed as on 25.07.2022, as the applicant no.3 was not present in the Court, otherwise the compromise would have taken place on 25.07.2022 itself. The order dated 25.07.2022 already reproduced hereinabove.

18. Learned counsel for the applicants further submits that on 03.08.2022, the matter again came up before the Court on which date applicants were present in terms of the order dated 25.07.2022, but deliberately opposite party no.2 did not appear and sent e-mail through his counsel Mr. Atharv Dixit that he is suffering from spinal injuries and has been advised for bed rest till 12.08.2022 and on his request, the matter was again fixed for 24.08.2022. The order dated 03.08.2022 is already reproduced hereinabove. Unfortunately, just before two days, on 22.08.2022, a supplementary counter affidavit was filed by the opposite party no.2 by engaging new counsel Mr Sanjeev Kumar Yadav, Advocate, along with one Senior Counsel of Supreme court, whereby refusing to settle the matter allegedly on the ground that the Hon'ble Apex Court in the case of ***State of Madhya Pradesh Vs. Kalyan Singh reported in (2019) 4 SCC 268*** has refused to quash the criminal proceedings under section 307 IPC. In the supplementary counter affidavit, he has further filed a complaint against the applicants before the S.S.P., Dehradun,

alleging therein that on 16.08.2022 at about 10:00 AM, applicants armed with knife, stick and other weapons assaulted the opposite party no.2, requesting the S.S.P. to lodge a criminal case against the applicants. Learned counsel for the applicants further submits that it is highly unfortunate that opposite party no.2, who has admitted in the open court that he is ready to settle the matter, is now running away from the settlement by again raising false and frivolous allegations against the applicants. **After the first hearing of the matter, which took place on 20.04.2022 as mentioned above, where the incorrect statement was given that the order dated 08.11.2021 has been corrected, the correction application was moved u/s 151 and 152 C.P.C. for the first time on 24.04.2022, whereby seeking the correction of the order dated 08.11.2021 of concerned court of Dehradun in which not only the opposite party no.2 was present, but his statement was also recorded by the court of ADJ-III, Dehradun showing his presence at Dehradun.** In fact, the order dated 8.11.2011 is still uncontroverted and unrebuttable on the instance of opposite party No.2 as till today he neither filed any corrected order nor appeared before the court to press the correction in the order, particularly because he does not want to give incorrect statement or by filing false affidavit before the concerned court because the court and O.P no.2 are aware of truth and true facts and that is why the correction application was deliberately moved by the junior counsel Hariom Advocate (Complaint Case No.32/2022).

19. Firstly, learned counsel for the applicants further submits that no correction application has been moved by the opposite party no.2 himself seeking correction of the order dated 08.11.2021 upto the first date of hearing of the present application u/s 482 of Cr.P.C., which was held on 20.04.2022. Even after filing the correction application, no steps have been taken by the opposite party no.2 or his junior counsel to get the correction application decided. In fact, the order sheet shows and reflects that they are seeking adjournment and not getting the correction application decided, which is for the reason that the Presiding Officer knows that the opposite party no.2 was present before him on 08.11.2021 and his statement and presence was correctly recorded by the court. For the aforesaid reason, the opposite party no.2 is trying to linger on the matter and without waiting for final discussion, has approached the Hon'ble Apex Court against interim order.

20. Secondly, learned counsel for the applicants submits that the allegations are so absurd and improbable that no man of ordinary prudence can rely upon such vague and baseless allegations and therefore, the present criminal case against the applicants is a pure abuse of process of law and has been maliciously instituted for oblique motive in order to fill up nefarious designs. The criminal proceedings are manifestly attended with malafide and the proceedings are maliciously instituted with an ulterior motive for wrecking vengeance with the accused and with a view to spite them due to private and personal grudge as the applicants changed their choice, by engaging another counsel on commission basis in place of opposite party no.2. The opposite party no.2 is misusing his power and profession and has arranged all the things in a well planned manner by creating the chance witnesses, whose names are mentioned in the F.I.R and also by

managing the doctor, who mischievously manufactured the false injury report.

21. Thirdly, learned counsel for the applicants submits that the opposite party no.2 is the habitual complainant because in the past, in a similar fashion, he filed two criminal cases first was an application u/s 156(3) of Cr.P.C. on 03.02.2017 against Anoop, Sanjay, Neetu, Yashpal Singh, Praveen, Shishupal and Jitendra at Police Station Patelnagar, District Dehradun, in which he allegedly sustained some injuries and was examined at private hospital. The said application u/s 156(3) of Cr.P.C. was also filed in a similar fashion and the same was ultimately dismissed by the court of ACJM, Dehradun on 18.02.2017 by a detailed order mentioning therein that the opposite party no.2 sought to falsely implicate the accused therein by creating the injuries. The copy of the order dated 18.02.2017 rejecting the aforesaid application u/s 156(3) of Cr.P.C. has been annexed as Annexure No.SA-3 to the supplementary affidavit. The second FIR came to be lodged by the opposite party no.2 in similar fashion on 26.02.2017 at P.S. Raipur, Sadar, Dehradun being case crime no.75/2017 u/s 323, 504, 506 IPC against two unknown persons and finally, the said case was settled on the basis of compromise and accordingly a final report was submitted on 25.03.2017.

22. Fourthly, learned counsel for the applicants submits that the order sheet OF THE COURT PROCEEDINGS AT DEHRADUN COURT dated 08.11.2021 shows the presence of the opposite party no.2 at Dehradun on the date of alleged incident. The abovementioned order sheet dated 8.11.2021 is the sacrosanct document of impeccable character and its veracity cannot be doubted as the same is the record of judicial proceedings, where the statement and presence of the opposite party no.2 is recorded by the competent court and the same remains uncontroverted and unrebuttable till the first date of hearing on 20.04.2022 as the correction application for deleting the name and presence of O.P no.2 at Dehradun on 8.11.21 was moved by junior counsel on 22.04.2022. **Placing the above arguments, learned counsel for the applicants has just tried to prove that the presence of the opposite party no.2 at Bijnor is doubtful.** Hence, the criminal proceedings are liable to be quashed on this ground itself.

23. Placing reliance upon the judgment of Hon'ble Apex Court in the case of **Harshendra Kumar D. Vs. Rebatilata Koley and others, reported in (2011) 3 SCC 351**, wherein it has been held that High Court can quash the criminal proceedings, if material/document as placed by accused are beyond suspicion or doubt or which are in the nature of public document are uncontroverted and are such that accussation against the accused cannot stand, it would be travesty of justice of the accused is relegated to trial and is asked to prove his defence before trial court.

24. Learned counsel for the applicants, placing reliance upon the judgment of Hon'ble Apex Court in the case of **State of Madhya Pradesh Vs. Laxmi Narayan and others, reported in (2019) 5 SCC 688**, has emphasized the fact that compromise in offences involving Section 307 IPC can be looked into in cases where wrong is basically personal or private in nature and does not amount to offence against society. The opposite party placing

reliance upon the judgment of **Kalyan Singh (supra)** has wrongly interpreted the view of the Hon'ble Apex Court.

25. Learned counsel for the applicant further submits that the power under Section 482 Cr.P.C., which is inherent in a court's jurisdiction, is meant to prevent abuse of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. On the application of abuse of process, the court confirms that an abuse of process justifying the interference in prosecution could arise in the circumstances where it would be impossible to give the accused a fair trial or where it would amount to misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case. Learned counsel for the applicants further contends that it may be abuse of process if either (a) the prosecution has manipulated or misused the process of the court so as to deprive the accused of a protection provided by law or to take unfair advantage of a technicality, or (b) on the balance of probability the accused has been, or will be, prejudiced in the preparation of conduct of his defence by delay on the part of the prosecution which is unjustifiable. In support of his contentions, he has relied upon the judgments of Hon'ble Apex Court in the cases of ***Chandran Ratnaswami vs K.C. Palanisamy, reported in (2011) 3 SCC 351, Rajesh Tiwari and others Vs. Nandkishor Roy, reported in (2010) 8 SCC 442 and Dr. Monica Kumar & Anr vs State Of U. P. & Ors, reported in (2008) AIR SCW 4618.***

26. Learned counsel for the applicants further submits that the Hon'ble Apex Court in various other cases has held that cognizance of offence cannot be taken unless there is at least some material indicating the guilt of the accused. The details of the cases are as follows:-

a) ***R.P. Kapur Vs. State of Punjab, reported in (1960) 3 SCR 388***

b) ***Janta Dal Vs. H.S. Chowdhary, reported in (1992) 4 SCC 305***

c) ***Raghubir Saran (Dr) Vs. State of Bihar, reported in (1964) 2 SCR 336***

d) ***State of Karnataka Vs. M. Devendrappa, reported in JT 2002 (1) SC 213***

e) ***Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haque, reported in JT 2004 (9) SC 486***

27. He further submits that the powers under section 482 is a guarantee to injustice as held by the Apex Court, the relevant paragraph nos.11 and 12 of the judgment passed by the Hon'ble Apex Court in the case of **Manoj Mahavir Prasad Khaitan Vs. Ramgopal Poddar and another, reported in (2010) 10 SCC 676** is being reproduced hereunder:-

"11. It was pointed out that the criminal revision against the issuance of summons was withdrawn. We were, therefore, taken to the High Court's judgment, where the High Court has found itself to be powerless in view of the withdrawal of the criminal revision and had advised the parties to go back to the revisional Court and get it restored. We do not think that the High Court was justified in advising the appellant to go back to the Sessions Judge and to get the criminal revision revived without going into the question whether such revision could have been revived in law or not. We observe that the High Court was not powerless.

The High Court itself was exercising its jurisdiction under Section 482 Cr.P.C., where the High Court could pass any order in the interests of justice. This power was available only to the High Court in contradistinction to the Sessions Judge who was only entertaining the revision application of the appellant under Section 397 Cr.P.C. The High Court should have, therefore, applied its mind to the fact situation. It should have been realized that the complaint was wholly covered under the 7th circumstance in the case of State of Haryana and Ors. v. Bhajan Lal and Ors. (cited supra), which is as under:

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

It was also covered under 3rd circumstance in the case of State of Haryana and Ors. v. Bhajan Lal and Ors. (cited supra), which suggests:

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

12. We reiterate that when the criminal Court looks into the complaint, it has to do so with the open mind. True it is that that is not the stage for finding out the truth or otherwise in the allegations; but where the allegations themselves are so absurd that no reasonable man would accept the same, the High Court could not have thrown its arms in the air and expressed its inability to do anything in the matter. Section 482 Cr.P.C. is a guarantee against injustice. The High Court is invested with the tremendous powers thereunder to pass any order in the interest of justice. Therefore, this would have been a proper case for the High Court to look into the allegations with the openness and then to decide whether to pass any order in the interests of justice. In our opinion, this was a case where the High Court ought to have used its powers under Section 482 Cr.P.C."

28. Learned counsel for the applicants further submits that the present case is squarely covered under fifth and seventh guideline framed by the Hon'ble Supreme Court in **State of Haryana Vs. Bhajan Lal case, reported in 1992 Supp (1) SCC 335**, wherein it has been held that criminal case can be quashed to protect the accused from malicious prosecution. When a criminal proceeding is instituted with mala-fide intention to harass the person, the court can quash the entire proceedings to secure the ends of justice.

29. Lastly, learned counsel for the applicants, relying upon the judgment of the Hon'ble Apex Court in the case of ***State of West Bengal vs. Committee for Protection of Democratic Rights, West Bengal reported in (2010) 3 SCC 571,*** has prayed that the C.B.I. Inquiry be conducted in the present matter as well as several other matters in which the opposite party no.2 has lodged false and frivolous complaint on the basis of concocted story and has manipulated the medical report also.

30. Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicant is not only malicious but also amount to an abuse of the process of the court of law. On the cumulative

strength of the aforesaid submissions, it is submitted by learned counsel for the applicant that the proceedings of the above mentioned criminal case are liable to be quashed.

31. On the other hand, Mr. Amit Rai, learned counsel for the opposite party no.2 has opposed the submission made by the learned counsel for the applicants and submitted that the applicants have misled this Court with distorted facts and submissions which have no bearing with the present case. There is no junior senior relationship between the applicant and the complainant/opposite party no.2. **In the entire proceedings, no such material was produced by the applicants to establish the relation of senior and junior with opposite party no.2**. All the accused persons have their different versions for lodging this FIR in question. He has drawn attention of the Court to para 24 of the instant application, wherein reason for lodging FIR has been given as to applications nos. 1, 2 and 3 were pursuing their internship with opposite party no.2, but due to bad behaviour of opposite party no.2, they left him and joined applicant no.4, Jubair for their future internship, which prompted the opposite party no.2 to lodged the FIR in question. However, it is a matter of fact and record that applicant no.4 is not a lawyer and it is also strange to believe that why applicant no.3, who is a lawyer registered in 2013 with bar council of Uttarkhand as claimed by him, will join applicant no.4 as intern. This is the question as to whether a lawyer will join as an intern with law student? The submission made in para 24 is highly improbable.

32. He further submits that applicant no.3 has stated in his statement under Section 161 Cr.P.C. that he is having restaurant/house at the upper floor of the office of the opposite party no.2. Due to influence of money, the opposite party no.3, in order to purchase his restaurant/house has put pressure by lodging this FIR. The statement of applicant no.3 has been annexed at page 73 of the supplementary affidavit filed by the opposite party no.2. Contrary to the above statements, one accused Ehtesham Ansari, in his statement before the Investigating Officer has stated that he alongwith Praveen (applicant no.1), Virendra (applicant no.2) and Jubair (applicant no.4) was working in the office of opposite party no.2 as junior advocates. He has given the reason for lodging the present FIR as he opposed the opposite party no.2 from charging extra death claim amount from the widow of a victim. The statement of accused-Ehtesham Ansari has been annexed at page 74 of the supplementary affidavit filed by the opposite party no.2. He further submits that the co-accused-Ehtesham Ansari has challenged the impugned order dated 07.03.2022 before the concerned court below by filing revision petition U/s 397 Cr.P.C. In para 9 of the said revision petition, contrary to his statement before the Investigating Officer, he has submitted that since he had filed vakalatnama in some cases of opposite party no.2, caused for lodging the FIR in question.

33. Learned counsel for the opposite party no.2 further submits that in this matter complete and correct facts have been placed before this Court. The statements of the eye-witnesses, namely, Moola Singh, Rakesh Kumar, Manoj Kumar, Dalveer Singh, statement of opposite party no.2 and Dr. Promod Kumar, Prabhari Medical Officer, Primary Health Centre, Kotwali Dehat, Bijnor, who

examined the complainant on 08.11.2021 and prepared medical report, have been placed at page 81-89 of the supplementary affidavit filed by the opposite party no.2. There is a criminal history of applicant no.3 as FIR u/s 117, 323, 332, 341, 353, 427, 504 IPC has been lodged on 12.02.2016 at P.S. Dalanwala, District Dehradun and also the criminal history of Applicant no.4 as one FIR dated 18.06.2019 u/s 147, 323, 307, 498A IPC and 3/4 Dowry Prohibition Act was lodged against the applicant no.4 at P.S. Kotwali, District Dehradun being Case Crime No.219/2019. He further submits that the opposite party no.2 has also lodged one FIR no.52/2022, under Sections 379, 382, 506, 120B IPC against the applicants at P.S.-Nurpur, District-Bijnor on 06.02.2022. The applicants had challenged the said FIR before this Court by means of filing Cri. Misc. Writ Petition No.4324 of 2022, which was dismissed as withdrawn on 21.04.2022.

34. Learned counsel for the opposite party no.2 further submits that in the entire application, the applicants have failed to established that the impugned order dated 07.03.2022 suffers from any illegality, incorrectness or perversity. He further submits that the concerned Magistrate has applied judicial mind before summoning the accused persons. The applicants have not challenged the order of concerned Magistrate dated 29.11.2021, directing for lodging of the FIR against them. It is the summoning order which is under challenge before this Court under Section 482 Cr.P.C.. This Court has to see whether the summoning order is justified as per law. Whether the trial court has exercised his jurisdiction appropriately before passing the summoning order. Whether the prima facie case is made out. Whether the material placed on record before the concerned Magistrate was sufficient to pass order of summoning the accused persons. Whether the concerned court below should have discarded the medical evidence as well as statements of the eye-witnesses. Whether the impugned order has been passed within the legal parameters. In support of his submissions, learned counsel for the opposite party no.2 has relied upon the judgment of the Apex Court in the case of ***HareramSatpathy vs. Tikaram Agarwala & Ors. reported in (1978) 4 SCC 58 and Nupur Talwar vs. Central Bureau of Investigation, Delhi and Another reported in (2012) 2 SCC 188.*** Relying upon the aforesaid judgments, the counsel for the opposite party no.2 submits that this Court may not interfere with an order of taking cognizance and summoning the accused persons unless it is shown by the applicants that the order impugned is perverse or based on no material.

35. Learned counsel for the opposite party no.2 further submits that the applicants have failed to establish their case for invoking jurisdiction of this Court U/s 482 Cr.P.C. This case does not fall under the category for which extra-ordinary jurisdiction should be invoked by this Court. The trial cannot be stalled by merely raising some suspicion and doubt in the allegations. The applicants are dreaded criminals having several criminal records and are running away from facing the trial. They have deliberately violated the order of the trial court in the garb of pendency of this instant application. Before the Hon'ble Apex Court, order dated 08.07.2022. passed by this Court was assailed, whereby a blanket protection was granted to the accused persons without any reasons. The Hon'ble Apex Court has taken cognizance in the matter qua the interim protection and stalling of trial. The matter is listed before

the Supreme Court on 12.09.2022. Before the Supreme Court, the applicants as well as the State have failed to justify the order dated 8.07.2022 in their respective affidavits.

36. Learned counsel for the opposite party no.2 further submits that the matter is required to be tried by the court having competent jurisdiction in full-fledged manner. Prima Facie, cognizable offence is made out and, therefore, interference of this Court in the present case under Section 482 Cr.P.C. is not warranted. He has relied upon the following judgments of the Apex Court:-

a) ***(2006) 7 SCC 188, Central Bureau of Investigation vs. Ravi Shankar Srivastava, IAS & Another (para 7,8 and 9)***

b) ***(2005) 1 SCC 568, State of Orissa vs. Debendra Nath Padi (para 18, 20 & 23)***

c) ***(2022) SCC Online Sc 484, Ramveer Upadhyay & Another vs. State of U.P. and another (para 30, 31, 38 & 39)***

d) ***(2022) SCC Online SC 513, Rathish Babu Unnikrishnan vs. State (Govt. of Nct of Delhi) & another (para 14&15)***

37. Thus, learned counsel for the opposite party no.2 submits that different versions have been made by the accused persons qua the lodging of the FIR in question in the initial stage. Alternate remedy lies with the applicants to file revision petition against the impugned order. Further in the entire application, no infirmity in the summoning order has been pointed out by the applicants, which shows that summoning order under challenge passed by the concerned Magistrate is within the legal parameters. The matter pertains to intricate questions of facts where detailed enquiry and full-fledged trial is required to reach its logical conclusion. He further submits that in the garb of the instant application, the trial has been scuttled which is not the objective of Section 482 Cr.P.C.

38. On the cumulative strength of the aforesaid submissions, learned counsel for the opposite party no.2 states that this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and hence the present application is liable to be rejected.

39. Per contra, Mr. Amit Singh Chauhan, learned A.G.A. for the State has opposed the prayer made by the learned counsel for the applicants by contending that there is no illegality or infirmity in the impugned summoning order dated 07.03.2022 by which the applicants have been summoned by the learned Magistrate. The applicants can agitate their grievance at appropriate stage before the concerned court below. Therefore, the impugned order passed by the learned Magistrate cannot be quashed at this stage.

40. Learned A.G.A. submits that perusal of F.I.R. as well as statements of the witnesses, goes to show that, prima facie case for the alleged offence is made out against the applicants. Lastly, the learned A.G.A. states that this High Court may not quash the entire criminal proceedings under Section 482 Cr.P.C. at the pre-trial stage, for which he has relied upon the judgment of the Apex Court in the case of **Mohd. Allauddin Khan Vs. The State of Bihar & Others** reported in ***2019 0 Supreme (SC) 454***, wherein the Apex Court has held that the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 Cr.P.C.

because whether there are contradictions or/and inconsistencies in the statements of the witnesses is an essential issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. However, in the present case the said stage is yet to come.

41. Learned A.G.A. has further relied upon the judgment of the Apex Court in the case of **Rajeev Kaurav Vs. Balasahab & Others** reported in ***2020 0 Supreme (SC) 143***, wherein the Apex Court has held that it is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence(s) alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any law or Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

42. On the cumulative strength of the aforesaid submissions, learned A.G.A. states that this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and hence the present application is liable to be rejected.

43. I have given thoughtful consideration to the submissions made by the learned counsel for the parties and gone through the records of the present application.

44. From perusal of the records, this Court finds that the present dispute had arisen out of an FIR lodged by opposite party no.2 namely, Pramod Kumar Baliyan, as Case Crime No.419 of 2021, under Sections 326, 307, 323, 324, 504, 506 and 120-B IPC, Police Station- Haldaur, District-Bijnor on 02.12.2021 for the incident allegedly occurred at 08.11.2021. The aforesaid case was lodged at the instance of opposite party no.2 through an application filed by him u/s 156(3) Cr.P.C. on dated 22.11.2021.

45. The prosecution as forwarded by the first informant is that on 08.11.2021, the accused/applicant, namely, Praveen Singh, Virendra Singh, Arun Khanna, Zubair and Ethesam Ansari armed with country made pistols and other weapons assaulted the opposite party no.2, whereby he sustained grievous injuries resulting in fracture of his nose bone. The opposite party no.2 is said to have been medically examined at Primary Health Centre, Kotwali Dehat, District- Bijnore at 6:35 A.M. on 08.11.2021. As per FIR the incident was witnessed by the persons, namely, Moola Singh, Rakesh Kumar, Manoj Kumar and Dalvir Singh. The case was investigated and after investigation, recording statement of witnesses of FIR and independent witnesses, the Investigating Officer submitted the Final Report with the remark that dispute pertains to professional rivalry as such opposite party no.2 (first informant) has lodged false case merely on the pretext of taking vengeance. The aforesaid Final Report dated 29.12.2021 was challenged by way of protest petition by opposite party

no.2 which ultimately got allowed by order dated 07.03.2022 passed by learned ACJM-I Bijnor, hence the applicants have been summoned by the learned Magistrate.

46. As for the applicants, they are invoking the interference of this Court on the following grounds:-

a) Firstly, as per the applicants, no such incident has taken place, and the entire prosecution case as forwarded by the opposite party no.2 is based on false and fabricated story.

b) That all witnesses are interested witness and managed for the purpose deliberately to harass the applicants.

c) That the presence of opposite party no. 2 is questioned as on the date of alleged occurrence, he was present before the learned Additional District Judge, Court No. 3, Dehradun in Misc. Case No. 598 of 2021, which is being supported by order dated 08.11.2022 of that court.

d) That in several other cases, after the date of said incident, the opposite party no. 2 has appeared on almost nearby dates in District Dehradun, which depict that no such injury was sustained by him which could have unable the opposite party no.2 to follow ordinary pursuits as defined in Section 321 IPC.

e) Lastly, multiple cases have been filed in the similar fashion against the accused applicants by opposite party no.2 only for his personal grudge and malicious intention. Learned counsel for the applicants has relied upon the several judgments of the Hon'ble Apex Court in the following cases:-

1. Harshendra Kumar D. Vs. Rebatilatakoley and Others reported in (2011) 3 SCC 351;

2. Chandran Ratnaswami Vs K.C. Palaniswamy, reported in (2013) 6 SCC 740;

3. State of Karnataka Vs L. Muniswamy and Others reported in (1977) 2 SCC 699;

4. State of Haryana and Others Vs. Bhajan Lal and Others reported in 1992 Supp. (1) SCC 335;

5. Dr. Monica Kumar and Another Vs State of UP and Others reported in (2003 AIR SCW 4618);

f) From the aforesaid submissions made by learned counsel for the applicants, it is pressed that the Court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution.

47. However, in contrast the opposite party no.2 had pleaded to reject the application of the applicants on following grounds:-

a) That *Prima facie*, cognizable offence is made out and, therefore, the matter is required to be tried by the Court having competent jurisdiction

b) That applicants have failed to establish that there is any incorrectness, perversity or illegality in the impugned order.

c) That witness of FIR had supported the prosecution case and the Investigating Officer has wrongly placed Final report in the case before concerned court.

d) The applicants are dreaded criminals and are running away from facing the trial.

e) In support of his contentions, learned counsel for the opposite party no. 2 has relied upon the following judgments:-

1. (2006)7 SCC 188; CBI Vs. Ravi Shankar Srivastava,/ Act Anr.

2. (2005) L SCC 568; State of Orissa Vs. Debendranath Padhi

3. 2022 SCC online SC 484; Ramveer Upadhyay and Another Vs. State of UP and another.

4. 2022 SCC online SC 513; Rathish Babu Unnikrishna Vs State (Gov. Of NCT) and Another.

f) By way of the aforesaid submissions, learned counsel for the opposite party no.2 has requested that the matter pertains to intricate question of facts where detailed enquiry and full fledged trial is required and no short cut can be adopted to decide the matter.

48. Before discussing the power of Hon'ble Court u/s 482 Cr.P.C., it would be appropriate to analyze the facts admitted by both the parties, which are as follows:-

a) There was a professional relationship between the parties concern as it has also been set up in the FIR.

b) The presence of opposite party no.2 has been shown in the Court at Dehradun on 08.11.2021 by order of competent Court until it was sought for correction after filing of this present application, till date not corrected.

c) There is medical examination of the injured opposite party no.2 conducted on 08.11.2021 at PHC, Bijnor for which certainly the applicants have raised doubt and claimed to be procured document.

d) The relationship between both the parties was strained due to monetary and professional cases.

e) Various criminal cases have been filed by/between the parties. There is further dispute with regard to engagement with clients.

f) The opposite party no.2 is a senior legal practitioner having settled practice and applicants are young legal aspirants.

g) Lastly, during pendency of the present application before this Hon'ble Court there was likelihood of matter being settled amicably, but stand of opposite party changed due to reasons best known to him.

49. The scope and ambit of Section 482 Cr.P.C. is a very agitated and debatable issue. Nevertheless, there are some cases which have got vide acceptance in the legal fraternity and hence, are used as the minor guidelines/principles governing the cases of quashing criminal proceedings.

50. The Hon'ble Apex Court in the case of ***Prashant Bharti Vs. State of NCT of Delhi reported in (2013) 9 SCC 293*** has held that, in order to determine the veracity of prayer for quashing the criminal proceedings raised by an accused u/s 482 Cr.P.C., the following questions are to be raised before the High Court, if the answer to all the following questions was in affirmative, then the High Court should quash the proceedings by exercising its power u/s 482 Cr.P.C.

"1. Whether the material relied upon by the accused is sound, reasonable and indubitable, i.e. material is of sterling and in impeccable quality?

2. Whether the material relied upon by the accused is sufficient to reject and over rule the factual assertions contained in the complaint, i.e. material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusation as false?

3. Whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or that the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

4. Whether proceeding with the trial would result in an absuse, of process of the Court and hence, would not serve the end of Justice?"

51. The Apex Court in the case of ***Parbatbhai Ahir Vs. State of Gujarat reported in (2017) 9 SCC 641, referring to various caases has summarized following principles to govern powers of High Court under Section 482 Cr.P.C.:-***

"15 The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

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

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

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction underSection 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

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

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

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

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

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

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of aconviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and (x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-

being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

52. The power of this Court under Section 482 Cr.P.C. has been amiably elaborated in following two cases, which are considered to be authorities on the subject of quashing of criminal proceedings. Despite all the contradicting judgments of the Apex Court the following cases provides most accepted views:-

I. In the case of ***State of Haryana Vs. Bhajan Lal reported in 1992 AIR 604***, the Apex Court in paragraph 102 has enumerated 7 categories of the cases where power under Section 482 Cr.P.C. can be exercised by this Court, which are quoted below:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers underSection 156(1)of the Codeexcept under an order of a Magistrate within the purview ofSection 155(2)of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated underSection 155(2)of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a

specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

II. In the case of ***R.P. Kapur Vs State of Punjab reported in 1960 AIR 862,*** the Apex Court discussing the power of this Court under Section 482 Cr.P.C. observed in paragraph 6 as follows:-

"6. Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under Section 561-A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisionsof the Code. In the present case the magistrate before whom the police report has been filed underSection 173of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the .proceedings is not at the present stage covered by any specific provisionof the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisionsof the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends ofjustice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the a11egations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no ques- tion of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can

be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction underSection 561-Athe High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. xxxxxxxx"

(Emphasis supplied)

53. Thus, the Hon'ble Apex Court has discussed 3 clauses of cases in which criminal proceeding can be quashed. They are as follows:-

"(a) where there is a legal bar against institution or continuance of criminal proceedings;

(b) where the allegation in FIR do not discloses or constitute an offence, even if taken at face value and not their entirely.

(c) where the allegation made constitute an offence but there is no evidence which can prove them."

54. Limitation of power under Section 482 Cr.P.C. has been discussed by the Hon'ble Apex Court and held in the case of ***Dr. Monika Kumar Anr. Vs State of U.P.*** as well as many other judgements of the Apex Court, that Section 482 Cr.P.C. powers are to be ex-debito justitiae (as a matter of right) in a manner to ensure real and substantial justice, and the administration of justice is why Court exists.

55. In recent relevant judgement of the Apex Court in the case of ***Anand Kumar Mohatta Vs. State (Govt. of NCT of Delhi, reported in (AIR) 2019 SC 210: 2018 SCC Online SC2447***, it was observed;

"18-It is a settled principle of law that the High Court can exercise jurisdiction u/s 482 Cr.P.C. even when discharge application is pending with the trial Court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegation are materialized in a charge sheet. On the contrary, it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of the power of any Court."

56. This Court time and again has examined the scope of jurisdiction of the High Court under Section 482 Cr.P.C. and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 Cr.P.C. A three-Judges Bench of this Court in *State of Karnataka v. L. Muniswamy (1977) 2 SCC 699* held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process

of the Court or that the ends of justice require that the proceeding ought to be quashed. In para 7 of the judgment, the following has been stated :

"7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

57. Further it has been held in various judgements that in proceeding u/s 482, the High Court will not enter into any finding of facts, particularly when the matter has been concluded by the concurrent finding of facts.

58. However, in the judgment of Apex Court in the case of ***Indian Oil Corporation Vs. NEPC India Ltd. And Ors. reported in (2006) 6 SCC 736***, the Apex Court observes the following principles:-

"1. The High Courts, should not exercise the inherent powers to repress a legitimate prosecution. The power to quash criminal complaints should be used sparingly and with abundant caution.

2. The criminal complaint is not required to verbatim reproduce of legal ingredients of the alleged offence. If the necessary factual foundation is laid in the criminal complaint, merely on the ground that a few ingredients have not been stated in detail, the criminal proceeding should not be quashed. Quashing of complaint is warranted only where complaint to bereft of even the basic facts which are absolutely necessary for making out the alleged offence.

3. It was held that a given set of facts may make out (a) purely a Civil wrong, or (b) purely or criminal offence or (c) a civil wrong as also a criminal offence. A commercial .....or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence."

59. As such, the High Court u/s 482 Cr.P.C. has very wide scope and is an essential part of the functioning in order to meet the end of justice, it must be noted that the power so assigned is so vast and can easily be misinterpreted. So, it becomes important for the Courts to use it wisely and according to the guidelines laid down by Hon'ble Apex Court.

60. Section 482 of Cr.P.C. has made its space in Cr.P.C. in order to not only enable the High Court to provide proper justice but also to curb the filing of fictitious complaints.

61. In the present case as forwarded by/from both the side, the Hon'ble Court may surely take judicial notice that contain facts as provided u/s 57 of the evidence act and set the law in motion by delivering substantial justice and balance be struck between the statutory obligations of investigation and rights of affected parties.

62. Further, even the framers of legislation while enacting section 482 Cr.P.C. had started with a non-obsante clause and completed the section with "or otherwise to secure the ends of justice" which lays obligation upon the power of High Court to prevent the Society from Criminals and law-breakers and should be exercised to stop the public from filing fictitious complaints just to fulfill their personal grudges.

63. In the present case, a balance has to be struck while considering the rival submissions made by the parties in order to arrive at a judicious conclusion. The land mark judgments have been cited by both the parties considering which this Court has to arrive at a conclusion considering the guidelines and principles setup by the Hon'ble Apex Court in various cases.

64. It has been emphasized by counsel for the opposite party that there is no senior, junior relationship between the parties and as the applicants have taken different stands while taking their defence, the aforesaid has established. This Court finds that from perusal of the FIR itself, wherein the opposite party no.2 has accepted that few applicants engaged him in cases on commission basis and other accused persons in one or other way assisted them, it can be understood that the applicants, who are pursuing internship or are advocates, being assisted by other persons, were connected with the opposite party no.2, (who happens to be senior lawyer by way of legal profession). Thus, the monetary relationship between the applicants and opposite party no.2 is established from perusal of the FIR itself. The dispute between the two cooked up when during period of lock-down due to pandemic of Covid-19, the professional activities were affected and the relationship between the two got strained as the applicants changed their stand and engaged some other person on commission basis which annoyed the opposite party no.2 and he cooked up the story by means of lodging the present case against the applicants showing the date of incident as 08.11.2021 at District-Bijnor, whereas on the same day, as per the proceedings of the District Court of Dehradun, the opposite party no.2 was present at Dehradun. Thus, from any of the stand taken by the applicants, there is monetary interest, which has given rise to the strained relationship, which fumed up due to unexpected lockdown and the opposite party no.2 being dissatisfied by the conduct of the applicants of handing over the cases on commission basis to some other counsels and handling of earlier pending cases, this affecting opposite party no.2 by causing monetary loss or gain, which gave way to lodging of the present FIR to wreak vengeance.

65. Learned counsel for the opposite party no.2 has tried to support his case with the medical document and the eye-witnesses mentioning about the criminal history of the applicants, this Court finds that during investigation, the Investigating Officer has collected the CDR of opposite party no.2 and the applicants to find the exact location from which he concluded that the presence of applicants and opposite party no.2 was not found at the place of

occurrence on that date and time, which has been further supported by the independent witnesses of nearby locality. Moreover, the presence of opposite party no.2 is uncontroverted at District-Dehradun as on the date of incident, i.e. 08.11.2021, as he was present at court proceedings and his statement was recorded by the concerned court.

66. Further more, it is the time, date and month of the incident, which makes it highly doubtful, as the same witness and medical aid have been managed and used against the applicants by the opposite party no.2 and one of his junior Hariom. The records of the District Court Dehradun also does not support the medical report according to which the opposite party no.2 received injuries which resulted in nose-bone fracture, however, he is shown to be present nearly everyday being engaged and also arguing cases at District Court Dehradun, which is highly improbable and contrary to the principles set and expected in conduct of normal human behavior.

67. Keeping in mind all these circumstances, it can be said that the witnesses have been managed and the medical documents have been procured by the opposite party no.2.

68. In relation to the averments with regard to criminal history of the applicants, several cases have been lodged by the opposite party no.2 and with regard to applicant no.3 and 4 explanation has already been provided by the applicants in rejoinder affidavit.

69. Final contentions as forwarded by opposite party no.2 is that the material placed on record before the concerned magistrate was sufficient to pass order of summoning the accused and that court concerned cannot discard the medical evidence as well as statement of eye witnesses and the trial cannot be stalled by merely raising some suspicion and doubt in allegation against the applicants.

70. In this regard, it is noted that present application is moved by the applicant invoking power under Section 482 Cr.P.C. of the High Court, challenging summoning order dated 07.03.2022 as well as the entire proceedings of the criminal case. To be precise, the power of the court concerned while deciding the protest petition and power of the High Court U/s 482 CrPC are two different thing. The court below was bound within the four tight corner's of Section 190 Cr.P.C. and 204 Cr.P.C. and had to be content with what is on record and cannot come to the conclusion about reliability of evidence at the initial stage, however in exercise of power u/s 482 Cr.P.C., this Court has different scope than what magistrate could have applied in the given situation.

71. The Hon'ble Apex Court in Bhajan Lal case (supra), after considering several judgments, distilled the principles governing the exercise of extra ordinary power of the court under Article 226 of the Constitution of India or it inherent power u/s 482 Cr.P.C. Several categories of cases by way of illustrations were also listed out, the same has been earlier discussed for ready reference. But, at the same time, the Apex Court also recorded a note of caution.

72. From the entire discussion, what is subtly clear is that FIR and charge sheet can be quashed if allegation or evidence do not establish the commission of an offence. Upon analysis, the Court noted that the facts of each case would determine the

exercise of the discretion vested in the Court to quash criminal proceedings in order to prevent abuse of process of Court.

73. In the recent judgment delivered by the Single Bench of High Court of Delhi in the case of Mr. Abhishek Gupta and another vs. State of NCT of Delhi and another passed in CRL MC 1064/2022 and CRLMA 4586/2022 decided on 16.03.2022, even while denying to interfere, not finding the case to be suitable one to exercise power u/s 482 Cr.P.C., observed, inherent powers would be predicated on the facts of each case and no court would have any qualm in quashing of FIR and charge-sheet, if commission of offence is not established.

74. Now, coming to the contention of the applicants, they have supported their cases, firstly, that no such incident has happened and entire prosecution case has been build up on fabricated and procured story. To support it, they have demonstrated by way of Court order passed at District Dehradun that on the said date and time of incident, the opposite party no.2 was at District Dehradun, wherein his statement was also recorded and not at the location of alleged occurrence. Their contention finds support of 15 independent witnesses of the locality, whose statement has been recorded by the Investigating Officer during investigation and CDR which is also made part of case diary and particularly when just after the alleged incident the opposite party no.2 was engaged in ordinary daily business which is also confirmed from the record as submitted. The Court can certainly take into account the aforementioned facts/documents while exercising power u/s 482 Cr.P.C. as has been discussed earlier and as held in the case of ***Harshendra Kumar D. vs. Rabatilata Koley and Others, (2011) 3 SCC 351.***

75. Inherent powers of High Court under Section 482 Cr.P.C. are meant to act *ex debito justitiate* to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the Court. These inherent powers can be exercised in the following category of cased:(i) to give effect to an order under the Code; (ii) to abuse of the process of the court; and (iii) to otherwise secure the ends of justice.

76. Now applying the ratio laid down in the above referred several judgments, only in the circumstances that the registration of the case itself is an abuse of process of law, inherent powers can be exercised to prevent abuse of process of law. This Court finds that this case stands to the category when the registration of case itself is an abuse of process of law.

77. This Court while invoking inherent powers under Section 482 Cr.P.C. can always interfere in considering the present facts of the case where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

78. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is

designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the, ends of mere law though justice has got to be administered according to laws made by the, legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.

79. It is a settled canon of law that this Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilizing the institution of justice for unjust means. Thus, it would be only proper for this Court to deny any relief to a litigant who attempts to pollute the stream of justice by coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court time and public money to achieve his ends.

80. It is well settled that inherent powers under Section 482 Cr.P.C. have to be exercised to secure the ends of justice, to prevent abuse of process of any Court and to make such orders as may be necessary to give effect to any order under the Cr.P.C. depending upon the facts of given case. In the instant case, it appears that there is miscarriage of justice, thus relying upon the Judgement of Hon'ble Apex Court in the matter of ***State of West Bengal and others (supra)*** as well as in the interest of justice and to protect the interest of applicants, who are victimised of false accusations due to personal grudge of opposite party no.2, who has managed the FIR and other documents at Bijnor while he was present at Dehradun and as the opposite party no.2 has filed several cases, not only against the applicants, but other persons also, normally this Court would have directed to investigate the matter by the C.B.I., but seeing the conduct of the opposite party no.2, the matter is being decided finally.

81. In the facts of the present case, where it has been established that the opposite party no.2 has not approached the Court with clean hands, noticing his conduct before this Court of initially agreeing to amicably settle the disputes, later changing his stand, exerting pressure upon the Court to decide the matter finally and also approaching the Hon'ble Apex Court without waiting for final decision in the matter and where circumstances go to show that FIR has been lodged for settling monetary dispute, this Court finds it to be a fit case for exercising power under Section 482 Cr.P.C. Keeping in mind that criminal prosecution is a serious matter; it affects the liberty of a person, no greater damage can be done to the reputation of a person than dragging him in a criminal case, continuance of prosecution would be nothing but an abuse of the process of law and will be a mental trauma to the applicants, it becomes necessary for this Court to invoke inherent powers under Section 482 Cr.P.C. in present facts and circumstances of his case.

82. Therefore, in view of above discussion, this Court finds a good ground

for quashing the impugned summoning order as well as entire proceedings of the aforesaid case.

83. Accordingly, the summoning order dated 07.03.2022 passed by Additional Chief Judicial Magistrate, Court No.1, District-Bijnor as well as the entire proceedings of F.R. Case No.63/2021 (Misc. Case No.87/2022) (Pramod Kumar Baliyan vs. Praveen Singh and others), arising out of Case Crime No.419/2021, under Sections 326, 307, 323, 324, 504, 506, 120B IPC, Police Station-Haldaur, District-Bijnor are hereby **quashed.**

84. The present application under Section 482 Cr.P.C. is, accordingly, **allowed**. There shall be no order as to costs.

85. A copy of this order be certified to the lower court forthwith.

(2022) 12 ILRA 582
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Appl. U/s 482 No. 27731 of 2022

Bhagat Singh ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Rakesh Kumar Srivastava

Counsel for the Opp. Party:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 323, 308, 452, 506-Quashing of-accused granted anticipatory bail by HC-trial court insisted for a regular bail-accused filed an application to treat the anticipatory bail granted by HC as a regular bail but the same was rejected by trial court stating that the anticipatory bail was granted till the submission of charge sheet-the categorical conditions provided while granting anticipatory bail, it was explicitly clear that the anticipatory bail granted by HC shall extend till conclusion of the trial-Thus, the order passed by the trial court is perverse and contrary to law-It is settled law passed by Apex Court that the anticipatory bail order can continue till the end of the trial unless there are some special or peculiar features necessitating the court to limit the tenure of anticipatory bail.(Para 1 to 10)

The application is disposed of. (E-6)

List of Cases cited:

Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & ors. (2020) 5 SCC 1

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard learned counsel for petitioner as well as learned Additional Government Advocate for State Mr. M.P.S. Gaur.

2. The present 482 Cr.P.C. application has been filed to quash the impugned order dated 13.7.2022, passed by Civil Judge (Junior Division)/F.T.C.-I, Gautam Budh Nagar in case No.100 of 2020, arising out of case crime No.18/2020 under sections 323, 308, 452, 506 I.P.C., PS. Ecotech-Ist, district Gautam Budh Nagar (State vs. Bhagat Singh).

3. Learned counsel for applicant submits that the applicant is an accused in case crime No.18/2020 under sections 323,

308, 452, 506 I.P.C., PS. Ecotech-Ist, district Gautam Budh Nagar. He filed an anticipatory bail application No.2289 of 2020 before this Court, in which a Coordinate Bench of this court has, vide order dated 17.3.2020, directed release of the applicant on anticipatory bail, in the event of arrest, with certain conditions.

4. It is submitted that although the applicant was released on anticipatory bail by this Court, the trial court is insisting for a regular bail and therefore, he filed an application before the trial court to treat the anticipatory bail granted by this Court as a regular bail. However, the trial court vide order under challenge has rejected the prayer of the applicant and held that the anticipatory bail was granted till submission of charge sheet. It is submitted that the order of the trial court is perverse and contrary to the order passed by this Court.

5. Learned A.G.A. has opposed the petition.

6. For ready reference, order dated 17.3.2020 (supra) is extracted below :

" Vakalatnama filed by Sri Pandey Balkrishna, Advocate on behalf of opposite party no.2 is taken on record.

Heard Sri Vinay Prakash Shukla and Sri Durga Prasad Tiwari, learned counsels for the applicant, Sri Pandey Balkrishna, learned counsel for opposite party no.2 as well as learned A.G.A. appearing for the State and perused the averments made in the first information report and rejection order.

It has been contended by learned counsel for the applicant that the applicant has been falsely implicated in this case by the first informant on account of personal grudge and enmity. In Para 15 of the affidavit, it is stated that the wife of applicant's younger brother had an affair with the brother of first informant and had solemnized second marriage with him. Thereafter, she was claiming her share in the property of her husband which is the bone of contention between the parties. Learned counsel for the applicant states that according to F.I.R. four persons are stated to have assaulted the injured by lathi and danda, however, the injured sustained three local injuries on the face which was subjected to X-ray. Prima facie, offence under Section 308 I.P.C. is not made out against the applicant. The applicant is ready to cooperate with the investigation. The matter needs deeper and fairer investigation before any arrest should be given effect to. Therefore, the applicant, having no criminal antecedents to his credit, may be enlarged on anticipatory bail.

Per contra, learned A.G.A. as well as learned counsel for the informant have vehemently opposed the prayer for bail and submitted that the applicant and other accused had badly assaulted an aged man of 80 years old who had sustained some fracture on his face, however, could not place any supplementary report or document to show that there was any likelihood of the death of the injured. He has also not disputed the averments made in Para 15 of the affidavit. Learned A.G.A. has also borrowed the arguments made by learned counsel for the informant.

Be that as it may, without expressing any opinion on the merits of the case, considering the nature of accusation and the fact that he has no criminal antecedents, the applicant is entitled to be released on anticipatory bail in this case.

In the event of arrest of the applicant-Bhagat Singh involved in Case Crime No. 0018 of 2020, under Sections 323, 452,

308, 506 I.P.C., Police Station- Eco Tech-1st, District- Gautam Budh Nagar, he shall be released on anticipatory bail on his furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the Station House Officer of the police station concerned with the following conditions:-

1) that the applicant shall make himself available for interrogation by a police officer as and when required;

2) that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

3) that the applicant shall not leave India without the previous permission of the court;

4) that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

5) that the investigating officer is directed to conclude the investigation in the present case in accordance with law expeditiously, preferably, within a period of four months from the date of production of a certified copy of this order independently without being prejudiced by any observation made by this court while considering or deciding the present bail application of the applicant;

6) that the applicant is directed to produce certified copy of this order before the SSP/SP concerned forthwith, who shall ensure the compliance of the present order;

7) that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

8) that the applicantshall not pressurize/ intimidate te prosecution witness

9) that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

10) that in case of breach of any of the above conditions the court below shall have the liberty to cancel the bail;

It is made clear that if the charge-sheet is submitted and cognizance is taken and matter is committed to the Court of Sessions, as the case may be, the trial court shall decide the trial preferably within a period of one year from the cognizance/committal of the case to the Court of Sessions.

In view of aforesaid, the present Criminal Misc. Anticipatory Bail Application is, accordingly, allowed."

7. A perusal of condition No.2 of the bail order depicts that a condition has been imposed on the applicant that he shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence. Further, as per condition No.8, the applicant has been directed not to pressurise/ intimidate the prosecution witness. Vide condition No.9, the applicant has been directed to appear before the trial court on each date fixed unless personal presence is exempted. Lastly, the trial court has been given liberty to cancel bail in case of breach of any of nine conditions mentioned in the bail order.

8. In view of the categorical conditions provided while granting anticipatory bail to the applicant, it is explicitly clear that the anticipatory bail granted by this Curt vide aforesaid order

extends till conclusion of the trial. Therefore, the impugned order rejecting the application of the accused vide order under challenge without even giving any reason is perverse and liable to be set aside.

9. Even otherwise, law in this regard is settled. Supreme Court in Sushila Aggarwal and others vs. State (NCT of Delhi) and others (2020)5 SCC 1 has held that the anticipatory bail order can continue till the end of the trial, unless there are some special or peculiar features necessitating the court to limit the tenure of anticipatory bail. Relevant para 91.2 is extracted below :

"91.2 : As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so."

10. In view of the above, the impugned order dated 13.7.2022 (supra) is set aside. The matter is remanded back to the court below to pass a fresh order in the light of the observation made above and the law settled by the Supreme Court in the case of Sushila Aggarwal's case (supra).

11. The petition is disposed of.

(2022) 12 ILRA 585
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.11.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Revision No. 921 of 2022

Shyam Sunder Prasad ...Revisionist
Versus
C.B.I., Lko. ...Opp. Party

Counsel for the Revisionist:
Dhananjay Singh

Counsel for the Opp. Party
Shiv P. Shukla

A. Criminal Law -Code of Criminal Procedure, 1973-Section 397/401 , 311 - Prevention of Corruption Act, 1988 - Sections 7, 13(2) r/w 13(1)(d)-Challenge to-summoning order u/s 311-revisionist (Branch Manager) asked for bribe for de-freezing complainant's account-a trap was laid by CBI team and the revisionist was caught red handed with tainted bribe cheque -CFSL report was prepared by one Senior Scientific Officer-CBI filed application u/s 311 Cr.P.C. to allow substitute Senior Scientific Officer as prosecution witness in place of earlier officer as she is residing abroad-revisionist filed objection that substitute voice examiner could not be examined-trial court rejected the objection and allowed the application-Section 293(3) Cr.P.C. provides that if such an expert is unable to attend personally, any other responsible officer working with him may be deputed to attend the court-When the opinion of expert u/s 45A of Indian Evidence Act is admitted by trial, it becomes the opinion of the Court-Hence, impugned order requires no interference. (Para 1 to 26)

B. When the Court has to form and opinion upon a point of foreign law or of science or art or fingerprints, handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art are relevant facts. Such persons are called experts(section 45 of Evidence Act)

C. When in any proceeding, the court has to form an opinion on any matter relating

to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 is a relevant fact.(Section 45A of Evidence Act)

The revision is dismissed. (E-6)

List of Cases cited:

1. Official Liquidator Vs Dharti Dhan (P) Ltd (1977) 2 SCC 166

2. Dinesh Chand Pandey Vs HC of M.P. & anr. (2010) 11 SCC 500

3. Dalchand Vs Municipal Corp. Bhopal (1984) 2 SCC 486

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

1. The present criminal revision under Section 397 read with Section 401 Cr.P.C. has been filed against the order dated 20.08.2022 passed by the Special Judge, C.B.I. Court No.6, Lucknow in Criminal Case No.04 of 2014, Union of India through CBI Vs. Shyam Sunder Prasad, arising out of RC No.0062014(A)0015, under Sections 7 and 13(2) read with 13(1)(d) Prevention of Corruption Act, Police Station CBI/ACB, Lucknow, whereby the learned trial court has allowed the Application No.B-28 filed by the Central Bureau of Investigation (for short "CBI') under Section 311 Cr.P.C. for summoning Sri Mahesh Kumar Jain to give evidence in respect of the electronic evidence as Smt. Manisha Kulshreshta, who prepared paper Nos.B-22/1 to B-22/4, is not living in India now and directed for calling Sri Mahesh Kumar Jain as a witness to prove the said documents.

2. The facts, in brief, are that a written complaint was received by the CBI, Lucknow from Sri Kaleem Ahmad on 23.4.2014 regarding demand of illegal gratification by the revisionist. Sri Kaleem Ahmad had taken a Cash Credit Loan of Rs.80,00,000/- from Punjab National Bank, Dhangata, Sant Kabir Nagar. Some cheques of this account got dishonored. The complainant approached the revisionist, who was posted as Branch Manager, and inquired about dishonoring of his cheques despite availability of Cash Credit Loan amount in his account. The revisionist told the complainant that his account was frozen and it would not be de-freezed until he gave him Rs.80,000/- as bribe. The complainant requested the revisionist to reduce the bribe amount and the revisionist agreed to accept a bribe of Rs.50,000/- by cheque from the complainant for de-freezing his account.

3. The CBI after verifying the complaint, registered an FIR against the revisionist under Section 7 of Prevention of Corruption Act on 26.4.2014. A trap was laid on 26.4.2014 by the team of the CBI. The team was accompanied by the complainant along with two independent witnesses. The revisionist was caught red handed with tainted bribe cheque for an amount of Rs.50,000/- received from the complainant for de-freezing his Cash Credit Loan account.

4. The CBI sent the CDs containing conversation recorded between the complainant and the revisionist and their specimen voice collected during pre and post trap proceedings of the case for examination by the Director, Central Forensic Science Laboratory (CBI), New Delhi (for short "CSFL') on 5.5.2014. The CFSL prepared the report dated 13.6.2014, which was brought on record by the CBI before the trial court. The said report was prepared by Smt. Manisha Kulshreshtha,

Senior Scientific Officer, GR.II (Phy)-cum-Chemical Examiner, CFSL. The result of the examination would reveal that the questioned voices and the specimen voice of the revisionist were similar. The said report stated *"hence, the voices marked exhibits "Q-1(P)', & "Q-2(P)' are the probable voice of the persons (Shri Shyam Sundar Prasad) whose specimen voice is marked exhibit "S-1(P)'."*

5. An application on behalf of the CBI under Section 311 Cr.P.C. was filed on 2.6.2022 before the trial court with request to allow Sri Mahesh Kumar Jain, Senior Scientific Officer Grade-II (Phy), CFSL as prosecution witness in place of Smt. Manisha Kulshreshta, who had prepared the CFSL report, as she is residing abroad and immediate examination of her is not possible. The revisionist filed an objection on 10.8.2022 that the substitute voice examiner could not be examined as he had not conducted the examination of electronic evidence related to the present case.

6. Learned counsel for the revisionist also argued that the CSFL was not a notified organization/laboratory by the Central Government under Section 79A of the Information Technology Act, 2000 and, therefore, the test report allegedly released by Dr. Manisha Kulshreshta was not consistent with Section 45A of the Indian Evidence Act, 1872. However, the trial court rejected the objection and allowed the application filed by the CBI and ordered to summon Sri Mahesh Kumar Jain.

7. Learned counsel for the revisionist submits that the learned trial court had admitted the report without deciding the question of relevancy of the said document as per Section 136 of the Indian Evidence Act. CSFL report being the electronic evidence and the witness being an expert witness, the said report could not have been proved by a substitute witness as he did not carry out the examination of the sample of voices. The Central Government has not notified the CFSL as an examiner of the electronic evidence according to Section 79A of the Information Technology Act and, the opinion of any other examiner on this behalf particularity regarding the report of an electronic record of a laboratory not notified by the Central Government, would not be relevant as per Section 45A of the Indian Evidence Act. Thus, the CFSL report admitted by the learned trial court vide impugned order dated 20.8.2022 is illegal. To have competence to examine the electronic evidence, notification of Forensic Science Laboratory is mandatory as required under Section 79A of the Information Technology Act and, therefore, the CSFL report in question is not admissible in evidence.

8. On the other hand, Sri Shiv P. Shukla, learned counsel for the CBI has submitted that under Section 79A of the Information Technology Act, it is provided that the Central Government may authorize or notify any department, body or agency to examine the electronic evidence. The provision would not mean that unless an agency/laboratory is notified by the Central Government, it would not be competent to examine the electronic evidence. He further submits that CFSL is a scientific department established by the Central Government in the year 1968 under the administrative control of the CBI and overall control of the Ministry of Home Affairs, Government of India. It is an ISO/IEC 17025:2017 Certified Laboratory from National Accreditation Board of Testing and Calibration Laboratories and,

therefore, it is competent to examine any electronic record and give its report.

9. Section 79A of the Information Technology Act would mean that the Central Government may notify any other agency for examination of the electronic evidence, which are not established by the Central Government and which are not under the administrative control of the Government. For CFSL, no such notification would be mandatory. He, therefore, submits that the learned trial court has rightly allowed the application filed by the CBI and no interference is required by this Court.

10. I have considered the submissions advanced by the learned counsel for the parties and perused the record.

11. Section 79A of the Information Technology Act reads as under:-

"79A. Central Government to notify Examiner of Electronic Evidence.-The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence."

12. In Section 79A of the Information technology Act, the word "may" has been used for the Central Government to notify any department, body or agency for examination of the electronic record/evidence. In some of the judgments, the Supreme Court has interpreted the word "may" and held that in some context, "may" should be read as "must" and in some context, it may be directory or discretionary, but it would depend on the context in which the word "may" is used in a provision.

13. Supreme Court in the case of ***Official Liquidator Vs. Dharti Dhan (P) Ltd. (1977) 2 SCC 166***, in paragraph 8 of the judgement held as under:-

"8. Thus, the question to be determined in such cases always is whether the power conferred by the use of the word "may" has, annexed to it, an obligation that, on the fulfillment of certain legally prescribed conditions, to be shown by evidence, a particular kind of order must be made. If the statute leaves no room for discretion the power has to be exercised in the manner indicated by the other legal provisions which provide the legal context. Even then the facts must establish that the legal conditions are fulfilled. A power is exercised even when the court rejects an application to exercise it in the particular way in which the applicant desires it to be exercised. Where the power is wide enough to cover both an acceptance and a refusal of an application for its exercise, depending upon facts, it is directory or discretionary. It is not the conferment of a power which the word "may" indicates that annexes any obligation to its exercise but the legal and factual context of it. This as we understand it, was the principle laid down in the case cited before us: Frederic Guilder Julius v. Right Rev. Lord Bishop of Oxford: Re v. Thomas Thellusson Carter [5 AC 214] ."

14. Similarly, where the expression "shall" has been used in a provision, it has been held that it would not necessarily mean that it is mandatory. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provisions along with other provisions of

the Rules, the purpose sought to be achieved and the object behind implementation of such a provision.

15. Supreme Court in the case of ***Dinesh Chandra Pandey Vs. High Court of M.P. and another,*** (2010) 11 SCC 500 in paragraph 15 of the judgement held has under:-

"15. The courts have taken a view that where the expression "shall" has been used it would not necessarily mean that it is mandatory. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provisions along with other provisions of the Rules, the purpose sought to be achieved and the object behind implementation of such a provision. This Court in Sarla Goel v. Kishan Chand [(2009) 7 SCC 658] , took the view that where the word "may" shall be read as "shall" would depend upon the intention of the legislature and it is not to be taken that once the word "may" is used, it per se would be directory. In other words, it is not merely the use of a particular expression that would render a provision directory or mandatory. It would have to be interpreted in the light of the settled principles, and while ensuring that intent of the Rule is not frustrated."

16. In the case of ***Dalchand Vs. Municipal Corporation, Bhopal,*** (1984) 2 SCC 486, the Supreme Court held that there are no ready tests or invariable formulae to determine whether a provision is mandatory or directory. The relevant paragraph of the aforesaid judgment reads as under:-

"..... There are no ready tests or invariable formulae to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. ....."

17. Section 79A of the Information Technology Act or provision under Section 45A of the Indian Evidence Act do not provide that in absence of a notification in respect of a laboratory, opinion based on scientific examination given by a person well versed or skilled in such science, is not admissible in evidence. Unless such a bar is specifically provided in law, it can not be read as an extension of Section 79A of the Information Technology Act that the report given by any other body/laboratory shall not be inadmissible in evidence in absence of notification. If the body/laboratory is notified, the authenticity of the report of such a body/laboratory may not be available for questioning.

18. When the opinion of expert under Section 45A of the Indian Evidence Act is admitted by the trial, it becomes the opinion of the Court. For the sake of convenience, Sections 45 and 45A of the Indian Evidence Act are extracted herein-under:-

"45. Opinions of experts.--When the Court has to form an opinion upon a point

of foreign law or of science or art, or as to identity of handwriting 35 [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, 36 [or in questions as to identity of handwriting] 35 [or finger impressions] are relevant facts. Such persons are called experts.

"45A. Opinion of Examiner of Electronic Evidence. --When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 (21 of 2000) is a relevant fact."

19. Section 136 of the Indian Evidence Act, which gives power to the court to decide as to admissibility of the evidence, reads as under:-

***"136. Judge to decide as to admissibility of evidence.**--When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise. If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking. If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."*

20. It can not be doubted that the voice sample report of the CSFL, New Delhi is not a relevant evidence. Whether it is admissible or not, it would depend on it being proved in accordance with law.

21. In view of the above, I find no substance in the submission of learned counsel for the revisionist that the learned trial court has not decided the relevancy before admitting the report of the CFSL in evidence.

22. The objection of the revisionist regarding calling of substitute witness for examination vide order dated 20.8.2022 by the Special Judge, CBI as the person who prepared the report is not living in India, also has no substance and is hereby rejected.

23. Section 293 Cr.P.C. provides that any document purporting to be a report under the hand of a Government Scientific Expert in respect of any matter or thing submitted for its examination or analyse may be used as evidence and the court may summon or examine any such expert as to the subject matter of his report.

24. Sub-section (3) of Section 293 Cr.P.C. specifically provides that if such an expert is unable to attend personally, any other responsible officer working with him may be deputed to attend the court. For ready reference, Section 293 Cr.P.C. is quoted below:-

***"293. Reports of certain Government scientific experts.**--(1) Any document purporting to be a report under the hand of*

a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court, and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:--(a) any Chemical Examiner or Assistant Chemical Examiner to Government; (b) the Chief Controller of Explosives; (c) the Director of the Finger Print Bureau; (d) the Director, Haffkeine Institute, Bombay; (e) the Director 1[, Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory; (f) the Serologist to the Government; (g) any other Government scientific expert specified, by notification, by the Central Government for this purpose."

25. In view of the aforesaid discussion, I am of the view that the impugned order passed by the learned trial court does not require any interference by this Court in exercise of its revisional jurisdiction under Section 397 read with Section 401 Cr.P.C.

26. Thus, revision has no merit and substance, which is hereby ***dismissed***.

(2022) 12 ILRA 591
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2022

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Crl. Revision No. 1119 of 2013

Virendra & Ors. ...Revisionists
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Revisionists:
Sri Krishna Nand Yadav, Sri Parmeshwar Yadav

Counsel for the Opp. Parties:
Govt. Advocate, Sri Avadhesh Pratap Singh, Sri Awadhesh Pratap Singh, Sri Niyaz Ahmad Khan(Sr. Advocate)

A. Criminal Law -Code of Criminal Procedure, 1973-Section 397/401 & 145-learned Magistrate passed ad interim injunction order in favour of the party, who initiated the proceeding u/s 145 Cr.P.C. and passed the order to attach the subject matter of dispute, giving it to some impartial custodian till decision of question of title-Ld. Magistrate had not given his satisfaction as required u/s 145(1) Cr.P.C. regarding dispute is likely to cause the breach of peace or state of emergency u/s 146(1) Cr.P.C.-Instead of deciding that none of the parties were then in possession, Ld. Magistrate observed that the opposite parties have usurped the possession of the entire disputed plot in violation of civil court's order-Thus, the jurisdiction u/s 146 Cr.P.C. cannot be exercised where the applicant has been dispossessed prior to two months by the opposite party-Thus, the impugned order passed by Ld. Magistrate u/s 145 Cr.P.C. is set aside-Parties are relegated to avail remedy before civil court-it is open to respondent who is presently recorded tenure holder of

the land in dispute that if he is dispossessed in violation of ad interim injunction order of civil court, he may move application for enforcement and punishment for disobedience of that order-Ld. Magistrate will be within his right to initiate proceeding section 107/151 Cr.P.C., if any of the party likely to commit breach of peace.(Para 1 to 21)

The revision is allowed. (E-6)

List of Cases cited:

1. Gulab Chand Vs St. of U.P. & anr. (2004) CrLJ 2672

2. Shivmurti Pandey & ors. Vs Bharati Lal Pandey

3. Girish Chandra Upadhyay Vs St. of U.P. & anr. (2007) 2 DNR HC 387

4. Munna Singh @ Shivaji Singh & anr. Vs St. of U.P. & anr. (2011) 9 ADJ 98

5. Ganesh Prasad & ors. Vs St. of U.P. & ors. Crime 2686 of 2016

6. Ram Raj Vs St. of U.P. (1995) U.P. Cri R 745 All

7. Darshan Lal Vs Sain Dass (2002) CriLJ 3214

8. Ranjeet Singh Vs Moti Lal Katiyar (1988) 1 Crimes 102 All

9. Mangi Lal Vs Bhangmal (1988) CrLJ 1905

10. Om Prakash Vs Dharam Chand (1998) 3 Crimes 898, 902

11. Neelam Singh Vs St. of U.P. (1999) CriLJ 90

12. Manzooran Vs St. of Punj. (1988) 1 Crimes 547

13. Balwant Singh Vs Daulat Singh (1997) 7 SCC 137

14. Jitendra Singh Vs St. of M.P. (2021) SCC OnLine SC 802

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri Krishna Nand Yadav, learned A.G.A. for the State and perused the record.

2. The present revision under Section 397/401 of Cr.P.C. has been preferred by the accused persons against the judgment and order dated 30.03.2013 passed by the Sub Divisional Magistrate Sadar, District Maharajganj in Complaint Case No. 119/123 (State vs. Ram Bhawan & others) under Section 145 of Cr.P.C., Police Station- Chowk, District Maharajganj. The Sub Divisional Magistrate, Sadar, Maharajganj vide impugned order has attached ½ part of the land in dispute Araji No. 550, Ara 0.737 hectare, Araji No. 573, Area 1.753 Hectare, Araji No. 606, Area 1.181 Hectare and Araji No. 454, Area 0.117 Hectare, till disposal of the question of right and title of the parties. He also directed the S.H.O- Chowk to take possession of the plots in dispute and give the entrustment of same to any impartial person who will provide the statement of income and expenditure of the plots before the Court from time to time. Any further proceeding in the case will not be undertaken after the final adjudication of the question of succession of the property of deceased- Shahdeo.

3. Feeling aggrieved by the impugned order, all the opposite parties, who are collateral of the deceased- Ram Bhavan and the original owner of the property, have filed present revision before this Court under Section 397/401 Cr.P.C. Notices were issued to the respondent- first party before the Court of Magistrate and they put in appearance through their counsel and

filed counter affidavit on 16.9.2016, which is placed on record.

4. In Gulabc**hand vs. State of U.P. and Another, (2004) CrLJ 2672**, Allahabad High Court held that an order passed by Executive Magistrate, attaching the property under Section 146(1) Cr.P.C., when there was totally no material before the Magistrate to record his satisfaction regarding likelihood of breach of peace, being mentioned, is not interlocutory order and revision under Section 397 Cr.P.C. against such order is maintainable. Therefore, in the light of aforesaid precedent, this revision is maintainable before this Court.

5. Admit.

6. The facts in brief as carved out from the counter and rejoinder affidavits are as follows:

(i) The respondent- Ram Bhawan, who has claimed himself as son of the sole daughter of the deceased- Shahdeo had filed an application under Section 145 Cr.P.C. before the Court of Upper Zila Magistrate, Sadar, Maharajganj, wherein it was stated to the effect that there is dispute of possession between him and opposite party- Virendra and others. The S.D.O. concerned reported to learned Executive Magistrate that the plots in dispute were property of deceased Shahdeo, who died long before. He was blessed with a daughter, who had also died. The dispute of succession of said property of Shahdeo is under litigation between Ram Bhawan and collaterals of Shahdeo before different courts. Name of Virendra and others (opposite party-respondents) is recorded in Khatauni and they are in possession over the disputed plots. Proceeding under Section 107/116 Cr.P.C. have also been undertaken against both parties. Therefore, with a view to maintain law and order and keeping in view the maintainable litigations between the parties, it is desirable that the disputed property be attached and the question of real heirs of deceased- Shahdeo be adjudicated upon.

(ii) During the course of proceedings under Section 145 and 146 Cr.P.C., opposite party- Janardan- present revisionist No.3 had moved an application before the Court of learned Magistrate stating therein that the plaintiff Ram Bhawan has filed a civil suit for injunction, in which injunction has been granted in favour of the plaintiffs and in this fact of situation and in accordance with law, the present suits are not maintainable and are liable to be dismissed.

(iii) Learned Magistrate has observed in impugned order dated 30.3.2013 that from the perusal of material on record, it appears that manifold suits and proceedings are pending before various courts with regard to disputed plots and in civil suits filed by the plaintiff- Ram Bhavan, the civil court has injuncted the opposite party from interfering in possession of plaintiff but in spite of injunction order of civil court, opposite party and others have taken possession of complete area of disputed plots, in disobedience of civil court's order.

(iv) The opposite party has taken resort of a decided case of this Hon'ble High Court, cited as **Shivmurti Pandey and others vs. Bharati Lal Pandey**, according to which, in case of pendency of prior civil suit, no proceeding under Section 145 Cr.P.C. can be undertaken by Judicial Magistrate but the first party had taken recourse of a judgement of Hon'ble Allahabad High cited as **Girish Chandra Upadhyay vs. State of U.P. and Another, 2007 (2) DNR (HC) 387,** in which it is

held that the Magistrate is empowered to pass appropriate orders with a view to maintain law and order under Section 145/146 Cr.P.C. even during pendency of civil suit. Thus, learned magistrate concluded that tension is prevalent between the parties in view to their respective claims regarding the possession of the property of deceased- Shahdeo and there is apprehension of breach of peace any time and thus, in this situation, the disputed property is liable to be attached until adjudication of question of real successor of deceased- Shahdeo.

(v) From the perusal of record, it also appears that respondent No.3- Ram Bhavan is claiming his title and possession over disputed property on the basis of succession claiming himself as the son of Smt. Fuda, daughter and sole heir of deceased- Shahdeo whereas revisionists, opposite parties before the Magistrate, has claimed their right over the disputed property on the basis of unregistered Will deed dated 31.3.1978, purportedly executed by Shahdeo, in favour of Prahlad and others. The revisionist Surendra is son of said Prahlad. The respondents have questioned the veracity of the said Will deed in various judicial proceedings and alleged it manufactured document, which was not executed by deceased- Shahdeo. The respondent No.3- Ram Bhavan filed a civil suit No. 402 before the court of Civil Judge (J.D.), Maharajganj on 28.5.2009, wherein, the Civil Judge has passed interim order on 28.5.2009, in which the defendants Virendra and others are directed to restrain from interfering in the possession of plaintiff regarding disputed plots of its half share claimed by the plaintiffs.

(vi) It is also obvious from the record that for deciding the question of title of disputed plots, mediation proceeding has been taken before various revenue and conciliation courts by the parties and the matter is still pending before conciliation court for decision.

7. Feeling aggrieved by the impugned order of learned Magistrate, this revision has been preferred mainly on the ground that learned Magistrate has passed impugned order dated 30.3.2013, on a complaint/application dated 27.7.2012, made by the respondent No.3 before him, while appeal No.2468 of 2017 Consolidation and Holdings Act is pending before the Settlement Officer of Consolidation and Holdings. Order of Consolidation Officer has been stayed by the Settlement Officer on 17.10.1988, despite that the land in question has been attached under Section 146(1) Cr.P.C. by the impugned order, which is illegal, arbitrary and against the mandate of law.

8. The impugned order has been passed on the basis of report submitted by the Sub In-charge of Police Station concerned. Valuable rights of the revisionists has been vacated by the impugned order. Learned Magistrate exercising its jurisdiction, not vested in him by the law, passed the impugned order without going into the merits of the case and considering the material evidence adduced by the revisionists, hence, the same is liable to be set aside by this Court and suitable orders may be passed.

9. The objection to present revision has been filed in the form of counter affidavit by the respondent No.3, wherein it is stated that admittedly the land in dispute belongs to deceased- Shahdeo, who died. His sole daughter Fuda was her heir and legal representative and the defendant-respondent No.3 is son of said Fuda. The

revisionists have no concern with the land in dispute, as they tried to interfere in the peaceful possession of respondent No.3, hence, he made complaint before the police with regard to land in dispute. The impugned order was passed by the learned Magistrate only to maintain peace on the spot and is correct. Deceased- Shahdeo never executed any deed to create any right in favour of anyone including the revisionists. In fact, he remained as owner in possession of the property in dispute up to his lifetime and, therefore, property vested in his daughter, who is mother of defendant. The Will deed propounded by the revisionists is a forged document and it was never executed by the said Shahdeo in favor of his nephew Virendra and others. Consolidation Authorities have found that Shahdeo was inherited by his daughter Fuda and now by respondent No.3 Ram Bhawan, hence, the allegations in respect of consolidation proceedings are baseless and have no locus to stand. The name of Fuda has been maintained by order dated 16.12.2014 passed by the Consolidation Officer and the same has been acted upon in Khatauni thus, the name of mother of respondent No.3 is recorded as heir of deceased- Shahdeo in Khatauni, copies thereof are filed along with the counter affidavit. There is an injunction order of civil court in favour of the respondent No.3. However, in violation of the order of civil court, revisionists are trying to interfere in the peaceful possession of respondent No.3, hence, thereby appreciation of breach of peace justifying the police action and consequent proceeding under Section 145/146 Cr.P.C.

10. In rejoinder affidavit, the revisionist have stated that the names of the revisionists had already been recorded as early as on 19.3.1978 on the basis of Will executed by deceased- Shahdeo in favour of the revisionist and they are in possession over this land in dispute on the basis of said Will deed. In such a scenario, the impugned order dated 30.3.2013 is illegal and not sustainable under the eyes of law.

11. Learned counsel for the revisionists advanced his submissions in present revision pressing the grounds taken in revision and placed reliance on a Full Bench Judgement of this Court in case of **Munna Singh @ Shivaji Singh and Another vs. State of U.P.and Another, 2011 (9) ADJ 98**, wherein, it was held that orders passed under Section 145 (1) and 146(1) of the Code are not in every circumstance, orders simplicitor, and therefore a revision would be maintainable in the light of the observations made in this judgment depending on the facts involved in each case.

12. The invoking of the emergent powers under Section 146(1) Cr.P.C. is dependent on the satisfaction of the Magistrate that it is a case of emergency and none of the parties are in possession or the Magistrate at that stage unable to decide as to which of the parties was in possession. It is only then that attachment can be resorted to. An emergency is an unforeseen occurrence or a crisis with a pressing necessity which demands immediate action. An emergent situation is one that suddenly comes to notice and is almost unexpected or unapprehended. It is a situation that requires prompt attention impelling immediate action. The action to be taken would however be dependant on the satisfaction of a Magistrate recorded under Section 145 (1) Cr.P.C. that there exists an apprehension of breach of peace either on the basis of a police report or upon other information received. The order

of attachment on such a dispute being brought to the notice of the Magistrate therefore is clearly linked with the right of a party to retain lawful possession. The aforesaid ingredients have to exist to allow the Magistrate to exercise his authority within his jurisdiction.

13. Learned counsel for the revisionists further submitted that in impugned order itself it is stated by the Magistrate that the opposite party has taken possession over entire disputed land. Thus, it cannot be said that the Magistrate has decided that none of the parties then was in possession as referred in Section 145 Cr.P.C. wherein it is provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1). Learned counsel next submitted that there is no finding of learned Magistrate in the impugned order that the revisionists were dispossessed within two months next before the date on which the report of the police officer for initiating proceeding under Section 145 Cr.P.C. was received by him as proceeding under Section 145(4) proviso. Thus, learned Magistrate has also not decided the question of emergency as provided under Section 146(1) Cr.P.C. and passed the impugned order to the detriment of the revisionists who were in possession of the property in dispute.

14. In **Ganesh Prasad & Others vs. State of U.P. & Others, Crime 2686 of 2016** decided on 27.3.2018, attachment order passed by the Magistrate under Section 146(1) Cr.P.C. was challenged before this Court, wherein it was observed as under:

"31. The invoking of the emergent powers under Section 146 (1) Cr. P.C. is dependent upon the satisfaction of the Magistrate that it is a case of emergency and none of the parties are in possession or the Magistrate at that stage unable to decide as to which of the parties was in possession. It is only then that attachment can be resorted to. An emergency is an unforeseen occurrence or a crisis with a pressing necessity which demands immediate action. An emergent situation is one that suddenly comes to notice and is almost unexpected or un-apprehended. It is a situation that requires prompt attention impelling immediate action.

32 . The action to be taken would however be dependent on the satisfaction of a Magistrate recorded under Section 145 (1) Cr. P.C. that there exists an apprehension of breach of peace either on the basis of police report or upon other information received. The order of attachment on such a dispute being brought to the notice of the Magistrate therefore is clearly linked with the right of a party to retain lawful possession. The aforesaid ingredients have to exist to allow the Magistrate to exercise his authority within his jurisdiction. Accordingly the assumption of jurisdiction is dependent on the contingency that may arise in a dispute referable to the said provisions and hence what necessarily follows that if there is an exercise for want of jurisdiction or erroneous exercise of jurisdiction, then the order on the given facts of a case may not be a mere interlocutory order. If the exercise of a power and passing of an order is questionable to the extent of touching the

rights of the parties or are orders of moment, depending on the peculiar facts of individual cases, then the order in our opinion would be an intermediate nature of an order that can be subjected to a revision under Section 397 Cr. P.C.

33. The legislature in its wisdom will be presumed to have curtailed the revisional jurisdiction to the extent as spelt out under sub-section (2) of Section 397 Cr. P.C. in order to prevent any delays or unnecessary impediments in proceedings relating to trials under the Criminal Procedure Code. As noticed above, the orders which do not fall within the exact nature of an interlocutory order may therefore not be prohibited from being subjected to a revision in larger public interest. A litigant who is aggrieved by an action which does not involve immediate urgency can always knock the doors of the revisional Court, dependent on the facts of each individual case as explained hereinabove.

34 . We would also like to add that there were divergent views with regard to the jurisdiction of the Magistrate proceeding after attachment under Section 146 (1) Cr. P.C. but the said issue came to be resolved by the Apex Court in the case of Mathura Lal vs Bhanwar Lal, 1979 (4) SCC 665.

35. In view of what has been expressed herein above, we find ourselves in respectful agreement with the views expressed by the various courts and this Court to the effect that there is a third category of order which falls in between an interlocutory and final order that does touch upon the rights of the parties and is an order of moment. An order under Section 145 (1) followed by an order under Section 146 (1), or even passed simultaneously, bring to the forefront the primary question of the assumption of jurisdiction by the Magistrate to proceed in a matter. If the facts of a particular case do not warrant the invoking of such jurisdiction, for example, in cases where civil disputes are pending and orders are operating, then in view of the law laid down by the Apex Court in the decisions referred to herein above following Ram Sumer Puri Mahant's case (supra), an order ignoring such proceedings will have to be curtailed for which a revision would be maintainable under sub-section (1) of Section 397 as, such an order, would not be a mere interlocutory order and would touch upon the rights of the parties."

15. A photocopy of the unregistered will deed dated 19.3.1978 propounded by revisionist is placed on record, which reveals that in this will deed deceased Shahdeo, the original owner of the property in dispute, is shown to have bequeathed his agricultural property in favour of Virendra and Surendra, S/o Prahlad and Janardan and Bal Govind S/o Ram Lal. In this will deed it is stated that he was not blessed with any male or female issue. On the basis of this will deed, the property in dispute was initially mutated in favour of the revisionist, who were nephews of the deceased but subsequently, this was not relied upon by the Revenue and Consolidation Authorities and presently name of respondent No.3 Ram Bhawan, has been directed to be mutated by Consolidation Officers, as reveals from order dated 16.12.2014 passed by the Consolidation Officer after remand of the case. An ad interim injunction order in favour of the respondent No.3 is also being passed by the Civil Court in Civil Suit No. 402 of 2009 on 28.5.2009, in favour of the respondent No.3 Ram Bhawan against present revisionists, who are defendants in that suit. However, on perusal of statutory

provisions and relevant case law, this is obvious that for passing a preliminary order under Section 145 Cr.P.C., the Executive Magistrate will have to satisfy from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction. Similarly, while passing a final order of attachment under Section 146 Cr.P.C., the Magistrate will have to be satisfied that the case is one of emergency, or he has to decide that none of the parties was then in such possession. In the present case, learned Executive Magistrate has stated in impugned order that the opposite parties Virendra and others have usurped the possession of entire disputed plot in violation of the order of Civil Court whereas under Section 145 Cr.P.C., the proceedings can be initiated where it appears to the Magistrate that any party has been visibly and wrongly dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before of his order under sub-section 1 to Section 145 Cr.P.C. Thus, the jurisdiction under Section 146 Cr.P.C. cannot be exercised where the applicant has been dispossessed prior to two months by the opposite party. Similarly, in impugned order learned Magistrate has not stated specifically the matter to be one of emergency. No evidence has been mentioned which might have been recorded for satisfaction that the case is one of emergency and instead of giving a finding that none of the parties was then in such possession, he has observed that the opposite parties have usurped possession of disputed plot in violation of an interim injunction order of civil court, which was passed in the year 2009.

16. In **Ram Raj vs. State of U.P., 1995 U.P. Cri R 745 (All)**, Allahabad High court held where the civil court had granted injunction in plaintiffs' favour, the proceeding under Section 145 Cr.P.C. cannot be initiated. Similarly in **Darshan Lal vs. Sain Dass, 2002, CriLJ 3214,** Jammu and Kashmir High Court held that where dispute between the parties pertaining to disputed land is pending in civil/revenue courts, in such cases, preliminary proceeding in respect of some property are not permissible.

17. In **Ranjeet Singh vs. Moti Lal Katiyar, 1988 (1) Crimes 102 (All)**, this Court held that where the question of possession was involved and pending in the civil court on the date when the orders under Section 145 (1) and 146(1) Cr.P.C were passed and injunction order was in operation, proceeding cannot be allowed to continue as it would be nothing but abuse of process of law.

18. In **Mangi Lal vs. Bhangmal, 1988 CrLJ 1905**, Madhya Pradesh High Court held that mere pendency of litigation may not furnish any justification for dropping any proceeding where the relief of temporary injunction has been sought and obtained ultimately be urged that despite the order granting temporary injunction apprehension of breach of the peace still exists and the order granting temporary injunction in any way is less efficacious than the 145 (6) (A) Cr.P.C. However, in Om Prakash vs. Dharam Chand 1998 (3) Crimes 898, 902, Jammu and Kashmir High Court held that by directing the maintenance of status quo regarding possession of the subject matter in the civil suit, the civil court does not adjudicate either intermily or finally on the question of possession and such an order by

itself does not take away the jurisdiction of criminal law under this section to initiate or continue with a proceeding, on being satisfied about the existence of the grounds for exercising powers under this Section.

19. Similarly, in **Neelam Singh vs. State of U.P., 1999 CriLJ 90**, this Court held that where the civil court has passed order for status quo only and has not given any protection about actual physical possession, proceedings under Section 145 Cr.P.C. are not barred. In **Manzooran vs. State of Punjab, 1988 (1) Crimes 547**, High Court of Punjab and Haryana held that the order of the civil court must be respected even while initiating a proceeding under this Section. The Magistrate can very well initiate proceeding under this Section to decide, which party was in possession. But at the same time for prevention of breach of peace it can be sought to proceed under Section 107 Cr.P.C. and not to attach the property under Section 146 Cr.P.C., as that would tend to violate the orders of the civil court by dispossessing the party, who was ordered to be left in possession by the order of maintenance of status quo.

19. Learned counsel for the revisionists placed reliance on **Balwant Singh vs. Daulat Singh (1997) 7 SCC 137**, which is reiterated in **Jitendra Singh vs. State of M.P. 2021 SCC OnLine SC 802,** wherein it is held that "this is well settled position of law that mutation entry does not confer any right, title or interest in favour of the person and it is only recorded for the fiscal purpose." However, in the present case, it may be added that mutation entry in favour of the respondent No.3 has been entered by orders of competent court i.e. Consolidation Court after long drawn litigation between the parties.

20. On consideration of above cited case laws and in the light of statutory provisions under Section 145 and 146 Cr.P.C., this Court is of the opinion that although the learned Magistrate has observed in impugned order that ad interim injunction order was passed in favour of the party, who initiated the proceeding under Section 145 Cr.P.C. before him and passed the impugned order to attach the subject matter of dispute, giving it under the custody of some impartial custodian till decision of question of title in possession by competent court. The same cannot be sustained as ad interim injunction order is specifically passed in the civil suit in favour of the respondent No.3. Learned Magistrate had not given his satisfaction as required under Section 145(1) Cr.P.C. regarding dispute is likely to cause the breach of peace or state of emergency as cited under Section 146 (1) Cr.P.C. exists. Instead of deciding that none of the parties were then in possession, which prompted the passing of the impugned order, he has observed that the opposite parties have usurped the possession of the entire disputed plot in violation of civil court's order, thus impugned order cannot be countenanced and sustained within the purview of Sections 145 (1) and 146(1) Cr.P.C. In view of facts and circumstance of the case, the order impugned is liable to be quashed.

21. Accordingly, the revision is **allowed** and impugned order dated 30.3.2013 passed by learned Magistrate in Complaint Case No. 119/123 (State vs. Ram Bhawan & others) under Section 145 of Cr.P.C., Police Station- Chowk, District Maharajganj is set aside in the light of the discussion made above. However, parties are relegated to avail remedy before civil court and it is open to respondent Ram

Bhawan, who is presently recorded as tenure holder of the land in dispute that if he is dispossessed in violation of ad interim injunction order of civil court, he may move appropriate application for enforcement and punishment for disobedience of that order, before the court concerned to seek appropriate remedy and the same will be decided by the learned civil court in accordance with law after giving opportunity of hearing to both the parties. Learned Executive Magistrate will be within his right to initiate proceeding under Section 107/151 Cr.P.C., if any of the party is likely to commit breach of peace or disturb the public tranquility in view of the dispute over the land in question.

(2022) 12 ILRA 600
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Revision No. 2625 of 2021

Kalicharan & Ors. ...Revisionist
Versus
The State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Ashutosh Yadav, Abhilasha Singh, Sri Nagenda Kumar Singh, Sri Pradeep Kumar, Mrs. Swati Agrawal Srivastava, Sri S.Lal, Sri Udia Karan Saxena(Sr. Advocate)

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401, &319 Cr.P.C. - Indian Penal Code, 1860- Section 302/34-deceased died due to asphyxia-witnesses statements proved involvement of all three revisionist and also corroborated with the post-mortem report-Trial court rightly appreciated the evidence and considering the examination-in-chief came to the conclusion that more than prima facie case was made out against the revisionist-Revisionists have to go through de novo trial and it will have no effect of the trial concluded against other accused wherein they have been acquitted.(Para 1 to 17)

B. While considering the application u/s 319 Cr.P.C. Court of Magistrate has to make an opinion only on the basis of evidence produced before Court and he is not required to look into the material collected during investigation and has to make out an opinion/satisfaction that a prima facie case is to be established from the evidence led before the Court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity as well as the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction.(Para 5 to 15)

The revision is dismissed. (E-6)

List of Cases cited:

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

2. Brijendra Singh & ors. Vs St. of Raj. (2017) 7 SCC 706

3. A.T. Mydeen & anr. Vs The Asstt. Commr. Customs Deptt. (2021) SCC OnLine SC 1017

4. Sugreev Kumar Vs St. of Punj. & anr. (2020) 14 SCC 472

5. Sartaj Singh Vs St. of Har. & anr.(2021) 5 SCC 337

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Sri Udai Karan Saxena, learned Senior Advocate assisted by Ms. Swati Agrawal Srivastava, Advocate for revisionists, has submitted arguments, which are in two folds. Firstly, that summoning of revisionists (three in numbers), under Section 319 Cr.P.C., is contrary to judgment passed by Constitution Bench in **Hardeep Singh vs. State of Punjab and others, (2014) 3 SCC 92** and **Brijendra Singh and others vs. State of Rajasthan (2017) 7 SCC 706**, that, Trial Court has to make out an opinion to see whether much stronger evidence than mere possibility of their (applicants) complicity has come on record. However, there is no satisfaction of this nature in the impugned order. Relevant para 15 of the judgment in **Brijendra Singh (supra)**, is quoted hereinafter:

*"15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the "evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. H**owever, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether ''much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record.** There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."*
(Emphasis given by Court for revisionists)

2. Second fold of the argument of learned Senior Advocate is that, during pendency to challenge to order passed under Section 319 Cr.P.C. trial has been concluded against originally charge sheeted accused, wherein Trial Court vide judgment and order dated 07.09.2022 has acquitted said accused from the offence under Section 302 IPC, therefore, there would be no justification that present revisionists may go through the same procedure wherein same evidence has to be led again and most likely outcome of trial will be same.

3. The above submissions are vehemently opposed by Sri Sushil Kumar, learned counsel appearing for Opposite Party No. 2. He submitted that Trial Court has correctly appreciated the evidence of eye witnesses, i.e., PWs 1, 2 and 3 that all the three revisionists have also assaulted deceased, who not only received multiple injuries but died due to strangulation and said witnesses had witnessed the incident and further that in a case where a person is summoned under Section 319 Cr.P.C. he

has to face de novo trial, therefore, there will be no consequence of acquittal of the charge sheeted accused for the same offence after the trial.

4. The Court proceeds to consider the second argument of learned Senior Advocate, which was vehemently opposed by counsel for Opposite Party No. 2 and AGA that what will be the consequence of conclusion of trial of charge sheeted accused if for the same offence accused persons summoned under Section 319 Cr.P.C. has to face de novo trial?

5. This issue has been considered recently by Supreme Court and law has been reiterated in **A. T. Mydeen and another vs The Assistant Commissioner, Customs Department, 2021 SCC OnLine SC 1017** and relevant paragraphs are mentioned hereinafter:

"39. The provisions of law and the essence of case-laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above.

*40. **The essence of the above synthesis is that evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence."***

(Emphasis supplied)

6. As held in **A.T. Mydeen (supra)**, that the accused summoned under Section 319 Cr.P.C. has to face trial de novo and evidence led in other trial for the same offence cannot be relied on against accused summoned under Section 319 Cr.P.C., who has to tried on the basis of evidence recorded in separate trial though for the same offence. Therefore, the second argument of learned Senior Advocate is hereby rejected.

7. Now the Court proceeds to consider the first argument, whether the order summoning revisionists under Section 319 Cr.P.C. is legally sustainable or not?

8. The scope of summoning under Section 319 Cr.P.C. has recently been considered and reiterated by Supreme Court in **Sugreev Kumar vs. State of Punjab and another, (2020) 14 SCC 472** and relevant paras are mentioned hereinafter:

"10. It remains trite that the provisions contained in Section 319 CrPC are to achieve the objective that the real culprit should not get away unpunished. By virtue of these provisions, the Court is empowered to proceed against any person not shown as an accused, if it appears from evidence that such person has committed any offence for which, he could be tried together with the other accused persons. In Hardeep Singh

(supra), the Constitution Bench of this Court has explained the purpose behind this provision, inter alia, in the following:

"12. Section 319 Code of Criminal Procedure springs out of the doctrine judex damnatur cum nocens absolvitur (judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Code of Criminal Procedure.

13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?

**** *** ****

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

11. As regards the degree of satisfaction required for invoking the powers under Section 319 CrPC, the Constitution Bench has laid down the principles as follows:

"95. ***At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter.*** *A two-Judge Bench of this Court in Vikas v. State of Rajasthan, held that on the objective satisfaction of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.*

**** *** ****

105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. ***Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction.*** *In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from*

the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

12. Thus, the provisions contained in Section 319 CrPC sanction the summoning of any person on the basis of any relevant evidence as available on record. However, it being a discretionary power and an extraordinary one, is to be exercised sparingly and only when cogent evidence is available. The prime facie opinion which is to be formed for exercise of this power requires stronger evidence than mere probability of complicity of a person. The test to be applied is the one which is more than a prime facie case as examined at the time of framing charge but not of satisfaction to the extent that the evidence, if goes uncontroverted, would lead to the conviction of the accused."

(Emphasis supplied)

9. Supreme Court also considered the scope of Section 319 in a recent judgment in **Sartaj Singh vs The State Of Haryana and another, (2021) 5 SCC 337** and relevant paras are mentioned hereinafter:

"6.1.2 In the said case, the following five questions fell for consideration before this Court.

(i) What is the stage at which power under Section 319 CrPC can be exercised?

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

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

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

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

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"6.1.4 While answering Questions (iii), namely, whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial, this Court, in the aforesaid decision has observed and held as under:

"58. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 CrPC, the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that come up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have

been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 CrPC indicate that the material has to be "where ... it appears from the evidence" before the court.

59. Before we answer this issue, let us examine the meaning of the word "evidence". According to Section 3 of the Evidence Act, "evidence" means and includes:

"(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the court;

such documents are called documentary evidence."

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78. It is, therefore, clear that the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

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82. This pretrial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the chargesheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the chargesheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word "evidence" as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 CrPC. The court, therefore, should be understood to have the power to

proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is ***that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The "evidence" is thus, limited to the evidence recorded during trial.***

6.1.5 While answering Question (ii) namely, whether the word "evidence" used in Section 319(1) Cr.P.C. means as arising in examination-in-chief or also together with cross-examination, in the aforesaid decision, this Court has observed and held as under:

86. The second question referred to herein is in relation to the word "evidence" as used under Section 319 CrPC, which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination-in-chief. In Rakesh (2001) 6 SCC 248 : 2001 SCC (Cri) 1090 : AIR 2001 SC 2521, it was held that: (SCC p. 252, para 10)

"10. ... It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising the court's power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not."

87. In Ranjit Singh v. State of Punjab, (1998) 7 SCC 149 : 1998 SCC (Cri) 1554 : AIR 1998 SC 3148, this Court held that: (SCC p. 156, para 20)

"20. ... it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

88. In Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899, it was held that the prerequisite for exercise of power under Section 319 CrPC is the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even wait till the cross-examination is over and that there would be no illegality in doing so. A similar view has been taken by a two Judge Bench in Harbhajan Singh v. State of Punjab (2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135. This Court in Hardeep Singh v. State of Punjab, (2009) 16 SCC 785 : (2010) 2 SCC (Cri) 355 seems to have misread the judgment in Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899, as it construed that the said judgment laid down that for the exercise of power under Section 319 CrPC, the court has to necessarily wait till the witness is cross-examined and on complete appreciation of evidence, come to the

conclusion whether there is a need to proceed under Section 319 CrPC.

89. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. ***Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence.***

90. As held in Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899 and Harbhajan Singh (2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135, all that is required for the exercise of the power under Section 319 CrPC is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The prerequisite for the exercise of this power is similar to the prima facie view which the Magistrate must come to in order to take cognizance of the offence. Therefore, no straitjacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s). It is essential to note that the section also uses the words "such person could be tried" instead of should be tried. Hence, what is required is not to have a mini trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of subsection (4) of Section 319 CrPC, the person would be entitled to a fresh trial where he would have all the rights including the right to cross-examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of examination-in-chief, the court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, examination-in-chief untested by cross-examination,undoubtedly in itself, is an evidence.

91. ***Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 CrPC, the person sought to be arraigned as an accused, is in no way participating in the trial.*** *Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross-examine the witness(es) prior to passing of an order under Section 319 CrPC, as such a procedure is not contemplated by CrPC. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(es) is obliterating the role of persons already facing trial. More so, Section 299 CrPC enables the court to record evidence in absence of the accused in the circumstances mentioned therein.*

92. Thus, in view of the above, we hold that power under Section 319 CrPC can be exercised at the stage of completion of examination-in-chief and the court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

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6.2 Considering the law laid down by this Court in Hardeep Singh (supra) and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

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6.4 In the case of Rajesh v. State of Haryana (2019) 6 SCC 368, after considering the observations made by this Court in Hardeep Singh (supra) referred to hereinabove, this Court has further observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused." (Emphasis supplied)

10. Considering **Sugreev Kumar (supra)** and **Sartaj Singh (supra)** that the answer to Question-3 by Constitution Bench in Hardeep Singh (supra) would be relevant and, as quoted above, wherein it is categorically held that word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the Court, in relation to statements, and as produced before the Court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or Court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

11. In view of above observation of Constitution Bench that while considering the application under Section 319 Cr.P.C. Court of Magistrate has to make an opinion only on the basis of evidence produced before Court and he is not required to look into the material collected during investigation and has to make out an opinion/ satisfaction that a prima facie case is to be established from the evidence led before the Court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity as well as the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of

satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction.

12. On the basis of above legal position the Court scrutinize the impugned order and examination-in-chief of PWs-1, 2 and 3 on which the impugned order was passed.

13. PW-1, Shiv Lal in categorical terms has stated as under:

"दिनांक 26.3.18 का सुबह के लगभग 9.00 बजे रामनरेश व मनीराम सौच के बाद वापस अनीता के घर पास आये देखा कि सुघड़पाल सरिया से सावित्री देवी हसिया से रामकिशोर व कालीचरन डण्डों से मेरी पुत्री के साथ मारपीट कर रहे थे।"

14. PW-2, Mani Ram in categorical terms has also stated as under:

"मैं एकदम दौड़कर पहुँचा तो देखा कि अनीता को सुघड़पाल, रामकिशोर, सावित्री देवी कालीचरन चारो लोग लाठी डण्डों व सरिया व हंसिया से मार रहे थे। बाद मैने रोका तो तब तक इन लोगों ने गला दबाकर अनीता की हत्या कर दी। और मुझे भी धक्का मार कर बाहर भगा दिया।"

15. Lastly, PW-3, Ram Paresh in categorical terms has also stated as under:

"दूसरे दिन सुबह दिनांक 26.3.18 को जब हम लोग सौच क्रिया से निवृत्त होकर वापस आ रहे थे तो हमने अपनी बहन की चीख पुकार सुनी, कह रही थी भईया बचाओ भईया बचाओ। सुघड़पाल के हाथ में सरिया थी रामकिशोर के हाथ में डण्डा था। सावित्री के हाथ में हसिया था, कालीचरन के हाथ में डण्डा था। चारो एक साथ मार रहे थे। जब हम नजदीक पहुँचे तो हमें धक्का मार भाग गये। हम अपनी बहन के पास पहुँचे तो देखा कि उसके पूरे चेहरे गर्दन पीठ कन्धों पर चोटे थी मेरी बहन की हत्या अभियुक्त सुघड़पाल उसकी सावित्री देवी, उसके पिता कालीचरन व भाई राम किशोर ने मिलकर की है।"

16. The above quoted parts of prosecution witnesses have in equal terms alleged the involvement of all three revisionist also and allegations are also corroborated with the post-mortem report which opined that cause of death was due to asphyxia and shock and haemorrhage due to anti mortem injuries and strangulation. Therefore, in the impugned order dated 20.09.2021 Trial Court after considering **Hardeep Singh (supra)** as well as the above referred evidence has come to the conclusion that considering the examination-in-chief more than prima facie case was made out against revisionists. I, therefore, do not find any irregularity in the impugned order whereby revisionists are summoned under Section 302/34 IPC. So far as observations made in **Brijendra Singh (supra)** are concerned, since the impugned order satisfies the test prescribed by Constitution Bench judgement in **Hardeep Singh (supra)**, as referred in **Sugreev Kumar (supra)** and **Sartaj Singh (supra)**, only evidence brought before the Court has to be considered. Therefore, the revisionists will not get any help from observations made in **Brijendra Singh (supra)**.

17. As discussed above, the revisionists have to go through de novo trial and it will have no effect of the trial concluded against other accused wherein they have been acquitted. Therefore, while rejecting the prayer made in this revision, it is disposed of with the direction that Trial

Court shall conclude trial expeditiously, preferably within a period of one year from today, subject to the calender of the Court.

(2022) 12 ILRA 610
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Revision No. 3014 of 2021
&
Crl. Revision No. 3022 of 2021

Rajat Upadhyay (minor) ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Raj Kumar Kesari

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

A. Criminal Law -Code of Criminal Procedure, 1973 - Section 397/401 - Indian Penal Code, 1860- Sections 302, 307, 34, 504, 506 & 3/25 - Arms Act,1959 -application for declaring juvenile rejected by Juvenile Justice Board-discrepancy between dates of birth recorded upto class 5 as compared to date which came to be recorded in class 6-a fake story was made up by the revisionist side that exactly on same date and month but a year ago mother of minor gave birth to another male child, who died within a few weeks-the Board found this fact conspicuous that the birth of rest of the three children came to be registered in the Nagar Nigam except the birth registration of present juvenile-when he was admitted in another institution in Class-6 no transfer certificate or any other document was produced and different date of birth was mentioned-The story given by the revisionist as to birth and death of second child has no legs to stand and has been rightly discarded by the appellate court-no reliance can be placed on birth certificate-in view of unambiguous school papers, there was no need to go for medical examination-Hence, the court has committed no fault in rejecting the request for medical examination. (Para 1 to 18)

The revision is dismissed. (E-6)

List of cases cited:

1. Parag Bhati Vs St. of U.P. (2016) 12 SCC 744

2. Sanjeev Kumar Gupta Vs St. of U.P & anr. (2019) 12 SCC 370 Abuzar Hossain Vs St. of W.B. (2012) 10 SCC 489

3. Ashwani Kumar Saxena Vs St. of M.P. (2012) 9 SCC 750 Babloo Pasi Vs St. of Jharkhand (2008) 13 SCC 133

4. Arnit Das Vs St. of Bih.(2000) 5 SCC 488

5. Jitendra Ram Vs St. of Jharkhand (2006) 9 SCC 428

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Raj Kumar Kesari, learned counsel for the revisionist, Sri Sunil Kumar Singh, learned counsel for the opposite party no.2 and Sri O.P. Mishra, learned A.G.A. for the State in both the matters.

2. Perused the record.

3. These criminal revisions have been filed on behalf of the alleged minor through his natural guardian/mother challenging the order dated 05.10.2021 passed by the learned Additional District and Sessions Judge/Special Judge (POCSO Act), Court No.2, Varanasi in both the matters in Criminal Appeal Nos.96 of 2020 and 97 of 2020 affirming the order dated 19.11.2020 and 11.11.2020 passed by the Juvenile

Justice Board, Varanasi respectively, by which the applications presented by the revisionist for declaring him juvenile were rejected and he was declared an adult.

4. Facts in brief leading to filing of these revisions are as below:-

Two F.I.R.s were lodged against the revisionist as Case Crime No.247 of 2019, under section 3/25 Arms Act and Case Crime No.227 of 2019, under sections-302, 307, 34, 504, 506 I.P.C. After investigation, charge-sheets were filed and cognizance was taken by the court concerned; thereafter, applications were moved before the Juvenile Justice Board for declaring him juvenile along with affidavit supported by certain papers like matriculation certificate and school certificate showing his date of birth as 02.09.2002; the statement of C.W.1- mother Pooja Upadhyay, C.W.2- Clerk from Harsewanand Public School, Varanasi, C.W.3- Rishikant Sharma, a Clerk from Nagar Nigam Varanasi and C.W.4- Anand Sharma, a Clerk from Annie Besant Primary School were examined. The Juvenile Justice Board was of the view that on the date of occurrence the accused was above 18 years of age and passed the order in both the matters on 19.11.2020 and 11.11.2020, respectively; appeals were preferred against the aforesaid orders passed by the Juvenile Justice Board; the appellate court dismissed the appeal and also dismissed the application filed on behalf of the juvenile for his medical examination moved for the purpose of determination of age.

5. The contentions of the revisionist are as below:-

Firstly that the birth certificate issued by the Nagar Nigam Varanasi, High School certificate, certificate from school where he studied from class-6 to class-8 showing his date of birth as 02.09.2002 were produced; however, the court committed a grave error in not relying on them; the Juvenile Justice Board and the appellate court instead relied on the papers of Annie Besant Primary School, where he studied from class-1 to class-5; in continuation of this argument, it is contended that there has been ample evidence to show that in that school the date of birth was wrongly recorded. To support this contention, it is stated on oath by mother of the minor that she infact gave birth to her second child on 02.09.2001 and that male child died within 15-20 days. Therefore, the birth registration in Nagar Nigam Varanasi showing date of birth as 02.09.2001 is of her second child and not of present minor accused, who is her third child; during the pendency of the appeals, an application dated 04.09.2021 supported with the affidavit annexing another birth certificate (showing date of birth 02.09.2002) issued by the Nagar Nigam Varanasi was filed in the appellate court by the revisionist; the appellate court took no notice of that birth certificate showing the minor-revisionist's date of birth same as recorded in matriculation certificate; the impugned order is silent about filing of that paper therefore the order cannot be sustained in law; the application is still pending. It is vehemently contended that where clear and unambiguous documents pertaining to middle school as well as high school are available supported by a birth certificate, the court could not ignore them; the findings are arbitrary and against the evidence on record, therefore, the revision deserves to be allowed.

6. For the purpose of checking the legality and propriety of the order, I went through both the impugned orders as well as the material which was placed before the Juvenile Justice Board and the appellate court.

7. Before proceeding to draw an inference, it will be useful to briefly refer to the evidence and material which was available before the Juvenile Justice Board and the appellate court with reference to findings given by both the courts. The Juvenile Justice Board noticed the facts that as per oral evidence of Pooja Upadhyay, mother of the minor, she gave birth to four children, minor being the third one; all her children were born in a hospital except this minor, who was born in her house; the date of birth were recorded of all the children in the register of Nagar Nigam Varanasi but no birth certificate showing date of bith 02.09.2002 allegedly of her third child was produced then. It was noticeable that the date of death of second child who allegedly died within two weeks was not recorded though his date of birth was admittedly recorded.

8. It may be noted that there is a serious dispute on the point that whether she ever gave birth to a male child who died within 15-20 days of his birth or not. It is vehemently contended by the other side that no such thing ever happened; infact the second child was the present revisionist whose date of birth in Nagar Nigam Varanasi was recorded as 02.09.2001 and on the basis thereof, he was admitted in class-1 in Annie Besant Primary School and this fact is amply proved by the Clerk of that school. Contradicting the above stand, it is contended on behalf of the revisionist that exactly a year after i.e. 02.09.2002 present revisionist was born and the similarity in the dates of birth is just a co-incidence. The Juvenile Justice Board found the evidence from certificates of Annie Besant School, Kamachha, Varanasi, where the juvenile admittedly studied from LKG to class-5 reliable. It has come in evidence of C.W.4- Clerk from Annie Besant Primary School that juvenile was admitted in that institution in July, 2005 in LKG and his date of birth 02.09.2001 was mentioned on the basis of birth certificate issued by Nagar Nigam Varanasi. It has also come in evidence that the admission form bore signature of Rajendra Kumar Upadhyay and Pooja Upadhyaya, the parents of the child. The witness not only produced the admission form but also the date of birth certificate annexed therewith. There is no theory or possibility that at the time of his admission a wrong birth certificate was produced. The child studied upto class-5 and was issued transfer certificate in April, 2012. It has clearly come in evidence of C.W.4 that no other paper except the birth certificate from Nagar Nigam was produced at the time of his admission. Further, it has also clearly come in evidence that C.W.2- Ashok Kumar Yadav, Clerk of Harsewanand Public School (where admittedly the minor studied from class-6 onwards) that at the time of admission in that institution no transfer certificate from any school much less from Annie Besant School was ever produced and that the date of birth 02.09.2002 was recorded in school record on the basis of admission form only. The witness has also stated that the parents assured of producing the transfer certificate but they never produced any. Most important evidence has come from C.W.3- Rishikant Sharma- Clerk from Nagar Nigam Varanasi, who produced the birth and death register before the court and gave evidence that on 02.09.2001, a male child

was born to Rajendra Upadhyaya and Pooja Upadhyaya and on the basis of this information, a birth certificate was issued. Here, it may be noted that as per the version of the revisionist, the minor was third child, their second child died within 15-20 days. It does not appeal to reason that birth registration was made of an infant who allegedly died within 15-20 days of his birth.

9. Before proceeding further, it will be useful to refer to settled position of law relating to age determination as to acceptance of documents and as to need to go for medical opinion.

10. The judgement in **Parag Bhati vs. State of U.P., (2016) 12 SCC 744** has been referred to support the contention that in case High School certificate is available, other evidence may not be taken into consideration. In the light of above contention, I went through the judgement of the Court in **Parag Bhati** case. In the aforesaid case, the High School certificate was found quite doubtful, therefore, a medical examination of the minor was conducted and he was declared adult; on the basis of medical opinion, the appellate court had upheld the order of the Juvenile Justice Board; the criminal revision preferred against the two judgements was dismissed and the matter went before the Supreme Court; the Supreme Court framed a question in para-5 "**whether the facts and circumstances of the present case when the date of birth mentioned in matriculation certificate is doubtful, ossification can be the last resort to prove the juvenility of the accused."** In the aforesaid case of **Parag Bhati,** the Apex Court considered several important judgements and gave an observation that where doubts are raised as to matriculation certificate, the medical examination of the juvenile can form a basis of his age determination. It may be very importantly be noted that the Apex Court nowhere said that the High School or the matriculation certificate shall be given primacy over other certificates.

11. In a very recent judgment of Apex Court in **Writ Petition (Criminal) No. 121 of 2022 (Vinod Katara vs. State of U.P.)**, the Court had an opportunity to consider several judgments as regards determination of age. The Apex Court while referring to another recent judgment of the Supreme Court in **Rishipal Singh Solanki vs. State of U.P.; 2021 (11) ADJ 489** agreed upon following observation that Section- 94 of the Juvenile Justice Act, 2015 does not give precedence to the matriculation certificate over other certificates to determine the age of the person, since the said section only dealt with the matter of procedure.

12. The dictum of Hon'ble Apex Court in **Rishi Pal Singh Solanki case (supra)** has been cited before me wherein the Hon'ble Apex Court had considered the judgments given in **Parag Bhati vs. State of U.P.; (2016) 12 SCC 744, Sanjeev Kumar Gupta vs. State of U.P. and Another; (2019) 12 SCC 370 and Abuzar Hossain vs. State of West Bengal; (2012) 10 SCC 489, Ashwani Kumar Saxena vs. State of M.P.; (2012) 9 SCC 750, Babloo Pasi vs. State of Jharkhand; (2008) 13 SCC 133, Arnit Das vs. State of Bihar; (2000) 5 SCC 488, Jitendra Ram vs. State of Jharkhand; (2006) 9 SCC 428** and several others.

13. In Para-25 of the above judgment (Rashipal Singh Solanki), the Hon'ble Apex Court has pointed out the difference in the procedure under the two enactments i.e.,

the Juvenile Justice Act, 2000 and the Juvenile Justice Act, 2015, as to inquiry into determination of age of the juvenile and also the power to seek evidence, how and when to exercise that power and when to go for ossification test. The Hon'ble Court, in nutshell, held that each case may be dealt in the light of its own peculiar facts and circumstances while keeping certain principles as guiding factor in mind as described in concluding para of the judgment of Hon'ble Apex Court. The Supreme Court in concluding Para-29 (vi) of **Rishi Pal Singh Solanki (supra)** observed as below:-

"(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case."

14. In **Sanjeev Kumar Gupta vs. State of U.P., (2019) 12 SCC 370**, the credibility and authenticity of the matriculation certificate for the purpose of determination of age under Section 7(A) of the Juvenile Justice Act, 2000 came up for consideration. In the said case, the Juvenile Justice Board had rejected the claim of the juvenility and that decision of the Juvenile Justice Board was restored by the Hon'ble Apex Court by rejecting the order of the Hon'ble High Court. It was observed therein that the records maintained by the C.B.S.C. were purely on the basis of final list of the students forwarded by the Senior Secondary School where the juvenile had studied from Class-5 onwards and not on the basis of any other underlying documents. On the other hand, there was clear and unimpeachable evidence of date of birth which had been recorded in the records of another school, which the second respondent therein had attended till Class 4th and which was supported by voluntary disclosure made by the accused while obtaining both, Adhaar Card and driving license. It was observed that the date of birth reflected in the matriculation certificate could not be accepted as authentic or credible.

15. To sum up, besides several other facts and circumstances, the Juvenile Justice Board found this fact conspicuous that the birth of rest of the three children came to be registered in the Nagar Nigam Varanasi except the birth registration of present juvenile; that all the children of Pooja Upadhyay were born in a hospital except the present revisionist; the admission form submitted to Annie Besant School at the time of admission of present juvenile bore signature of both the parents and date of birth therein was mentioned as 02.09.2001 and when he was admitted in another institution in class-6 no transfer certificate or any other document was produced before that institution and a different date of birth 02.09.2002 from now on was mentioned.

16. It may be noted that there is a glaring gap and discrepancy between dates of birth recorded upto class-5 as compared to date which came to be recorded in class-6. In my view, to fill this gap a story was made up by the revisionist side that exactly on same date and month (but a year ago) mother of minor gave birth to another male child, who died within a few weeks. That theory cannot be accepted in view of overwhelming evidence to disbelieve the same.

17. Another contention is based on a birth certificate, again issued by Nagar

Nigam produced for the first time by mother of the revisionist before the appellate court, which showed his date of birth as 02.09.2002. I heard both the sides on this point. Admittedly, this birth certificate was not produced before the Juvenile Justice Board. Admittedly, there has not been any statement on oath given by mother of the revisionist that infact the birth of her third child was registered in Nagar Nigam Varanasi though belatedly. Copy of this paper is on record which indicates that birth was registered on 17.04.2012 i.e. almost 10 years after his birth; this certificate was issued on 01.09.2021 i.e. after about 10 months of passing of the impugned order by the Juvenile Justice Board. The contention is that this paper was produced before the appellate court but the appellate court wrongly did not took that paper into consideration. In my view, the production of this paper was just a next step in the chain of a concocted theory put up from the revisionist side. The story given by the revisionist as to birth and death of second child has no legs to stand and has been rightly discarded by the appellate court too as is very clear from para-22 of the impugned order. In my view, this birth certificate is a waste paper on which no reliance can be placed. As far as the request for medical examination is concerned, in view of unambiguous school papers from Annie Besant school, there was no need to go for medical examination. Hence, the court has committed no fault in rejecting the request for medical examination.

18. I do not find any illegality or impropriety in the order. The revision is therefore **dismissed**.

(2022) 12 ILRA 615
REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Crl. Revision No. 3848 of 2022

Shoib Ahmad ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Ram Bahadur, Sri Manoj Kumar Srivastava, Sri Anil Srivastava, Sr. Advocate

Counsel for the Opp. Parties:
G.A., Sri Akhilesh Kumar Dwivedi, Sri Amrendra Kumar Mishra

A. Criminal Law -Code of Criminal Procedure, 1973-Section 397/401, 319 - Indian Penal Code, 1860-Sections 498-A, 304-B – The Dowry Prohibition Act, 1961 - Section ¾ -deceased died in her matrimonial home within a short span of time i.e. 3 months-trial court while passing the impugned order only considered the statement of PW-1 and PW-2 but completely ignored the evidence collected by the I.O. during the course of the investigation based on which the revisionist was not charge-sheeted-the evidence of PW-1 which came up during his cross-examination with regard to the revisionist was not considered by the trial court-Thus, the impugned order passed by learned trial court is not sustainable and liable to be set aside.(Para 1 to 22)

B. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Session Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs

against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.(Para 17)

The revision is allowed. (E-6)

List of cases cited:

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

2. Sagar Vs St. of U.P. & anr. (2022) Live Law SC 265

3. Brijendra Singh & ors. Vs St. of Raj. (2017) 7 SCC 706

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

5. Brijendra Singh Vs St. of Raj. (2017) 7 SCC 706

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Heard Shri Anil Srivastava, Senior Advocate assisted by Shri Prem Narayan Singh, learned counsel for the revisionist, Shri Amrendra Kumar Mishra, learned counsel for the informant and Shri Om Prakash Mishra, learned Additional Government Advocate for the State and perused the record.

2. The instant criminal revision has been filed against the order dated 23.08.2022 passed by the learned Additional Sessions Judge/Fast Track Court-I, Bhadohi on the application under section 319 Cr.P.C. moved by the informant in Sessions Trial No. 281 of 2021 arising out of Case Crime No. 135 of 2021, under sections 498-A, 304-B IPC and section ¾ of Dowry Prohibition Act, police station Bhadohi, district Bhadohi, whereby the learned trial court has summoned the revisionist under Section 319 Cr.P.C. to face the trial with other accused.

3. Brief facts of the case as narrated in the first information report are that the informant Akhlaq Ahmad lodged a report at the police station concerned with the averment that he performed the marriage of his daughter Dilkusha Bano with Ashfaq Ahmad on 25th March 2021 according to Muslim rituals. After one week of the marriage, the in-laws started harassing her for dowry. His daughter telephonically informed him about the same based on which the informant went to his daughter's house and requested her in-laws a lot, but they did not agree. The informant also asked her daughter to tolerate it for a few days presuming that things would be fine. On 15.06.2021 at around 6.00 p.m. the accused Mushtaq Ahmad called on the mobile phone of Toni Mansoori, the son of the informant and asked him to come right away to his home. The informant along with his family members reached the house of his daughter's in-law. He saw that her dead body was lying on the bed and marks of injury were present on her body. He suspected that the accused persons have committed her murder for dowry.

4. After the investigation, a charge sheet came to be filed against the accused persons namely Ashfaq Ahmad, Salma, Mustaq Ahmad, Ismat Firdaus and Washeem except for the present revisionist Shoaib Ahmad, who happens to be the brother-in-law (dewar) of the deceased Dilkusha Bano.

5. The Investigating Office during the investigation based on some affidavits received of some persons and after recording the statements under Section 161 Cr.P.C. concluded that the present

revisionist received his education with his maternal uncle Mukhtar Ahmad and at the time of occurrence he was working in the business with his maternal uncle. He was not residing with his family members including the deceased, therefore, no involvement of the revisionist was found in the commission of the crime.

6. Learned counsel for the revisionist argued that the revisionist never made any demand of dowry from the deceased since he had nothing to do with the matrimonial dispute if any. The first information report has wrongly been lodged against the revisionist. The facts mentioned in the FIR are fictitious, untrue and not substantiated with any material evidence. The financial position of the revisionist is very sound, therefore there was no occasion to make any demand for dowry from the deceased by him. The marriage of the deceased was solemnized without dowry. General allegations have been leveled against all the accused persons. During the investigation, no credible evidence was collected by the Investigating Officer against the revisionist and no charge sheet was submitted against him.

7. It is further submitted that the trial court while passing the impugned order has not applied its judicial mind. The application under section 319 Cr.P.C. was moved against the revisionist in order to further blackmail and harass the family members of the revisionist. The impugned order is contrary to the law. The revision is liable to be allowed and the impugned order may be set aside.

8. Learned counsel for the revisionist referred to the evidence recorded by the trial Court during the course of the trial. He referred to the statement of P.W.-1 Akhlaq Ah mad, the informant and the father of the deceased, and PW-2 Fakhre Alam, the brother of the deceased, and submitted that these two witnesses have repeated their version before the trial court, similar to their version as recorded by the I.O. under Section 161 Cr.P.C. PW-1 Akhlaq Ahmad had admitted in his evidence that at the time of marriage of his daughter Dilkusha Bano, the revisionist was living with his maternal uncle (Mama) Mukhtar Ahmad and he continued to remain there till the death of the deceased Dilkusha Bano. He further submitted that the trial Court failed to appreciate the evidence available on record and merely on the basis of the examination in chief of the witnesses it passed the impugned order which is bad in law. The trial Court ignored the evidence collected by the Investigating Officer relating to the revisionist based on which the involvement of the revisionist was not found and a charge sheet was not filed against him.

9. In support of his contentions, learned counsel for the revisionist has relied upon the judgment in the case of **Hardeep Singh vs State of Punjab and others** reported in (2014) 3 SCC 92 and in the case of **Sagar vs State of U.P. and another** reported in **2022 Live Law (SC) 265.**

10. Per contra, Shri Amrendra Kumar Mishra, learned counsel for the informant and Shri Om Prakash Mishra, learned Additional Government Advocate submitted that marriage of deceased Dilkusha Bano was solemnized on 20.03.2021 while she died on 15.06.2021 within a short span of time in her matrimonial home. Some articles were given by the informant after the marriage despite that the accused persons continued

to make demands and harass her daughter. PW-1-Akhlakh Ahmad, the complainant and PW-2-Fakre Alam, brother of the deceased, have deposed before the Court and stated about the harassment made by all the accused named in the first information report including present revisionist Shoib Ahmad and also about making a demand of a gold chain and a four-wheeler. The deceased Dilkusha Bano was subjected to harassment and cruelty by all the accused including the revisionist. The revisionist was present at his house when the complainant reached the in-law's house of her daughter where he found his daughter dead. There was sufficient evidence on record to summon the accused to face the trial with other accused. The learned trial Court rightly considered the evidence available on record and has passed the impugned order. The revision is liable to be dismissed.

11. Section 319 Cr.P.C. reads as under :-

"319. Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub - section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. Informant Akhlaq Ahmad was examined as PW-1. He stated in his examination-in-chief that he performed the marriage of his daughter Dilkusha Bano with the accused Ashfaq Ahmad on 25.03.2021. He brought his daughter from her in-laws' house on 27.03.2021 and on 03.04.2021 he sent her back after performing her "Vida" ceremony. From that very day, all the accused including Shoib Ahmad (present revisionist) started to harass his daughter and make demands for a gold chain and a four-wheeler. For this demand, he went to his daughter's in-laws' house and requested them but they did not agree. He asked his daughter to tolerate it for some days till things get settled down. On 14.06.2021 he received a call from his daughter that all these persons are harassing her and they will kill her. On the same day, he received a call from Toni Mansoori and reached the house of his daughter and he found her dead. Injury marks were present on her body. At that time all the accused were present including Shoib Ahmad. He called the police and all the accused were arrested except for Shoaib Ahmed who managed to escape from there. PW-1 Akhlaq Ahmad has proved his written report as Ex. Ka. 1.

13. PW-2 Fakre Alam, who is the son of the informant stated in his evidence that on 03.04.2021 Ashfaq Ahmad, Salma,

Mustaq Ahmad, Ishmat Firdaus, Washeem Ahmad and Shoib Ahmad took his sister after "vida" ceremony. From that day, all these people started to make a demand for a gold chain and a four-wheeler. They were taunting and harassing his sister that they had given a four-wheeler in the marriage of their daughter and hence they expected the same from his deceased sister. His sister communicated these things telephonically to him. His father went to her house and had spoken with them. He also provided some gifts. His sister made a call from her husband's mobile phone saying that all these people would kill her for dowry. When he reached the house of her sister he found that her dead body was lying and there were marks of injuries on her body. He specifically alleged that her in-laws including Shoib Ahmad have committed dowry death.

14. The Investigating Officer collected the following evidence during the investigation:-

(i) The affidavit of Iftekhar Ahmad (the cousin of the revisionist)

(ii) Affidavit of Mukhtar Ahmad (the maternal uncle of the revisionist)

(iii) Affidavit of Abhay Kumar Yadav

(iv) Statement under Section 161 Cr.P.C. of Mukhtar Ahmad

(v) statement under section 161 Cr.P.C. of Abhay Kumar Yadav

(vi) statement under Section 161 Cr.P.C. of Santosh Kumar Singh

(vii) Statement under Section 161 Cr.P.C. of Bhushan Kumar Bij

15. Iftekhar Ahmad, son of Mukhtar Ahmad who is the cousin of revisionist Shoib Ahmad has mentioned in his affidavit that revisionist Shoib Ahmad received his education while residing in their house and on the date of occurrence he was with them. In his statement under Section 161 Cr.P.C., witness Mukhtar Ahmad supported the version stated in his affidavit and stated that for the last ten years revisionist was living with his son Iftekhar Ahmad and on the date of occurrence as well he was living with them. Witness Abhay Kumar Yadav supported his affidavit and stated in his statement under section 161 Cr.P.C. that he was working as an Assistant in M/s Art Palace Dining Division at Rampur District Jaunpur since last four years and the revisionist was working with him as in-charge in that firm. On the date of occurrence, Shoib Ahmad was present in the aforementioned workplace. Santosh Kumar Singh in his statement under section 161 Cr.P.C. narrated to the Investigating Officer that when the incident occurred on 15.06.2021 in his colony, Shoib Ahmad was not involved since he used to live with his maternal uncle in District Bhadohi. On the date of the occurrence, he did not come to his house. A similar statement was given to the Investigating Officer by Bhushan Kumar Bij.

16. PW-1 Ikhlakh Ahmad admitted during his cross-examination that at the time of the marriage of the son Ashfaq, his brother Shoib Ahmad (the revisionist) was working with his maternal uncle Mukhtar Ahmad. Therefore, the aforesaid evidence corroborates the evidence collected by the Investigating Officer during the investigation.

17. The Supreme Court in **Hardeep Singh vs State of Punjab and others** reported in **(2014) 3 SCC 92** has observed as under:

"98. Power under Section 319 Cr.P.C. is a discretionary and an extra- ordinary

power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

18. In **Brijendra Singh & Ors. Vs. State of Rajasthan**, (2017) 7 SCC 706, the Hon'ble Supreme Court has considered the observation made in **Hardeep Singh Vs. State of Punjab & Ors.**, (2014) 3 SCC 92 in the matter of the power of the Court to summon a non-chargesheeted accused and has observed that a parallel was drawn with the deposition of the prosecution witnesses before the Court and their statements recorded under Section 161 Cr.P.C. by the Investigating Officer during the investigation to find out whether something more than prima facie has come out in their deposition or not and something more than mere complicit prospective accused is established in the crime. The Hon'ble Apex Court observed that:

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated: power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the I.O. at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent

evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 Cr.P.C. to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

19. In the given case also the learned trial Court while passing the order for summoning the revisionist to face the trial under Section 319 Cr.P.C. has considered only the evidence produced before it by the prosecution witnesses PW-1 and PW-2. Moreover, the learned trial court completely ignored the evidence in the cross-examination of PW-1 Ekhlakh Ahmad in which he admitted that revisionist Shoib Ahmad was working with his maternal uncle Mukhtar Ahmad at the time of the marriage of the deceased. The learned trial Court also ignored the evidence collected by the Investigating Officer during the course of the

investigation based on which the revisionist was not charge sheeted.

20. In view of the above, it is clear that the learned trial court while passing the impugned order only considered the evidence of PW-1 and PW-2 recorded during the trial about the involvement of the revisionist and summoned him invoking the power for summoning revisionist under Section 319 Cr.P.C. to face the trial. The trial court has completely ignored the evidence which was available on record more than prima facie as referred earlier. In view of the observation made by the Hon'ble Apex Court in *Brijendra Singh Vs. State of Rajasthan* (supra) in the present case also the evidence recorded during the trial was nothing more than the statements of informant Ikhlakh Ahmad and his son Fakre Alam, recorded by Investigating Officer under Section 161 Cr.P.C. Sufficient evidence was collected by the Investigating Officer which does not suggest the involvement of the revisionist in the crime. The evidence of PW1 Ekhlaq Ahmad, which came up during his cross-examination with regard to the revisionist was not considered by the trial court while passing the impugned order.

21. Therefore, in view of the above, the impugned order passed by the learned trial Court is not sustainable and liable to be set aside. Resultantly, the revision is liable to be allowed.

Order

22. The Criminal Revision is hereby **allowed.**

23. The impugned order dated 23.08.2022 passed in Sessions Trial No. 281 of 2021 (State Vs. Ashfaq Ahmad and Ors) relating to Case Crime No. 135 of 2021, under Sections 498-A, 304-B IPC and section ¾ of Dowry Prohibition Act, Police Station Bhadohi, District Bhadohi, is hereby set aside.

24. Let the copy of this order be sent to the court concerned for information and necessary compliance.

(2022) 12 ILRA 622
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2022

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Crl. Revision No. 5121 of 2010

Shiv Narain Gupta ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Surendra Singh, Sri Harsh Narayan Singh, Sri Prashant Kumar Singh

Counsel for the Opp. Parties:
Govt. Advocate, Sri Sanjay Kumar Singh

A. Criminal Law -Code of Criminal Procedure, 1973-Section 397/401 - Negotiable Instruments Act, 1881-Section 138-challenge to- conviction-dishonour of cheque-notice was given under the stipulated time but the complaint was not filed within one month from the date on which cause of action arose-condonation of delay application was moved-objection filed with regard to condonation of delay to file a complaint beyond time by the complainant-Provision of section 142(b) of NI Act cannot be considered to be effective with retrospective effect-Ld trial court did not consider it and rejected the objection and did not give the benefit of the provision to the respondent-Therefore, the complaint filed by the revisionist barred by limitation.(Para 1 to 21)

The revision is dismissed. (E-6)

List of Cases cited:

Subodh S.Salaskar Vs Jay Prakash M. Shah & anr. (2008) 13 SCC 689

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Present Criminal Revision is preferred against the judgment and order dated 31.08.2010 passed by learned Additional Sessions Judge Court No. 3, Banda in Criminal Appeal No. 14 of 2008 (Laxmi Narain Vs. Shiv Narain Gupta and another), under section 138 of Negotiable Instruments Act,1881 Police Station Kotwali, District-Banda, whereby learned Revisional Court set aside the judgment and order of sentence passed by the learned Civil Judge (S.D.)/ A.C.J.M., Banda in Complaint Case No.31/1/2008 (Shiv Narain Gupta Vs Laxmi Narain) convicting and sentencing the respondent no.2 with rigorous imprisonment for two years and with fine of Rs. 2000/-.

2. Brief facts of the case are that revisionist instituted a complaint case against the respondent no.2 under Section 138 Negotiable Instruments Act, alleging therein that on 17.03.1996 respondents borrowed Rs. 40,000/- from the revisionist and against that amount, he gave a cheque dated 20.03.1996 of this amount to the revisionist. The aforesaid cheque was presented for payment in the bank, but it was dishonoured on account of insufficient of the amount in the account of the respondent No.2. Thereafter, a notice dated 16.08.1996 was given by the revisionist asking him to repay the amount within fifteen days, but respondent No.2 did not make the payment.

3. Learned Trial Court vide order dated 23.02.2008 observed that respondent no. 2 has committed offence under section Section 138 Negotiable Instruments Act, and after considering the material available on record awarded punishment as aforesaid.

4. Feeling aggrieved with the aforesaid judgment and the order of the conviction, the respondent Laxmi Narayan preferred Criminal Appeal No.14 of 2008 before the Additional Session Judge, Banda, which was decided by means of impugned order dated 31.08.2010 and appeal of the respondent no.2 was allowed and judgment and order of sentence was set aside.

5. Against the impugned order dated 31.08.2010, present criminal revision has been filed.

6. Heard Sri Harsh Narayan Singh, learned counsel for the revisionist and Sri Alok Kumar Gupta, Advocate holding brief of Sri Sanjay Kumar Singh, learned counsel for the informant and perused the record.

7. Learned counsel for the revisionist vehementally urged that learned Revisional Court has committed jurisdictional error in passing the impugned order. Revisionist has proved its case with oral and documentary evidence, on which basis learned trial court convicted the respondent. Learned trial court has appreciated the material available on record rightfully. The cheque was not given by the respondents to the revisionist as collateral security against the amount borrowed by him while it was given to discharge of debt. Revisionist presented the cheque before Tulsi Gramin Bank on 12.08.1996 i.e. well within time, but it was dishonoured due to

insufficiency of the fund in the account of the respondent. Upon receiving the information, revisionist served notice dated 16.08.1996 to the respondents. Respondent inspite of proper service of notice upon him, failed to comply the requirement as contained in the notice and did not pay the amount to the revisionist therefore, complaint under Section 138 Negotiable Instruments Act,1881 was filed by the revisionist.

8. Learned counsel for the revisionist further submitted that learned trial court has rightly allowed the delay condonation application of the revisionist, since sufficient reason was given by the revisionist in his application. It is also submitted that respondents moved an application to recall the order of delay condonation but it was rightly rejected by the trial court. Learned Revisional court although has observed that complaint filed by the revisionist was time barred, but it rightly held that no benefit of this fact could be given to respondents since he did not prefer any legal remedy against the order of trial court passed on his application to recall order for delay condonation.

9. It is further submitted that revisional court erroneously arrived at a conclusion that cheque was given by the respondent in the form of collateral security while the cheque was given by the respondents to discharge of debt amount taken by him.

10. Learned counsel for the revisionist referred that in the provision contemplated under section 142 (b) of the Negotiable Instruments Act, 1881 revisionist has been granted the relief of delay condonation by learned trial court and objection of respondent were rejected thereafter.

11. Per contra, learned counsel for the respondent and learned A.G.A. has submitted that when the order of delay condonation was passed by the learned trial court, the aforesaid provision was not inserted in the Act. It is further submitted that learned revisional court opined that complaint of the revisionist was time barred but erroneously it held that since respondent has not availed any legal remedy against the order of delay condonation, therefore, no benefit could be given to the respondents and assumed that the complaint of the revisionist was maintainable. Further it is submitted that cheque was given for collateral security of the amount borrowed by the respondents.

12. Section 138 of Negotiable Instruments Act, 1881 reads thus:-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both.

Provided that nothing contained in this section shall apply unless--

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

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque,3[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

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

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

13. That in the case in hand on the basis of the fact, it transpires that cheque was given by the revisionist to the respondent no.2 on 20.03.1996. The aforesaid cheque was presented for clearance in Tulsi Gramin Bank on 12.08.1996 i.e. within six months as provided under Section 138 of Negotiable Instruments Act, 1881. After receiving the information from the Bank that cheque is not honoured due to in sufficient of the fund in the account of respondent no.2, the revisionist served a notice dated 16.08.1996 to the respondent no.2. The notice was given under the stipulated time as provided. But the complaint was filed under Section 138 of Negotiable Instruments Act, 1881 on 08.10.1996 by the revisionist, which ought to have been filed within one month from the date on which cause of action arose under Clause (c) of proviso of section 138 of Negotiable Instruments Act, 1881.

14. Perusal of record goes to show that during pendency of the complaint before the learned trial court, an application under Section 11-A for condonation of delay was moved on behalf of the revisionist on 06.01.1997. Thereafter, objection-paper No.14-A was filed by the respondents-opposite party on 27.03.1998 to recall the application dated 06.01.1997 with regard to condonation of delay to file a complaint beyond time by the complainant.

15. Learned trial court vide order dated 01.04.1997 rejected the objection of the respondent-opposite party and passed summoning order.

16. Learned counsel for the respondent vehmentally argued that provision of Section 142 (b) of Negotiable Instruments Act, 1881 was inserted by Act No. 55 of 2002 and it was made applicable w.e.f. 06.02.2003. Only after implementation of this provision, the court has power to take cognizance upon complaint which has filed after prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period. Learned counsel for the revisionist further argued that provision of Section142 (b) of the Negotiable Instruments Act, 1881 are not applicable with retrospective effect, therefore, the delay condoned by the learned trial court was erroneous and even when the revisional court opined that complaint was not filed within stipulated period, it would have been given benefit to the respondents-opposite party.

17. The proviso of Section 142(b) of Negotiable Instruments Act, 1881 was inserted by Act No. 55 of 2002, section 9 (w.e.f. 06.02.2003) as under:-

"Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period"

The provision made with insertion of the proviso empowers the Court to take cognizance of a complaint after the prescribed period, if the complainant satisfies that he had sufficient cause for not making a complaint within such period.

18. In ***Subodh S. Salaskar Versus Jay Prakash M. Shah and another (2008) 13 SCC 689***, Hon'ble Apex Court held that:-

26. "..... The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act,196 or Section 473 of the Code of Criminal Procedure,1976. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well settled, in absence of an express provision,cannot be given a retrospective effect or retroactive operation".

19. On the basis of observations made above by Hon'ble Apex Court, in the aforesaid matter, it is clear that provision of Section 142 (b) of Negotiable Instruments Act, 1881 cannot be considered to be effective with retrospective effect. Therefore, learned trial court has wrongly passed the order for condontion of delay in filing the complaint by the complainant and, moreover, when the objection was raised before the revisional court, it did not consider it and has rejected the objection. Learned revisional also ignored the provision as contained under section 142(b) of the Negotiable Instruments Act, 1881 and did not give the benefit of the provision to the respondent. Therefore, it is observed that the complaint filed by the revisionist barred by limitation.

20. That so far as the nature of transaction is concerned, learned revisional court on the basis of evidence produced by the revisionist observed that cheque was given by the respondent to the revisionist for collateral security not as discharge to any of debt or other liability. Revisional Court after appreciating the material available on record rightly observed that the cheque was given as collateral security to the amount given by the revisionist to the respondents. There is no illegality in observation and conclusion drawn by the learned trial Court.

21. In view of the above, criminal revision lacks merit and, is hereby ***dismissed***.

(2022) 12 ILRA 627
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Crl. Misc. Writ Petition No. 1294 of of 2020
with
Crl. Misc. Writ Petition Nos. 622 of 2022, 7160 of 2022, 5148 of 2021, 8758 of 2022 & Transfer Application (Criminal) No. 239 of 2020

Pramod Chandra Gupta ...Petitioner
Versus
The State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Shiv Sagar Singh, Sri Manish Gupta

Counsel for the Respondents:
G.A., Sri Gyan Prakash (Senior Adv.), Sri Sanjay Kumar Yadav

A. Criminal Law - Constitution of India, 1950- Article 226 - Indian Penal Code, 1860-Sections 420, 467,468, 471, 120-B – Prevention of Corruption Act,1988 - Section 13(1)(c), 13(1)(d) r/w Section 13(1)(2) of PC Act-Challenge to-Supplementary charge sheet filed by CBI against the discharged accused-CBI committed no illegality in charge sheeting the discharged accused as discharge of an accused u/s 227 does not tantamount to acquittal-The court can consider the offence again as it would not tantamount to review of the discharge order-This does not prejudice the accused, rather, it is the mandate of law i.e. no accused can escape trial-Once a report u/s 173(2)/173(8) of the code submitted, it can only be closed, proceeded further or case closed by the court of competent jurisdiction-The U.P. Police had filed the charge sheet at Meerut being designated Anti Corruption Court having jurisdiction over district Mathura-But on the case being transferred to CBI, the CBI filed the supplementary report before the designated Anti Corruption CBI Court at Ghaziabad-In exercise of powers u/s 186 of Code, High Court can transfer the trial from Special Judge Meerut to CBI Court at Ghaziabad , having jurisdiction-CBI in the present case has charge-sheeted public servants, private persons and companies for offences under PC Act, IPC, including, conspiracy-The conspiracy to commit offence punishable under the PC Act itself is an offence to be tried only by a Special Judge-It is not necessary that in every offence under the PC Act, a public servant must be an accused- The transfer application is allowed. (Para 1 to 102)

B. In the present case, the investigation of the case was transferred to CBI at the stage of pendency of investigation against some other persons-The U.P. Police had not concluded and closed the investigation-In the meantime, the earlier charge sheeted accused by the U.P. Police came to be discharged by the trial court for some of the offences under the IPC and the PC Act-The charges, thereafter, was framed by the trial court on other counts-The CBI upon concluding the investigation submitted supplementary charge sheet against 31 persons, including the petitioners, for the some offences already discharged by the trial court. (Para 67 to 70)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. T.T. Antony Vs St. of Ker. & ors.(2006) 1 SCC 181

2. Pradeep Ram Vs St. of Jharkhand & anr. (2019) AIR SC 3193

3. Vinubhai Haribhai Malaviya & ors. Vs St of Guj. &anr. (2019) 17 SCC

4. Common Cause Vs U.O.I. (1996) 6 SCC 775

5. Vinay Tyagi Vs Irshad Ali @ Deepak &ors. (2013) 5 SCC 762

6. Ratilal Bhanji Mithani Vs St. of Mah.(1979) AIR SC 94

7. Md. Safi Vs St. of W.B. (1966) AIR SC 69

8. St. of Bih. Vs J.A.C. Saldanha &ors. (1980) 1 SCC 554

9. P. Vishwanathan Vs Dr. A. K. Burman (2002) SCC OnLine Cal 805

10. Vishanu Maurya Vs St. of Raj. (1990) CrLJ 1750 Raj.

11. Hemant Dhasmana Vs C.B.I.(2001) 7 SCC 536

12. U.O.I. Vs Prakash P. Hinduja (2003) 6 SCC 195

13. Vineet Narain & ors. Vs U.O.I. (1998) 1 SCC

14. H.N. Rishbud Vs St. of Delhi (1955) SCR 1150

15. Prabhu Vs Emperor (1944) AIR SC 73

16. Lumbhardar Zutshi Vs The King (1950) AIR PC 26

17. Vinubhai Haribhai Malaviya & ors. Vs state of Gujarat

18. Luckose Zachariah @ Zak Nedumchira Luke & ors. Vs Joseph Joseph & ors. (2022) SCC OnLine SC 241

19. St. of M.P. Vs Sambhu Dayal Nagar (2007) 1 SCC Cri. 1

20. Romila Thapar Vs U.O.I. (2018) 10 SCC 753

21. St. thru CBI New Delhi Vs Jitender Kumar Singh (2014) 11 SCC 724

22. Ajay Aggarwal Vs U.O.I. (1993) 3 SCC 609

23. Pooja Pal Vs U.O.I. (2016) 3 SCC 135

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

1. Heard Shri Manish Gupta, assisted by Shri Abhishek Tripathi, Shri Shiv Sagar Singh, learned counsels for the petitioners, Shri Gyan Prakash, learned Senior Advocate, assisted by Shri Sanjay Yadav, learned counsel for C.B.I, Ms. Manju Thakur, learned A.G.A. for the State and Shri Jitendra Prasad Mishra, learned counsel appearing on behalf of Directorate of Enforcement.

2. Reliefs pressed by the petitioners/CBI:

(i) Criminal Misc. Writ Petition No. 1294 of 2020

(a) Issue a writ, order or direction in the nature of certiorari quashing the FIR bearing no. RC1202019A0008 dated 24.12.2019 registered by Central Bureau of Investigation, Ghaziabad, U/s 420, 467, 468, 471, 120-B IPC and Section 13(1)(c), 13(1)(d) read with Section 13(1)(2) of PC Act, 1988 in pursuance of the Gazette Notification bearing no. 228/35/2018-AVD-II dated 24.10.2019 issued by DOPT, Ministry of Personnel, Public Grievance and Pensions, Government of India for further investigation being violative of Article 14, 20 and 21 of the Constitution of India.

(ii) Criminal Misc. Writ Petition No. 622 of 2022

(a) Issue a writ, order or direction in the nature of certiorari for setting aside and/or to quash the FIR bearing no. RC1202019A0008 dated 24.12.2019 registered by Central Bureau of Investigation, U/s 120-B, 420, 467, 468, 471 IPC r/w Section 13(1)(c), 13(1)(d) and Section 13(2) of Prevention of Corruption Act, 1988, in pursuance of the Gazette Notification bearing no. 228/35/2018-AVD-

II dated 24.10.2019 issued by DOPT, Ministry of Personnel, Public Grievance and Pensions, Government of India for further investigation having identical allegations in FIR bearing no. 421/2018 dated 03.06.2018 registered by P.S. Kasna, Gautam Budh Nagar, u/s 120-B, 420, 467, 468, 471 IPC r/w Section 13(1)(c), 13(1)(d) and Section 13(2) of Prevention of Corruption Act, 1988 in which cognizance was taken, charges were framed and trial was going on before the Ld. Trial Court, Anti Corruption, Meerut in which cognizance was taken, charges were framed and trial was going on before the Ld. Trial Court, Anti Corruption, Meerut as the said second FIR is not maintainable on identical allegations in the eyes of law in which cognizance is taken, charges are framed as the law laid down by the Hon'ble Supreme Court of India in "T.T. Antony vs. State of Kerala and others" (2001) 6 SCC 181 dated 12.07.2001 and "Arnab Manoranjan Goswami vs. State of Maharashtra" (2021) 2 SCC 427 dated 27.11.2020; and/or

(iii) Criminal Misc. Writ Petition No. 7160 of 2022

(a) Issue a writ, order or direction in the nature of Certiorari for setting aside and/or to quash the ECIR bearing no. ECIR/03/LKZO/2020/242 registered by the Directorate of Enforcement arising out of the FIR bearing no. RC1202019A0008 dated 24.12.2019 registered by Central Bureau of Investigation, U/s 120-B, 420, 467, 468, 471 IPC r/w Section 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988; and

(b) Issue a writ, order or direction in the nature of Certiorari for setting aside and/or to quash Summon dated 29.04.2022 bearing No. PMLA/ SUMMON/ LKZO/ 2022/516 issued by the office of Directorate of Enforcement to the Applicant/petitioner in the aforesaid ECIR bearing no. ECIR/ 03/ LKZO /2020/242 registered by the Directorate of Enforcement arising out of the FIR bearing no. RC1202019A0008 dated 24.12.2019 registered by Central Bureau of Investigation, U/s 120-B, 420, 467, 468, 471 IPC r/w Section 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988; and

(c) Issue an order or direction in the nature of mandamus summoning all the record of the instant ECIR bearing no. ECIR/03/LKZO/2020/242 registered by the Directorate of Enforcement arising out of the FIR bearing no. RC1202019A0008 dated 24.12.2019 registered by Central Bureau of Investigation, U/s 120-B, 420, 467, 468, 471 IPC r/w Section 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988.

(d) Issue an order or direction in the nature of mandamus directing the Respondent ED not to proceed further and take any coercive action against the Petitioner/still the final adjudication of the instant Writ Petition.

(iv) Criminal Misc. Writ Petition No. 10995 of 2021

(a) Issue a writ, order or direction in the nature of mandamus quashing the impugned notification bearing No. U.O.-31/6-PO-9-18-167G/2009-Nyay-2 dated 24.07.2018, issue by Under Secretary, Department of Home Affairs, Government of U.P.;

(v) Criminal Misc. Writ Petition No. 8758 of 2022

(a) Issue a writ, order or direction in the nature of Certiorari for

quashing the proceedings of ECIR bearing no. ECIR/03/LKZO/2020/242 registered by the Directorate of Enforcement;

(b) Issue a writ, order or direction in the nature of Certiorari quashing the Summons dated 29.04.2022 bearing No. PMLA/ SUMMON/ LKZO/2022/511, 512 issued by the Office of Directorate of Enforcement to the Petitioners in the aforesaid ECIR bearing no. ECIR/03/LKZO/2020 registered by the Directorate of Enforcement; and

(c) Issue an order or direction prohibiting the respondents to proceed any further in pursuance to the ECIR bearing no. ECIR/03/LKZO/2020 and further to command them not to take any coercive measure in pursuance thereof in the nature of mandamus directing the Respondent E.D. not to proceed further and take any coercive action against the Petitioners/till the final adjudication of the instant Writ Petition.

(vi) Criminal Misc. Transfer Application No. 239 of 2020

CBI has sought transfer of the trial from court at Meerut to the CBI court at Ghaziabad:

"It is, therefore, most humbly prayed that the Hon'ble Court may graciously be pleased to allow this transfer application and transfer the Session Trial of all 5 court cases No. (CC No. 160/2018, 24/2019, 45/2019, 70/2019 and 84/2019) in Case Crime No. 421 of 2018, under Sections 120-B, 420, 467, 468 & 471 of IPC and Section 13 of Prevention of Corruption Act, registered with Police Station Kasna, District Gautam Budh Nagar, Uttar Pradesh to Hon'ble Court of Special Judge, Anti Corruption, Ghaziabad and till the matter not transferred to Hon'ble Court of Special Judge, CBI Anti Corruption, Ghaziabad trial proceeding in all related matters i.e. may be kept in abeyance in the interest of justice/or pass such other and further order which this Hon'ble Court may deem fit and proper under circumstances of the case, otherwise the applicant shall suffer irreparable loss injury."

3. The afore-noted writ petitions arise from the same incident and facts, accordingly, on consent of the parties, are being heard and decided together by a common judgment and order.

4. The writ petitions (7160/2022 and 8758/2022) filed against the FIR lodged by the Enforcement Directorate for money laundering by reproducing the FIR lodged by the U.P. Police and CBI, is dependant on the fate and outcome of other writ petitions. Learned counsel for the petitioners has submitted that nothing more is required to be stated in respect of the above noted writ petitions.

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

6. Briefly, the writ petitions, inter alia, raise challenge to (i) the notification issued by the Government of Uttar Pradesh transferring the investigation to Central Bureau of Investigation1; (ii) FIR lodged by the CBI pursuant to the notification of the State Government/DOPT; (iii) FIR lodged by the Directorate of Enforcement consequent to the FIR/report filed by the CBI; (iv) petition filed by the CBI seeking transfer of the trial from the court of Special Judge, Anti Corruption, Meerut, to Special Judge, Anti Corruption, CBI at Ghaziabad.

FACTS

7. On 03.06.2018, FIR bearing Case Crime No. 421 of 2018, under Sections 120-B, 420, 467, 468, 471 IPC, read with,

Section 13(1)(c),(d) and 13(1)(2) of PC Act, P.S. Kasna, District Gautam Budh Nagar, came to be lodged by Yamuna Expressway Industrial Development Authority2 against 21 nominated and other unknown persons. It was alleged in the report that with regard to purchase of 57.1549 hectare land, it transpired from the enquiry report dated 8.11.2017, submitted by the General Manager Project, and from another enquiry report dated 7.5.2018, submitted by the Chief Executive Officer, YEIDA/ Chairman/ Commissioner, Meerut Division, Meerut, that the land of seven villages of district Mathura, was purchased by YEIDA for which Rs.85.49 crore was paid. The inquiry revealed that the then Chief Executive Officer3, YEIDA, and other officers conspired in the purchase of land through their relatives, friends and other related persons. The purchased land was subsequently found not fit and conducive for the purpose for which the land was purchased by YEIDA. The land purchased, through relatives and friends of the officers of YEIDA, was purchased at exorbitant rates, thereby, causing huge loss to YEIDA. It was further revealed in the enquiry that the entire land purchased i.e. 57.1549 hectare is still lying vacant as it cannot be utilized by YEIDA, being non contagious i.e. scattered. The report, thereafter, details the irregularities/illegalities committed by the accused persons in purchase of land in the seven villages of Mathura.

8. Thereafter, pursuant to Order No. 1770(2)/P/VI-P-3-2018-15(06)P/2018 dated 26.07.2018, of Government of U.P. and subsequent Gazette Notification No. 228/35/2018-AVD-II dated 24.10.2019 issued by Department of Personnel and Training, Ministry of Personnel, Public Grievance and Pensions, Govt. of India, New Delhi4, the Case Crime No. 421/2018, was transferred to CBI, consequently, a Regular Case RC1202019A0008 was re-registered at CBI/ACB/Ghaziabad on 24.12.2019, pursuant to which investigation of Case Crime No. 421/2018, Police Station Kasna, District Gautam Budh Nagar, was taken over by CBI for further investigation. It appears that U.P. Police, either were not informed/aware that the investigation has been transferred to CBI and they proceeded with the investigation. Pursuant to the FIR initially registered with UP Police bearing Case Crime No. 421/2018, UP Police had arrested Shri PC Gupta on 23.06.2018 and a report (chargesheet) U/s 120-B, 420, 467, 468 & 471 IPC and Section 13(2) of PC Act, was filed against him before the Special Judge, Anti Corruption, Court No. 02, Meerut, on 18.09.2018. Role of few more accused persons surfaced, consequently, four more supplementary charge sheets were filed by U.P. Police on different dates i.e. 8.03.2019, 22.05.2019, 23.08.2019 and 24.09.2019, against Ranveer Singh, Bajesh Kumar, Gaurav, Manoj, Anil, Jugesh, Satender S/o Tursan Pal, Satender S/o Khem Chand, Sanjeev Kumar, Ramesh Bansal and Sonia Bansal.

9. Learned Special Judge, Anti Corruption, Meerut, passed orders on 1.05.2019, 7.06.2019 and 11.02.2021, respectively, framing charges against the accused, however, the accused came to be discharged by the court for offences under Sections 467, 468, 471 IPC and Section 13(1)(c) and (d) of PC Act. It is, thereafter, the CBI reproduced and re-registered Case Crime No. 421 of 2018, bearing No. RS 1202019A0008 dated 24.12.2019, under the same sections after lapse of sixteen months from the notification of the State of U.P. transferring the investigation.

10. After investigation, CBI filed supplementary report (charge-sheet No. 11 dated 23.12.2021), before the CBI Court at Ghaziabad, against 31 accused persons, including, companies under Sections 120-B, 420, 468, 471 IPC and Section 13(2) read with 13(1)(d) of PC Act. Accused, Nidhi Chaturvedi and Pramod Yadav, were not charge-sheeted for want of evidence against them. The report notes/records the background of the events of the crime.

Result of the Investigation

11. Investigation undertaken by CBI revealed that YEIDA is the nodal agency responsible for implementing the Yamuna Expressway Project and allied development in the region. Major decisions pertaining to policy matter is taken by the Board of YEIDA, which, *inter alia*, consists of the Principal Secretary to the Government of Uttar Pradesh and other officers. Day to day work of the YEIDA is looked after by the Staff of YEIDA, headed by CEO and other subordinate officers who work under his administrative control. CEO is authorized by the Board to provide financial and administrative approval in the matter of purchase of land from farmers through mutual consent as per the requirement of YEIDA. Investigation revealed that PC Gupta was working as CEO of the Authority during the relevant period when the land came to be purchased.

12. All the land related matters of YEIDA, viz- purchase of land through mutual consent, acquisition, resumption of LMC land, award to the affected farmers, is looked after by the Land Department, YEIDA, headed by Officer on Special Duty5 (Land) and assisted by Tehsildar, Naib Tehsildars, Lekhpals and others. Investigation revealed that VP Singh had worked as OSD, Ranveer Singh and Suresh Chand Sharma was posted as Tehsildar in YEIDA, during the relevant period, along with other staff. All the staff of Land Department were appointed on deputation.

13. Investigation further revealed that during the years 2014-16, about 57 hactare of land was purchased by YEIDA in seven villages of district Mathura, viz- Madore, Seupatti Bangar, Seupatti Khadar, Kaulana Bangar, Kaulana Khadar, Sotipura Bangar and Nauzhil Bangar, for an amount at Rs.96,33,65,575/- through 180 sale deeds for the following three purposes:

(1) For the construction of an entry-exit ramp near Bajna at the Yamuna Expressway (8.38 hectare)

(2) For allotment of abaadi plots to the farmers whose land had been acquired for the construction of Yamuna Expressway (12 hectare) and

(3) For the future development near the entry-exit ramp Bajna.

14. Investigation further revealed that Officers of YEIDA, including, PC Gupta - CEO, VP Singh- OSD, Suresh Chand Sharma - Tehsildar, Ranveer Singh - Tehsildar and other private persons entered into criminal conspiracy in furtherance of the crime, the above officers, by abusing their official position as public servant, dishonestly and fraudulently got the land purchased from the farmers for their acquaintance, relatives, friends and related persons in their names. Thereafter, within a short span of two/three months, the same land was got purchased for YEIDA by the above noted officers on more than double the rates, thereby, earned wrongful gain for themselves and caused wrongful loss to YEIDA.

15. Investigation further revealed that all the above land (approx 21 hectare) was

purchased by YEIDA from outsiders i.e. who are not local residents and they (outsiders) had purchased the same land from the local farmers on much lower rates, just two-three months prior, to sell their land to YEIDA. Investigation revealed that all these outsiders (person/companies) are related/associated/allied, to the officials of YEIDA, namely, PC Gupta- CEO, VP Singh - OSD, Suresh Chand Sharma, Tehsildar and Ranveer Singh, Tehsildar.

16. Investigation further revealed that no detail is available in the file pertaining to payment and publication of the advertisement in newspapers (related to purchase of land by YEIDA). It is further revealed that public notice of one village, viz., Seupatti Bangar, (against the land of five villages) was shown published in local newspaper, which has practically no circulation.

17. Investigation further revealed that weekly newspaper "Manohar Samachar' of Agra, is not authorised by Directorate of Advertising and Visual Publication6 for publication of any Government advertisement. In written reply, publisher confirmed that no such advertisement on behalf of YEIDA was ever published in his newspaper on 28.12.2013. It has been further informed by the publisher that he is authorized to publish his newspaper only on Sunday, whereas, advertisement has been shown published on Saturday, in the files of YEIDA. This establishes that fake newspaper was manufactured to complete the official record by the officials of YEIDA.

18. Further, to hide the purchase and payment from the Income Tax Department, the officials of YEIDA kept the sale amount below Rs.30 lakhs in the sale-deeds to avoid information to the Income Tax Department. On scrutiny, it is revealed that the balance amount towards consideration of the purchased land was subsequently released by YEIDA. In other words, to avoid scrutiny of the exorbitant rates, the sale consideration of the purchased land was broken in parts.

19. As per rule, the stamp duty should have been paid on the total purchase consideration i.e. 9,07,30,399/-, however, in this case the stamp duty was paid only for the amount of Rs. 4,99,18,462/- and rest of the amount i.e. Rs.4,08,11,937/- was paid to the farmers as Remaining Amount (Awshesh Rashi) to by-pass the Revenue, which is against the provision of the Stamp Act.

20. Investigation further revealed that out of 35.7 hectare, approx 27.4565 hectare land, was purchased from the outsiders i.e. sixteen persons/companies, all related/associated/allied to the accused officers of YEIDA, namely, PC Gupta, VP Singh, Suresh Chand Sharma and Ranveer Singh. These persons/companies are not the local residents of the villages of district Mathura, but, had purchased the land just two-three months back, from the local land owners by cheating them and subsequently sold the same land to YEIDA on more than double the purchase rates, thereby, making windfall gain for themselves and causing wrongful loss to YEIDA.

21. Investigation further revealed that out of 56.481 hectare land purchased by YEIDA, approx 41 hectare land was purchased by nineteen persons/companies, who are related/associated/allied to the officers of YEIDA viz. PC Gupta, VP Singh, Suresh Chand Sharma and Ranveer Singh, who had purchased parcel of land

just two-three months earlier from the local farmers on much lesser rates and sold the same land to YEIDA on exorbitant higher rates.

22. The relatives and acquaintance, include, nephew, wife, daughter, brother-in-law, father-in-law, sister's son, servant, gardener.

23. That apart, land was purchased through dormant/shell companies, wherein, life was injected into the companies at the relevant time to purchase the land. The shares of these companies were transferred to the relatives/friends/acquaintance of the officers of YEIDA, before purchase of the land.

24. Investigation further revealed that Khasra (plot) numbers purchased for the development purpose is not contagious, therefore, cannot be utilised for any development purpose, in its present form, as the Khasra numbers (plots) are scattered and lying at considerable distance from each other.

25. Questions for determination:

Having heard the rival contentions, the questions that arise for consideration is as to whether (i) FIR lodged by the CBI is second FIR for the same incident and facts; (ii) whether further investigation and consequent supplementary report submitted by the CBI would vitiate the investigation for want of permission of the concerned court; (iii) whether it is a case of double jeopardy insofar it relates to those accused who were already discharged for want of evidence by the trial court for offence under Sections 467, 468, 471 IPC and Section 13(1)(c) and (d) of Prevention of Corruption Act, 19887; (iv) whether CBI was justified in filing supplementary report (chargesheet) for the very same offence for which the accused came to be discharged; (v) whether investigation by U.P. Police/CBI -- irregular/illegal; and (vi) whether CBI designate court Special Judge, Anti Corruption at Ghaziabad would have jurisdiction of trial or the Special Judge, Anti Corruption, Meerut.

26. Question No. 1 :- (i) whether FIR lodged by CBI-- a Second FIR. (ii) whether the notification issued by U.P. Government and DOPT legal and valid.

27. On bare perusal of the impugned FIR, it came to be lodged by the CBI pursuant to the notification of DOPT issued under Section 5(1) of the DSPE Act. The FIR was re-registered by the CBI by reproducing the FIR of Case Crime No. 421 of 2018, lodged by U.P. Police. The FIR itself in column-12 clearly notes *"in compliance of above said notification, the FIR of Case Crime No. 421 of 2018 of Police Station Kasana, District Gautam Budh Nagar is reproduced below"*.

28. In this backdrop, the submission of learned counsel for the petitioner that the FIR re-registered by CBI by reproducing the FIR of Case Crime No. 421 of 2018, is second FIR, for the same incident, arising from the same facts is incorrect. The events that have unfolded as noticed herein above, reflect that it is a case of mere transfer of the investigation of Crime Case No. 421 of 2018, to a superior investigating agency i.e. C.B.I. pursuant to the notification issued by the Government of Uttar Pradesh. Accordingly, the dictum laid down in ***T.T. Antony vs. State of Kerala and others***8, would not apply. The Court in **T.T. Antony** (supra) held that there can be no second FIR and no fresh investigation on receipt of

every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. Only information about commission of a cognizable offence, which is first reduced in the station house diary by Station Incharge of Police Station can be registered as FIR under Section 154 Code of Criminal Procedure, 19739. A subsequent information will be covered by Section 162 Code.

29. In ***Pradeep Ram v. State of Jharkhand and another***10, the issue, inter alia, that fell for consideration was *"whether re-registration of F.I.R. No.RC-06/2018/NIA/DLI is a second F.I.R. and is not permissible there being already a FIR No. 02/2016 registered at P.S. Tandwa arising out of same incident?"*

30. The Court was of the opinion that *''FIR, which was re-registered by NIA on 16.02.2018 cannot be held to be second FIR of the offences rather it was re-registration of the FIR to give effect to the provisions of the NIA Act and re-registration of the FIR is only procedural act to initiate the investigation and the trial under the NIA Act. The re-registration of the FIR, thus, is neither barred nor can be held that it is second FIR.'*

31. In the given facts at hand, CBI merely re-registered the Crime Case 421/2018, lodged by the U.P. Police by reproducing it as per the CBI Manual. It is not a case of second FIR being lodged by the CBI on receipt of a subsequent information. Neither, it is a case of "fresh'/"denovo' or "reinvestigation' by the CBI, which the CBI otherwise, is not empowered to conduct. The submission of the counsel for the petitioner that the impugned FIR is second FIR, lacks merit, accordingly, rejected.

(ii) Notification whether valid and legal.

32. Learned counsel for the petitioner in the same breath submits that the notification issued by the Government of U.P. transferring the investigation to the CBI and the consequent notification issued by the DOPT, New Delhi, according approval is bad in law. On specific query, learned counsel for the petitioner does not dispute that the State Government was competent and within its right to order CBI investigation in exercise of power under the DSPE Act. Malafide is not alleged against the officials or the Government. Further, petitioners failed to show as to how they were prejudiced by transfer of the case to another investigating agency i.e. CBI. Similarly, DOPT was competent in accepting the request of the State Government, consequently, the notification entrusting investigation to CBI came to be issued. Mere delay in accepting the request of the State Government by the DOPT would not render the notification illegal or irregular.

33. The State Government having regard to the involvement of senior government officials, private persons and companies in the alleged land scam was justified in getting the case investigated by a superior agency. Fair and proper investigation of the case is in the interest of the petitioners. The U.P. Police, it will later be seen, that due to their inept and faulty investigation, petitioners came to be discharged of serious offences under the IPC and PC Act. Fair and unbaised investigation is the foundation of fair trial, which is also in the interest of the society. Learned counsel for the petitioners failed to show as to how the respective notifications

issued by the State Government and the DOPT is bad in law or irregular.

34. **Question No. 2** :- Whether permission of the court was required to be obtained by the C.B.I. for further investigation.

35. In ***Vinubhai Haribhai Malaviya and others v. State of Gujarat and another***11, the question before the Court that had arisen was "whether, after a charge-sheet is filed by the police, the Magistrate has the power to order further investigation, and if so, upto what stage of a criminal proceeding'.

36. The Supreme Court answered the question stating that the power of the Magistrate would be available at all stages of the progress of a criminal case before the trial actually commences.

37. Though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct "further investigation' or file "supplementary report' with the leave of the Court, the investigating agencies have not only understood but also adopted it as a legal practice to seek permission of the courts to conduct "further investigation' and file "supplementary report' with the leave of the court. The requirement of seeking prior leave of the court to conduct "further investigation', and/or, to file a "supplementary report' was held to have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. (Refer: **Vinay Tyagi**12 case)

38. It has been a procedure of proprietary and ordinarily desirable that the police should inform and has to seek permission of the court to continue "further investigation' and file supplementary chargesheet. Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused.

39. The next question that would follow is as to when the trial before the Court of Sessions commences.

40. In ***Common Cause vs. Union of India***13, Supreme Court upon examining the provisions of the Code held that before the Sessions Court trial commences when charges are framed.

"1. II (i) In cases of trials before the Sessions Court the trials shall be treated to have commenced when charges are framed under Section 228 of the Code of Criminal Procedure, 1973 in the cases concerned."

41. The investigating agency/CBI is, however, not empowered to conduct "denovo'/"fresh'/"reinvestigation'. The power conferred upon the investigating agency is of "further investigation'.

42. Supreme Court in ***Vinay Tyagi Vs. Irshad Ali alias Deepak and Others***14, laid down as follows:

"No investigating agency is empowered to conduct a "fresh', "de novo' or "re-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate."

43. The law as it stands is that the investigating agency under section 173(8) of the Code is required to inform and take permission of the court to conduct further investigation.

44. Now reverting to the facts brought on record. U.P. Police continued with the investigation despite the State Government had notified to transfer the case to be investigated by the C.B.I. However, before C.B.I. could re-register the FIR, the U.P. Police filed the first charge-sheet on 18.09.2018 (107/18), thereafter, four supplementary charge-sheets came to be filed on 8.3.2019 (24/19), 24.5.2019 (45/19), 23.8.2019 (70/19) and 24.9.2019 (84/19). The trial court, thereafter, framed charges against the charge-sheeted accused, vide orders dated 1.5.2019, 7.6.2019 and 11.2.2019. It is, thereafter, C.B.I. re-registered the Case Crime No. 421 of 2018 on 24.12.2019, as a regular case. In this backdrop, it is submitted that the investigating agency i.e. C.B.I. could not have proceeded to investigate the case as the trial had already commenced. Further, no permission was sought from the trial court for further investigation as mandated in **Vinay Tyagi (supra)** and subsequently followed in later pronouncement.

45. The primary police report dated 3.8.2018, filed by the U.P. Police, was submitted before the court on 20.9.2018, against one of the accused out of 22 nominated and other unnominated persons. In the police report (charge-sheet), it has been categorically stated by the Investigating Officer that the investigation against the other accused is still pending and under progress. Similarly, the subsequent supplementary charge-sheets submitted by the U.P. Police against other accused persons, clearly states and records that the investigation in respect of other accused persons is pending. Thereafter, the investigation, pursuant to the notification of the State Government and the DOPT, came to be transferred and re-registered by the C.B.I. In other words, CBI entered into the shoes of the U.P. Police to conclude the pending investigation of Case Crime No. 421/2018.

46. In this factual backdrop, the submission of the learned counsel for the petitioner that no permission was sought from the court, lacks substance and merit. It is not the case of the petitioners that the police report submitted by the U.P. Police tantamounts that the investigation of the case had concluded and was finally closed, rather, it is reflected from the charge-sheet and the supplementary charge-sheets, submitted by the U.P. Police before the competent court, that investigation in respect of other accused was pending and under progress. The information to the court through the police report that investigation is pending and under progress against other accused is sufficient compliance with regard to the ongoing investigation. Mere transfer of the pending investigation to the CBI, certainly would not tantamount to further investigation being carried out by the CBI after the U.P. Police having closed the investigation. The investigation by CBI is continuation of the very same case crime taken over from U.P. Police. The mandate of Vinay Tyagi (supra) is applicable in a case where the investigating agency concludes the investigation by submitting police report. The embargo of informing/taking permission of the court for further investigation would not apply in a case where the investigation is under progress against other accused and yet to be concluded. The U.P. Police in each of the

report filed before the court had informed the court of the pending investigation.

47. Further, there is no prohibition under the Code to preclude the trial court from proceeding with the trial against the accused already charge-sheeted by the U.P. Police during pendency of the investigation against other accused persons. The trial court need not wait until conclusion of the investigation against other accused. The trial can proceed against the charge-sheeted accused on material brought on record by the prosecution.

48. On perusal of the scheme of the Code pertaining to investigation, forwarding of police report, cognizance and commitment to the Court of Sessions for trial, there is no prohibition/restriction on the police to submit report (charge-sheet) against one or some of the accused, and/or, to keep the investigation pending against others. The investigating agency has power under Section 173(8) of the Code to put before the court new evidence which comes across even after filing of the police report (charge-sheet) or after the court taking cognisance against some of the accused. On commitment of the case to the Court of Sessions, the court can proceed with the trial by framing charge without waiting for the outcome of the pending investigation against other accused. During trial, the investigating agency can file supplementary report not only against whom the investigation was pending but also against the accused who were earlier charge-sheeted, provided, further evidence, oral or documentary, is obtained upon such investigation [Section 173(8) of the Code].

49. The C.B.I. submitted sole supplementary charge-sheet on 23.12.2021, against 31 accused persons, including, companies, whereas, other two alleged accused persons noted therein, came to be discharged as no evidence was found against them. In other words, the investigation came to be finally concluded by the C.B.I. which commenced with lodging of the FIR by the U.P. Police being Case No. 421 of 2018. The U.P. Police had categorically informed the trial court, while filing police reports that the investigation is under progress against other accused. The information to the court of the pending investigation is sufficient compliance of law.

50. Further, CBI during trial made an application before the trial court at Meerut seeking extension of judicial remand to two accused who were arrested by U.P. Police. In the application, it was categorically stated that pursuant to the order of the State Government and subsequent notification of the DOPT dated 24.10.2019, the case was transferred to CBI for further investigation. It was further stated by the CBI that investigation is at the initial stage and that five charge sheets have already been filed by the U.P. Police. The application came to be allowed by the court vide order dated 01.01.2020, extending the judicial custody remand, after noticing in the order that further investigation is in progress and the case was transferred to the CBI. In other words, CBI brought it to the knowledge of the court that further investigation is pending and that the CBI require the custody of the accused for investigation.

51. It is thus evident that it is a case of further investigation of the case instituted by the U.P. Police, which finally came to be concluded by the CBI. It is not a case where the U.P. Police had concluded the investigation by forwarding the police report and thereafter CBI had stepped in.

The mandate of **Vinay Tyagi** (supra) would not be applicable. In any case, the trial court was duly informed by the U.P. Police through the various police reports that the investigation against the accused is under progress. CBI upon taking over the investigation further informed the court while taking police remand custody of the accused. The record, thus, reveals that the trial court throughout was kept informed of the pending investigation. The objection of the learned counsel for the petitioners, accordingly is, rejected.

52. Question No. 3 :- Double Jeopardy

It is urged that C.B.I. on concluding the investigation and while submitting the report under Section 173(8) of the Code, has charge-sheeted the accused for the very same offences for which they (petitioners/accused) came to be discharged by the learned trial court. In this backdrop, it is submitted that it is a case of double jeopardy as accused would now face trial for the offences for which they earlier stood discharged/acquitted by the trial court.

53. In regard to the question on double jeopardy, under Article 20(2) of the Constitution of India, no person shall be prosecuted and punished for the same offence more than once. The said Article incorporates within its fold the plea of "outrefois convict" as known to the British jurisprudence or the plea of "double jeopardy" as known to American Constitution, but circumscribes it by providing that there should be not only a prosecution but also punishment in the first instance in order to operate as a bar to the second prosecution and punishment for the same offence. Section 300 of the Code lays down that a person once convicted or acquitted cannot be tried for the same offence which is based on the maxim "nemo debet bis vexari', thereby, meaning that a person cannot be tried a second time for an offence with which he was previously charged. In order to bar the trial of any person already tried, it must be shown that (i) he has been tried by a competent court for the same offence or one for which he might have been charged or convicted at that trial, on the same facts and (ii) he has been convicted or acquitted at the trial. The whole basis of the section is that first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal on merits. In a case exclusively triable by a Court of Sessions, the trial commences after a charge is framed under Section 228, and there is no trial before the charge is framed but only an inquiry. The provisions of the Code upon the question of previous acquittal are different from the principles underlined the English doctrine of "autrefois acquit' in this that the Code makes a clear distinction between "discharge" and "acquittal".

54. As per Section 227 of the Code, the court should ensure that there is no significant ground for proceeding, it means that no prudent person can conclude that there are grounds or even a single ground to sustain the charge against the accused. The test to be applied by the court is whether the materials on record if unrebutted, is sufficient to make conviction possible. But if the court is convinced after such consideration that there is ground for presuming that the accused has committed the offence which is exclusively triable by the Court of Sessions then the charges against the accused must be framed. Once the charge is framed the accused is put to trial and thereafter either acquitted or

convicted, but he cannot be discharged. Once charges are framed under Section 228 of the Code, there is no back-gear for discharging the accused under Section 227. Discharge of an accused under Section 227, is not tantamount to the acquittal of an accused.

55. In the case of ***Ratilal Bhanji Mithani v. State of Maharashtra***15, it has been held that once a charge has been framed, the court/Magistrate has no power to discharge the accused under the Code. Trial has to follow:

"Once a charge is framed, the Magistrate has no power to cancel the charge, and reverse the proceedings to the stage of Section 245 and discharge the accused. The trial in a warrant case starts with the framing of charge, prior to it, the proceedings are only an inquiry. After the framing of charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Sections 325 and 360."

56. It may be noticed that the language of Section 228 opens with the words, "if after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence'. The Judge may frame a charge and try him in terms of Section 228(1)(a) and if exclusively triable by the Court of Sessions, commit the case in terms of Section 228(1)(b). The purpose and object of the legislature in using the word "presuming' it can safely be concluded that "presuming' is an expression of relevancy and places some weightage on the consideration of the record before the Court. The record of the prosecution, at this stage, has to be examined on the plea of demur. Presumption is of a very weak and mild nature.

57. In ***Md. Safi v. State of West Bengal***16, Supreme Court held that a person has done something which is made punishable by law is liable to face trial.

"Where a person has done something which is made punishable by law is liable to face a trial and this liability cannot come to an end merely because the Court before which he was placed for trial forms an opinion that it has no jurisdiction to try him or that it has no jurisdiction to take cognizance of the offence alleged against him. An order of acquittal made by it is in fact a nullity."

58. The discharge of the accused at the stage of Section 227 of the Code is merely an inquiry based on the prosecution record in support of the police report, whether there is sufficient material to conclude/presume that either the accused is to be discharged or required to face trial after framing charge under Section 228 of the Code. Discharge is not acquittal. Accordingly, the plea of double jeopardy raised by the learned counsel for the petitioners is rejected.

59. **Question No. 4:-** Whether CBI justified in filing supplementary report against petitioner/accused for the discharged offences.

60. Investigation is for the purpose of collecting evidence by a police officer, and

otherwise by any person authorised by a Magistrate in this behalf, and also pertains to a stage before the trial commences. Investigation which ultimately leads to a police report under the Code is an investigation conducted by the police, and may be ordered in an inquiry made by the Magistrate himself in complaint cases.

61. "Inquiry" is defined in Section 2(g) as follows:

"2.(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;"

62. "Investigation" is defined in Section 2(h) as follows:

"2.(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf."

63. The statutory scheme of the Code, therefore, puts "inquiry" and "trial" in distinct compartments, as the very definition of "inquiry" demonstrates. "Investigation" is for the purpose of collecting evidence by a police officer.

64. The expression "fair and proper investigation' in criminal jurisprudence contemplates: 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.

65. A fair trial must commence only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted.

66. In ***State of Bihar v. J.A.C. Saldanha & others***17, a three Judge Bench, speaking through Desai, J., after referring the precedents held:

"25. There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. ..... Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognizance of the offence under Section 190 of the Code its duty comes to an end.

On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in Section 173(8).... "

67. In the facts of the case in hand, the investigation of the case was transferred to CBI at the stage of pendency of investigation against some other persons. The U.P. Police had not concluded and closed the investigation. In the meantime, the earlier charge sheeted accused by the U.P. Police came to be discharged by the trial court for some of the offences under the Indian Penal Code18 and the PC Act. The charges, thereafter, was framed by the trial court on other counts. The CBI upon concluding the investigation submitted supplementary charge sheet against 31 persons, including the petitioners, for the same offences already discharged by the trial court.

68. The question for consideration is as to whether CBI committed an illegality in charge-sheeting the discharged accused for the same offences.

69. There is no restriction or prohibition under the Code to preclude the court from considering the fresh material/ evidence brought on record by the investigating agency against the discharged accused. The court can consider the offence again as it would not tantamount to review of the discharge order. The satisfaction of the court would rest upon the fresh materials. As discussed earlier, discharge of an accused under Section 227 does not tantamount to acquittal. The investigating agency during further investigation can come across evidence implicating the discharged accused, in such circumstances accused has to face trial.

70. Under Section 227 of the Code, the accused is released on the ground of non-availability of the material collected by the officer during investigation. The discharge may be due to inept inquiry and investigation. The discharged person can again be charged subsequently after proper investigation and collection of relevant materials during the course of investigation. [Section 173(8) Cr.P.C.] (Ref: ***P. Viswanathan v. Dr. A.K. Burman***19)

71. Where the Magistrate had discharged some of the accused after recording the evidence let in by the prosecution, but, if fresh materials are found against the discharged accused, he can consider the offence as it would not tantamount review of the discharge order, earlier passed by the Magistrate. (Ref: ***Vishanu Murya vs. the State of Rajasthan***20).

72. The agency conducting such an investigation can either reach the same conclusion and reiterate it or it can reach a different conclusion. During such extended investigation, the officers can either act on the same materials or on other materials which may come to their notice. It is for the investigating agency to exercise its power when it is put back on that track. (Vide ***Hemant Dhasmana v. CBI***21)

73. The investigating agency i.e. C.B.I. in the given facts was justified in submitting charge-sheet against the discharged accused persons for the very same offences. The U.P. Police had filed charge-sheet against ten persons, whereas, the investigation against other accused persons was under progress. During investigation, CBI comes across any material, oral or documentary, while investigating the role of other accused persons and is satisfied that the evidence so

collected reflects upon the complicity of the discharged accused persons in commission of the offence, a supplementary report/charge-sheet can certainly be filed against them while submitting the police report in respect of the other accused persons. In the event of evidence surfacing against the discharged accused during further investigation, the consequence that follows is that the accused has to face trial. This does not prejudice the accused/petitioners, rather, it is the mandate of law i.e. no accused can escape trial. The question is accordingly answered against the petitioners.

74. **Question No. 5:** Whether irregular/illegal investigation by U.P. Police/CBI would have any bearing on the cognizance or trial.

75. A similar plea was raised in ***Union of India v. Prakash P. Hinduja***22, Supreme Court rejected the argument that since the directions issued by the Court in ***Vineet Narain and others v. Union of India***23, was not followed by the CBI and Chief Vigilance Commissioner (CVC), was not consulted by the CBI, before filing the charge sheet, the consequential proceedings of prosecution would be a nullity. The Supreme Court declined to quash the trial proceedings merely on the defect of not complying the directions.

76. The High Court held that in terms of directions issued in **Vineet Narain** (supra), CBI was to report to CVC about all cases taken up by it for investigation; progress of the investigation; cases in which charge-sheets are filed and their progress. CBI was bound to place the final results of its investigation along with all material collected before the CVC for the purposes of review. CBI had not placed before the CVC the results of its investigations and had by-passed it by filing a charge-sheet before the Special Judge. The High Court, in view of the mandate in ***Vineet Narain*** (supra) not being complied by the CBI, allowed the writ petition and quashed the cognizance taken by the Special Judge and all consequential proceedings. The Supreme Court reversed the decision of the High Court.

77. Reliance was placed by the Supreme Court on ***H.N. Rishbud v. State of Delhi***24, wherein, the Court was called upon to consider the effect of investigation having been done by a police officer below the rank of a Deputy Superintendent of Police, contrary to the mandate of Section 5(4) of Prevention of Corruption Act, 1947. The Supreme Court held as follows:

".....Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises. **A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial.**"

78. Supreme Court referring to ***Prabhu v. Emperor***25 and ***Lumbhardar Zutshi v. The King***26, held that if cognizance is in fact taken on a police report initiated by breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it cannot be set aside, unless illegality in the investigation can be shown to have brought about a miscarriage of

justice. An illegality committed in the course of investigation does not affect the competence and the jurisdiction of the court for trial.

79. The submission of the learned counsel for the petitioner that the U.P. Police was not competent to investigate the crime after the approval of the Governor to transfer the case to the CBI, consequently filing of the charge-sheet, followed by supplementary charge-sheet, is bad in law as the U.P. Police lacked authority to investigate the crime upon transfer of the investigation to CBI. It is further submitted that the court taking cognisance on the police report and framing charge against the petitioner is illegal and would vitiate the trial. Further, CBI after a lapse of sixteen months re-registered the FIR when the trial had commenced. In this backdrop, it is urged that the trial is bad in law.

80. The submission lacks merit. In ***Prakash P. Hinduja***27(supra), Supreme Court held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. Further, trial cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice.

81. The State Government having regard to the magnitude of the matter and the alleged involvement of the CEO of YEIDA and other officials, took a conscious decision to transfer the case to CBI for fair, unbiased and proper investigation. Fair investigation contemplates just, honest and unbiased investigation which is in the interest of the accused and also the society. The basic purpose of an investigation is to bring out the truth in accordance with law, and to ensure that the guilty are punished. The petitioners have failed to point out as to how the investigation conducted by both the investigating agency has brought about miscarriage of justice. In any case, the trial court is bound to consider the entire prosecution record submitted by the U.P. Police and the CBI and the material filed along with the reports.

82. While interpreting Section 173(2) and Section 173(8) of the Code, Supreme Court in **Vinay Tyagi** (supra) held:

"42. Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the court shall discharge an accused in compliance with the provisions of Section 227 of the Code."

83. The decision followed by three-Judge Bench in ***Vinubhai Haribhai Malaviya vs. State of Gujarat***28 and later by the Division Bench in ***Luckose Zachariah @ Zak Nedumchira Luke and others vs. Joseph Joseph and others***29.

84. Once a report under Section 173(2)/173(8) of the Code has been submitted, it can only be cancelled, proceeded further or case closed by the court of competent jurisdiction and that too in accordance with law. Neither the Police nor a specialised investigating agency has any right to cancel the said report. The question, accordingly, is answered against the petitioners.

85. **Question No. 6:** Whether the CBI court at Ghaziabad would have jurisdiction.

86. Learned counsel for the petitioner finally submits that Special Judge, Anti Corruption at Meerut, would alone have jurisdiction, the trial should continue at Meerut, instead before the court of Special Judge, Anti Corruption, CBI at Ghaziabad. None of the contesting parties dispute that for the offences under the PC Act, the designated Special Court constituted under the PC Act would have jurisdiction. Learned counsel for the CBI, however, submits that since the matter was investigated by the CBI, FIR was re-registered at Ghaziabad, the CBI court alone would have jurisdiction over the trial. Further, he submits that CBI twice made an application before the trial court at Meerut to transfer the case to the CBI court at Ghaziabad, but, the applications came to be rejected. The CBI, accordingly, approached this Court seeking transfer of the trial from Meerut to Ghaziabad.

87. The Central Government or the State Government, as the case may be, by notification in the Official Gazette, appoint as many special judges as may be necessary for such area or areas to try the offences specified in Section 3 of the PC Act. Section 4 of the PC Act mandates that every case specified in sub-section (1) of Section 3 shall be tried by the special judge for the area within which it was committed.

88. The Governor in exercise of the powers under sub-section (1) of Section (3) and sub-section (2) of Section 4 of the PC Act, read with, Section 21 of the General Clauses Act, 1897, and in supersession of all other notifications issued in this behalf, was pleased to appoint the Additional District Judge mentioned in the scheduled column as the special judge for the areas mentioned in the specified column for trial of such offences as specified in sub-section (1) of Section 3 of the PC Act, in which, hereinafter, charge-sheets are filed in the designated court by Special Police Establishment of the Government of India and direct that such other cases in which charge-sheets have already been filed before any other special judge appointed under the said Act and such other cases arising within the areas relating to Special Police Establishment which are pending, shall also be tried and disposed of by the designated special judge and his court shall be designated with headquarters at Ghaziabad.

89. Learned State Counsel points out placing reliance on the notification dated 29.05.2014 and the subsequent notification dated 18.05.2021, that the U.P. Government has notified four special judges at Ghaziabad as Anti Corruption CBI Court. The areas of jurisdiction has also been specified which includes district Mathura. The notification dated 29.05.2014, clearly provides that charge sheets are to be filed in the designated court having jurisdiction by the Special Police Establishment (CBI) of the Government of India. In other words, the case investigated by CBI, as per the notification, is to file the police report before the designated court having jurisdiction. The Case Crime No. 421/2018 was lodged at district Mathura, therefore, the designated CBI court appointed at Ghaziabad and not at Meerut, would be the competent court to try the case.

90. The State of U.P. has also notified, inter alia, at Meerut Special Judge, Anti Corruption Court under PC Act, (notification dated 23.11.2020) having jurisdiction over district Mathura, but, the court at Meerut has not been conferred jurisdiction to try cases investigated by the CBI. The U.P. Police had filed the charge-

sheet at Meerut being the designated Anti Corruption Court having jurisdiction over district Mathura. Thereafter, on the case being transferred to CBI, the CBI rightly filed the supplementary report before the designated Anti Corruption CBI Court at Ghaziabad.

91. In the given facts, since the investigation of the case was taken over by a superior investigating agency i.e. CBI and supplementary report has been filed before the designated CBI court having jurisdiction at Ghaziabad, to undertake trial of offences under PC Act, and other offences investigated by the CBI.

92 The designated Anti Corruption Court at Meerut, as per the notification, would lack jurisdiction to try cases investigated by the CBI. This Court, accordingly, in exercise of powers under Section 186 of Code can transfer the trial from the court of Special Judge, Meerut to the CBI court at Ghaziabad, having jurisdiction in the matter.

CONCLUSION:

93. In summary, corruption by public servant and white collar offence, in the recent past, has grown in geometric proportions, corruption feeds on corruption. It retards nation building. In cases of like nature, courts must come down with iron fist.

94. Supreme Court, in a case of corruption by public servant, in ***State of M.P. v. Shambhu Dayal Nagar***30, observed as follows:

"The corruption by public servants has become a gigantic problem. It has spread everywhere. No fact of public activity has been left unaffected by the stink of corruption. It has deep and pervasive impact on the functioning of the entire country. Large-scale corruption retards the nation-building activities and everyone has to suffer on that count. As has been aptly observed in Swatantar Singh v. State of Haryana corruption is corroding, like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralising the honest officers."

95. An accused cannot ask or require that the investigation be done or conducted in a particular manner. In ***Romila Thapar v. Union of India***31, Supreme Court held that an accused cannot ask to change an investigating agency, or to require that an investigation be done in a particular manner, including, asking for a court-monitored investigation.

96. CBI in the present case has charge-sheeted public servants, private persons and companies for offences under the PC Act, IPC, including, conspiracy (Section 120-B). The Special Judge, CBI court would have jurisdiction of trial over the private persons/company for offences under the PC Act and for non PC offences.

97. Supreme Court in ***State through CBI New Delhi V Jitender Kumar Singh***32, held that a private person for an offence be tried by Special Court. It is not necessary that in every offence under the PC Act, a public servant must be an accused.

"28. Thus, the scheme of the PC Act makes it quite clear that even a private person who is involved in an offence mentioned in Section 3(1) of the PC Act, is required to be tried only by a Special

Judge, and by no other Court. Moreover, it is not necessary that in every offence under the PC Act, a public servant must necessarily be an accused. In other words, the existence of a public servant for facing the trial before the Special Court is not a must and even in his absence, private persons can be tried for PC as well as non-PC offences, depending upon the facts of the case."

98. A Special Judge, while exercising, exclusive jurisdiction, that is, when trying any case relating to offences under Sections 3(1)(a) and (b) of the PC Act, may also try any offence other than the offence specified in Section 3, with which the accused may, under the IPC be charged at the same trial.

99. The conspiracy to commit offence punishable under the PC Act itself is an offence to be tried only by a Special Judge. In ***Ajay Aggarwal v. Union of India***33, the Court held as follows:

"...Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the conspiracy...."

100. It has been further submitted on behalf of the petitioners that delay in the investigation and trial has adversely impacted the right of the petitioners for speedy trial.

101. ***Pooja Pal v. Union of India***34, is an important judgment which speaks of the fundamental right under Article 21 of the Constitution in the context of the goal of "speedy trial" being tempered by "fair trial". The Supreme Court put it thus:

"83. A "speedy trial", albeit the essence of the fundamental right to life entrenched in Article 21 of the Constitution of India has a companion in concept in "fair trial", both being inalienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial. ..... Though a court's satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can by no means be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analysed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law is to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency. "

102. The supplementary charge-sheet came to be submitted by the CBI in the court at Ghaziabad, on 23.12.2021. The FIR was re-registered by the CBI on 24.12.2019. It is due to the pendency of the present writ petitions raising challenge to the FIR and the jurisdiction of CBI court. In the circumstances the CBI court at Ghaziabad, has shown restraint in taking cognizance of the offence, further, the trial of the case in respect of some of the accused was pending before the court at

Meerut. The trial for all these reasons got delayed. Be that as it may, the accused are entitled to speedy trial and more so fair trial.

ORDER

(1) The writ petitions bearing Criminal Misc. Writ Petitions No. 1294 of 2020; 622 of 2022; 7160 of 2022; 5148 of 2021; and 8758 of 2022, lack merit, accordingly, **dismissed.**

(2) The transfer application bearing Transfer Application (Criminal) No. 239 of 2020, is **allowed.**

(3) The trial of the cases pending before the Special Judge, Anti Corruption, Meerut, arising from Case Crime No. 421 of 2018, is transferred to the court of Special Judge, Anti Corruption, CBI at Ghaziabad.

(4) The Special Judge, Anti Corruption, CBI at Ghaziabad, is directed to proceed and conclude the trial expeditiously on day to day basis without granting unnecessary adjournment provided there is no other impediment.

(5) The Directorate of Enforcement, New Delhi, to proceed and conclude the investigation expeditiously.

(6) It is clarified that the observations made in the order with regard to the facts, or/and, merit of the case would have no bearing or influence upon the trial. The trial court shall proceed independently of the observations made in the order without prejudice to the accused.

(7) Learned counsel for the CBI to supply copy of the order to the Special Judge, Anti Corruption, CBI at Ghaziabad and Special Judge, Anti Corruption, Meerut, for compliance.

(2022) 12 ILRA 648
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Election Petition No. 7 of 2022

Sheshmani Nath Tripathi(S.N. Tripathi in Short) ...Petitioner
Versus
Sri Dinesh Rawat ...Respondent

Counsel for the Petitioner:
In Person

Counsel for the Respondent:
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(A) Election - The Representation of People Act, 1951 - Section 80A - High Court to try election petitions, Section 86 (7) - conclusion of trial within six months, Section 87 - Procedure before the High Court - Allahabad High Court Rules, 1952 - Chapter XV-A - Rule 6 - Issue of notice to respondents , Code of Civil Procedure,1908 - Order 5 Rule 20 – Substituted service - In case of conflict between the provisions of the Representation of the People Act, 1951 and the Rules framed there under or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the Rules of Procedure contained in the CPC on the other hand, the former shall prevail over the latter.(Para - 29,30)

Petitioner wants errors indicated by him in orders passed by Court to be corrected - refusal by Court to fix an early date of 3 to 4 days - Court not acceded procedures prescribed in CPC for service of notice - adhered to provisions of Rules framed under Chapter XV-A of Rules 1952 relating to trial of election petition. **(Para - 14,21)**

HELD:-In case of conflict between the rules framed by the High Court and the

rules of procedure contained in CPC, it is the rules framed by the High Court which shall prevail. No error in the order**(Para - 31)**

Application rejected. (E-7)

List of Cases cited:-

1. Kailash Vs Nanhku & ors. , 2005 (4) SCC 480

2. M. S. Gill Vs Chief Election Commissioner , 1978 (1) SCC 405

(Delivered by Hon'ble Abdul Moin, J.)

(I. A. No. 4 of 2022)

1. Heard Shri Sheshmani Nath Tripathi, petitioner who has appeared in person.

2. The instant application under Section 86 (7) and 87 of the Representation of People Act, 1951 has been filed with following prayers:

"(a) That this Hon'ble Election Court may graciously be magnanimous to apprise the Hon'ble Chief Justice about the paucity of time it is faced with because of the pre-occupied in the common lis between the private parties enabling the Hon'ble Chief Justice to invigorate this Election Court with appropriate time to do justice to this Assembly Constituency and defend the democracy envisaged.

(b) That this Hon'ble Election Court may graciously be magnanimous to correct and rectify the errors highlighted in the pronouncements of 13.07.2022 and 19.09.2022 under the Maxim-Ex-debits Justiciae so as to make the rule of law absolute and complete."

3. Upon filing of the election petition the Court had issued notices to the respondent. In terms of Chapter XV-A of the Allahabad High Court Rules, 1952 (hereinafter referred to as the Rules 1952) notice is to be issued to the respondents in an election petition, both by registered post as well as by publication in a daily newspaper. However the notice could not be published in the newspaper as the petitioner failed to deposit the charges as indicated by the office.

4. When the case was taken up on 05.07.2022 the petitioner had contended that the amount, as has been required to be deposited by the office of this Court, is contrary to the amount as reflected from the official website of the newspaper namely "Dainik Jagran' and he prayed for and was granted time to file an affidavit bringing on record the rates which were available on the official website of the newspaper.

5. When the case was next listed on 13.07.2022 the petitioner was heard on application bearing I.A. No. 2 of 2022 whereby he invited the attention of the Court towards Section 87 of the Representation of the People Act, 1951 (hereinafter referred to as the Act 1951) indicating that the order of the Registrar for publication in the newspaper was not in accordance with the Civil Procedure Code, 1908 (hereinafter referred to as the CPC) and it may be waived and the procedures and practices, as provided in the CPC, be followed and summons served to the defendants under Order 5 Rule 20 CPC denoting substituted service.

6. This Court vide the order dated 13.07.2022 was of the view that as specific rules have been framed under Chapter XV-A of the Rules 1952 as such it is the Rules 1952 which shall govern the trial of an election petitions and not the provisions of

Order 5 Rule 20 CPC for the purpose of substituted service. The order dated 13.07.2022, for convenience, is reproduced below:

*"**I.A. Application No. 02 of 2022***

Heard.

The petitioner who appears in person submits that in pursuance to the order dated 05.07.2022 he could not file the affidavit. He prays for some further time for filing the said affidavit.

The petitioner submits that he has filed an application under Section 87 of the Representation of People Act, 1951 (hereinafter referred to as "Act, 1951") praying that the order of the Registrar for publication in the newspaper not being in accordance with Code of Civil Procedure (hereinafter referred to as "CPC") may be waived and procedure & practices as provided in the CPC may be followed and the summons be served to the defendant as provided in Order 5 Rule 20 of CPC denoting "substituted service" inter alia.

This Court is of the view that once specific rules have been framed under Chapter XV (A) of the Allahabad High Court Rules, 1952 (hereinafter referred to as "Rules,1952") and Rule 1 categorically provides that the provisions of said chapter shall govern the trial of election petitions under the Act, 1951 and further Rule 6 provides that the notice of election petition shall be simultaneously published in a newspaper selected by the Registrar and that notices, process fee, charges and a particular sum as an initial deposit has to be supplied by the petitioner within seven days of the order directing notice to issue and that cost of publication in newspaper exceeding Rs. 50, the Registrar shall call upon the petitioner to deposit the excess amount within the time fixed, as such it is the provisions of Chapter XV (A) of the Rules, 1952 which would be applicable for the purpose of publication of notice in a newspaper.

So far as Rule 12 of Chapter XV (A) of the Rules, 1952 are concerned whereby the Court's power to give directions in matters of practice and procedure has been prescribed, again, suffice to say that once Rule 6 particularly deals with a particular provision pertaining to publication of notice merely because Rule 12 gives the power to give direction in matter of practice and procedure would not prevail upon this Court to act otherwise than in accordance with Rule 6 of Chapter XV (A) of the Rules, 1952.

So far as the prayer in the application filed by the petitioner to follow the practice as provided in Order 5 Rule 20 of CPC is concerned, suffice it to say that Order 5 Rule 20 of CPC would pertain to power of the "Court" and obviously the word "Court" as used in the aforesaid provision would not include the High Court. Accordingly, the application is rejected.

However, in pursuance to the order dated 05.07.2022, the petitioner may file an affidavit within two weeks.

Order on memo of petition

List this case on 28.07.2022 at 02:15 P.M. "

7. Thereafter the petitioner filed an application duly supported by an affidavit whereby he brought on record the rates indicated by the "Dainik Jagran', the newspaper publication, as available on the website towards classified rates. Considering the same the Court had passed an order on 28.07.2022. For the sake of convenience, the order dated 28.07.2022 is reproduced below:

"Heard Sri Sheshmani Nath Tripathi, the petitioner, who appears in person.

This Court vide order dated 26.04.2022 had issued notice to respondents. As per office report dated 27.06.2022 the petitioner has not deposited the cost of publication of notice in the newspaper.

When the case was listed on 05.07.2022, the petitioner contended that the amount as is being required by the office of this Court to be deposited is contrary to the amount as reflected on the official website of the newspaper namely 'Dainik Jagran' Barabanki Edition and hence the amount has not been deposited. He was accordingly granted time to file an affidavit in this regard bringing on record the rates which are available on the official website of the said newspaper and in pursuance thereof the petitioner has invited the attention of this Court towards the classified rates and schemes 2020-21 of Dainik Jagran as available on the website which has been brought on record as Annexure-1 through the application duly supported with an affidavit. Placing reliance on the same, it is contended that the rates as have been indicated by the office of this Court are much higher than those indicated on the website.

Considering the aforesaid as well as the Rules framed under Chapter XV-A of the Allahabad High Court, 1952, which relate to the trial of the election petitions, let the office of this Court submit its report in this regard within ten days considering the rates as have been indicated by the petitioner as available on the official website of the newspaper 'Dainik Jagran'.

List this case on 24.08.2022 at 02.15 PM."

8. In pursuance to the order dated 28.07.2022 the office had sent a letter to the Editor / Manager Advertisement, of the newspaper concerned to provide a report as to why the rates given for publication to the office of the High Court were higher than the classified rates available on the official websites.

9. When the case was taken up on 24.08.2022, the Court noticed that despite a letter having been sent to the newspaper concerned no reply has been received and hence the Court required a reminder to be sent to the newspaper concerned.

10. When the case was listed on 19.09.2022, the Court perused the office report dated 19.09.2022 from which it emerged that despite a reminder having been sent no report regarding rates of publication has been received from the newspaper concerned and thus required a final reminder to be sent to the newspaper concerned. The order dated 19.09.2022 is reproduced below:

"Heard the petitioner who appears in person.

From the order dated 24.8.2022 of this Court, it is apparent that this Court required a reminder to be sent to the Newspaper concerned in pursuance to the earlier order of this Court dated 28.7.2022. The matter pertains to the amount to be deposited for the purpose of publication of notice in Newspapers in terms of rules given in Chapter XV-A (6) (b) of Allahabad High Court Rules, 1952. As per Office report dated 19.9.2022, despite the reminder having been sent, no report regarding rates of publication has been received from the Newspaper Dainik Jagran.

The petitioner who appears in person, has placed reliance on the Rule 12 of Chapter XV-A of the Allahabad High Court Rules, 1952 to contend that this Court may pass appropriate orders regarding service of notice by publication.

The Court is of the view that once the Rule 6 of Chapter XV-A of the Rules, 1952

provides for notice of the election petition to be also published in a newspaper as selected by the Registrar and the Registrar of this Court had required the petitioner to deposit required publication charges according to Rule 5 and 6 of Chapter XV-A of the Rules, 1952 which admittedly have not been deposited by the petitioner on the ground that lower rates are indicated on the web-site of the concerned newspaper, as such, it would be in the fitness of things that a last reminder to be sent to the newspaper concerned namely, Dainik Jagran regarding rates of publication. The Registrar may also take notice of the fact that despite notice having been sent, the concerned has still not responded.

The petitioner who appears in person, has prayed that the matter may come up after three or four days and not more than a week's time may be granted for the purpose of taking reply.

However, the Court is of the view that once there are already 120 cases listed in the Additional Cause List apart from 22 fresh cases, it will not be possible for this Court to accommodate the petitioner for listing the case at an early date.

List this case on 18.10.2022."

11. When the case was listed on 02.11.2022 the petitioner invited the attention of this Court towards the aforesaid supplementary application filed under Sections 86(7) and 87 of the Act 1951 for the prayers as have already been quoted above.

12. The Court has gone through the record including the letter dated 19.09.2022 sent by the newspaper concerned wherein it has been indicated that the publication of notice of advertisements like notice of Election Petition is not published in classified category of newspaper. It has also been indicated that the publication was never asked to publish the advertisement in the classified category and that the rates provided by the newspaper publication were provided as per set norms.

13. From perusal of the said letter alongwith office report it emerges that the amount, as was required by the office of this Court to be deposited by the petitioner for publication in the newspaper, was the rate given by the said publication for the purpose of publication of the notice of election petition and not for classified advertisement. Considering the report and the letter of the newspaper at the very outset the petitioner was asked as to whether he was willing to deposit the amount, as was required to be deposited by the office of this Court, to which he stated that he wants the application with the aforesaid prayers to be decided.

14. Accordingly, the Court proceeds to decide the aforesaid application.

15. The perusal of the aforesaid application alongwith the prayers as set forth in the said application would indicate that the petitioner wants correction and rectification in the orders of this Court dated 13.07.2022 and 19.09.2022 by which this Court was of the view that as the High Court has got the rules governing the filing of election petition under the Act 1951 as such the provisions of CPC for substituted service shall not be applicable and further vide the order dated 15.07.2022 this Court had not acceded for listing of this case after three or four days on account of having a heavy board.

16. In this regard the petitioner has placed reliance over Section 80A and Section 87 of the Act 1951. The petitioner

contends that Section 80A of the Act 1951 provides that the court having jurisdiction to try an election petition shall be this Court. Placing reliance on Section 87 of the Act 1951 it is argued that the procedure before the High court would be that every election petition has to be tried by the High Court as nearly as may be in accordance with the procedure applicable under the CPC 1908 to the trial of a suit.

17. Placing strong reliance on Section 87 of the Act 1951 the argument of the petitioner is that once the Act 1951 itself provides that the procedure to be followed by the High Court for the purpose of trial of an election petition is the procedure applicable under the C.P.C. as such the provisions of Order 5 Rule 20 CPC for the purpose of substituted service would be only applicable and not the procedure prescribed under Chapter XV-A of the Rules 1952 and consequently this Court had committed an error in its order dated 13.07.2022 in not following the provisions of Order 5 rule 20 CPC for the purpose of substituted service and in adhering to the provisions of Chapter XV A of the Rules 1952 and thus it is prayed that the order dated 13.07.2022 be corrected and rectified.

18. In this regard, the petitioner has placed reliance on the judgement of Hon'ble the Apex Court in the case of **Kailash vs Nanhku and others** reported in 2005 (4) SCC 480 to contend that the Apex court was of the view that in case of conflict under the provisions of the Act 1951 with the High Court Rules, it is the provisions of the Act 1951 which would prevail over the provisions contained in the High Court Rules.

19. So far as the order dated 19.09.2022 passed by this Court is concerned whereby the Court had not fixed an early date within three to four days, as had been prayed for by the petitioner, on the ground of having a heavy board, reliance has been placed on a judgement of Hon'ble the Apex Court in the case of **M. S. Gill vs Chief Election Commissioner** reported in **1978 (1) SCC 405** to contend that an election petition should be decided expeditiously and argues that this Court should give precedence to the special law action i.e. election petition and not the common law lis between the private parties and hence it is prayed that the order dated 19.09.2022 whereby an early date had not been given be also corrected.

20. Heard the petitioner at length and perused the averments made in the application and the judgements of Hon'ble the Apex Court in the case of **Kailash (supra)** as well as **M. S. Gill (supra)**.

21. The application has been filed with prayers as have already been indicated above. From a perusal of the said prayers it emerges that the petitioner wants the errors indicated by him in the orders dated 13.07.2022 and 19.09.2022 passed by this Court to be corrected. The said errors are said to be (a) refusal by the Court to fix an early date of 3 to 4 days, as had been prayed for by the petitioner and (b) the Court not acceding in following the procedures prescribed in CPC for service of notice and adhering to the provisions of the Rules framed under Chapter XV-A of the Rules 1952 relating to trial of election petition.

22. So far as the question (a) is concerned reliance has been placed on the judgement of Hon'ble the Apex Court in the case of **M. S. Gill (supra)** to contend that an election petition should be decided

expeditiously. A perusal of the order sheet would indicate that an endeavor has been made by this Court to expedite the matter, as would be apparent from perusal of orders of various dates that have been passed in the petition. It is on account of non service of notice on the respondent and the office of this Court having required the petitioner to deposit a certain amount for publication of notice that on various dates time has been sought for by the petitioner objecting to deposit of the charges and also objecting to the same on the ground that lower rates are indicated on the official website of the newspaper. The Court required the office to obtain a report from the newspaper concerned regarding the disparity in the rates and the office of newspaper publication finally responded after two notices had been sent, indicating the difference in the rates pertaining to publication of classified and a notice of election petition. Thus, it is apparent that various dates in the petition have been fixed in order to resolve the issue regarding publication in newspaper of the notice and thus the insistence of the petitioner to fix a date of only 3 to 4 days, without publication of the notice in the daily newspaper, as provided under the Rules 1952, cannot be countenanced in any manner once the notice itself has not been published, as per the rules.

23. Consequently, it would not be possible for the Court to fix an early date simply on the insistence of the petitioner rather it is apparent that it is on account of non compliance of the provisions of the Rules 1952 of publication of notice in the newspaper that the present situation has arisen. There cannot be any dispute to the proposition of law laid down by Hon'ble the Apex Court in the case of **M. S. Gill (supra)** of election petition to be decided expeditiously. Thus, it is apparent that there is no error in the order dated 14.09.2022 whereby the Court did not find it possible to accommodate the petitioner for listing of the case at an early date.

24. So far as the question (b) is concerned, for deciding the said question, the Court would have to consider Section 80A and 87 of the Act 1951.

25. Section 80A of the Act 1951 reads as under:

"80-A. High Court to try election petitions. -

(1) The Court having jurisdiction to try an election petition shall be the High Court.

(2) Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice, shall, from time to time, assign one or more Judges for that purpose:

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.

(3) The High Court in its discretion may, in the interests of justice or convenience, try an election petition, wholly or partly, at a place other than the place of seat of the High Court."

26. Section 87 of the Act 1951 reads as under:

"87. Procedure before the High Court. -

(1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the

Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1872), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition."

27. From a perusal of Section 80A of the Act 1951 it emerges that it is the High Court which is to try the election petition.

28. So far as Section 87 of the Act, 1951 is concerned, the said provision provides that every election petition shall be tried by the High Court as nearly as may be, in accordance with the procedure applicable under CPC. The said Section further however provides that the High Court shall have the discretion to refuse to examine any witness and that the provisions of the Indian Evidence Act, 1872 shall, subject to the provisions of the Act 1951, be deemed to apply in respect of trial of an election petition. However, as this Court is only required to decide the applicability of the provisions of CPC to the election petition as such other provisions of the said section are not relevant to be considered by this Court at this stage.

29. Section 87 of the Act 1951 came up for consideration before the Apex Court in the case of **Kailash (supra)**. The Apex Court while considering the aforesaid provision, has summed up the issues as under:

"(i) The trial of an election petition commences from the date of the receipt of the election petition by the Court and continues till the date of its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition affording opportunity to the defendant to file written statement. The availability of such power in the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and Rules made for purposes of that Act and a resort to the provisions of the CPC is not called for.

(ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in the CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

(iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the Rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the Rules of Procedure contained in the CPC on the other hand, the former shall prevail over the latter.

(iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The

provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non- compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away.

(v) Though Order VIII, Rule 1 of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended."

(emphasis by the court)

30. So far as the present controversy is concerned issue (iii) of the judgement of the Apex Court in the case of Kailash (supra) would be relevant wherein the Apex Court after considering the provisions of the Act 1951 and the CPC has held that in case of conflict between the provisions of the Act 1951 and the Rules framed therein or the rules framed by the High Court in exercise of powers conferred by Article 225 of the Constitution on the one hand and the rules of procedure contained in CPC on the other hand **the former shall prevail over the latter.**

31. Thus it is apparent that the Apex Court has set at rest the controversy in as much it has been held that in case of conflict between the rules framed by the High Court and the rules of procedure contained in CPC, it is the rules framed by the High Court which shall prevail. In the instant case, as already indicated in the order dated 13.07.2022, the Court had considered the rules framed under Chapter XV A of the Rules 1952 vis a vis Order 5 Rule 20 of CPC pertaining to service of notice and the Court was of the view that it is Rule 6 of the Chapter XV A of Rules 1952 which shall prevail. Thus considering the law laid down by the Apex Court in the case of **Kailash (supra)**, this Court does not find any error in the order dated 13.07.2022.

32. Keeping in view the aforesaid discussion, the application is **rejected.**

Order on the main petition

1. The petitioner is granted two weeks time to deposit the cost of publication as directed by the office of this Court.

2. In case the cost is deposited, the office shall proceed.

3. List this case on the date to be indicated in the notice by the office.

(2022) 12 ILRA 657
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2022

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Application U/S 482 No. 25765 of 2022

Ravindra ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri C.D. Mishra

Counsel for the Opposite Parties:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 147, 148, 149, 452, 307, 302, & 506-In the instant case charges were framed against the accused persons on 23.12.2011 and since then the matter is being fixed for prosecution evidence-Session trial is more than 10 years old and the prosecution evidence is still not completed despite efforts of the Presiding Officer-However court cannot shut its eyes from so many obstacles into the proceedings of any trial-It is the duty of the court to see whether the prolongation was on account of any delaying tactics adopted by the accused and other relevant aspects which contributed to the delay-Therefore, this Court strictly directs the trial court to make all possible endeavor to conclude the trial of the case within six months. (Para 1 to 9)

The application is disposed of. (E-6)

List of Cases cited:

St. thru C.B.I Vs Dr. Narayan Woman Nerukar (2002) AIR SC 2977

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

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

2. This application under Section 482 Cr.P.C. has been filed seeking a suitable direction to the learned Additional District Judge-1, District- Muzaffar Nagar to decide the Sessions Trial No. 924 of 2011 arising out of Case Crime No. 20 of 2011 under Sections 147, 148, 149, 452, 307, 302, 506 I.P.C., P.S.- Kakrauli, District- Muzaffarnagar as expeditiously as possible within stipulated time.

3. The prosecution case as culled out from the FIR is that on 3.2.2011 at about 3.00 pm an altercation took place between the brother of complainant Shokendra and his villagers Anuj, Rajendra and his family members. Thereafter at about 6.00 pm., the accused persons namely Rajendra, Ramchandra, Bhopal, Anuj, Rajeev and Amit with intention to kill, attacked with firearms on the brothers of the applicant namely Shokendra and Subhash as well as his nephews namely Sachin and Jagpal, in which the brother of the applicant Shokendra died on the way of hospital, while others sustained grievous injuries. With regard to the aforesaid incident, the applicant immediately on the same day at about 22.50 hours lodged an FIR against the aforesaid accused persons. The police after investigation submitted the charge sheet against the aforesaid six accused. The learned Chief Judicial Magistrate, District Muzaffarnagar vide his order dated 20.04.2011 took cognizance on the above mentioned charge sheet and summoned the accused persons registering case no. 2224/9 of 2011.

Thereafter, the matter was committed for trial to the court of sessions on 26.9.2011 and registered as Sessions Trial No. 924 of 2011 in the court of learned Sessions Judge, District- Muzaffarnagar, which is presently pending in the Court of learned Additional District Judge-I, District Muzaffarnagar. In the above mentioned trial, charges were framed against the accused persons on 23.12.2011 and since then the matter is being fixed for prosecution evidence.

4. By way of the present petition, applicant prays for expeditious disposal of the aforesaid case.

5. From perusal of the record and explanation sent by the Court concerned, it appears that the Presiding Officer is trying to conclude the sessions trial expeditiously but for some reasons or the other it is still pending.

6. As a matter of fact, the Sessions Trial is more than 10 years old and the prosecution evidence is still not completed despite efforts of the Presiding Officer/ Court concerned. However, the Court should very well understand the pathetic condition of the poor informant also, who remains a mere spectator of such judicial proceedings and nothing remains in his hands, Indubitably, speedy trial is a fundamental right not only of an accused but also a valuable right of the victim/ informant of a case. If criminal proceedings pending in a court astounding on with tardy pace which causes unreasonable delay and results in grave prejudice to the victim, the Court must realize its role as the protector of the right of the litigant. While considering the question of delay, it was held by the Hon'ble Apex Court in S**tate through C.B.I. Vs. Dr. Narayan Waman Nerukar, AIR 2002 SC 2977,** that "Court has a duty to see whether the prolongation was on account of any delaying tactics adopted by the accused and other relevant aspects which contributed to the delay. Number of witnesses examined, volume of documents likely to be exhibited, nature and complexity of the offence which is under investigation or adjudication are some of the relevant factors."

7. At the same time this Court cannot shut its eyes from the fact that so many compelling circumstances occur during the proceedings of any trial causing hindrances therein and play a role of obstacles into the proceedings of any trial viz. strike of lawyers, adjournment by parties, loss of record, leave of the staff, power cut or any other infrastructural or urgent problem. Therefore, this Court strictly directs the trial court to make all possible endeavor to conclude the trial of the case within six months from the date of receiving of the certified copy of order of this Court and also keeping in view the mandatory provisions of Section 309 Cr.P.C.

8. It is also made clear that the Court / Presiding Officer is not the only stake holder in the trial and disposal of a criminal case, hence, besides the P.O. concerned, all the stake holders i.e. police and execution authorities, advocates, parties to the case, staff are also made bound by this order and it will be their responsibility also to assist the Court in every manner for the expeditious disposal of this case.

9. With the above observations, the application stands **disposed of.**

(2022) 12 ILRA 659
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. IInd Bail Application No. 3162 of 2021

Ganesh ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ardhendu Shekhar Sharma, Sri Ram Babu Sharma, Sri Sanjay Kumar Shukla

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - IInd Bail - Indian Penal Code, 1860 - Sections 498-A, 302, 326, 323, 504, 506 , Section 299 - Culpable Homicide , Section 300 - 'murder' , Section 304 - 'culpable homicide not amounting to murder' - Dying declaration - distinction between Section 302 and Section 304 - "culpable homicide" is genus and "murder" its specie - All "murder" is "culpable homicide" but not vice-versa .(Para - 11)

Applicant (husband) Illicit relationship with wife of his brother – deceased (wife) could not prepare food due to non availability of vegetable - her husband lost his temper and started beating and poured kerosene oil upon her and burned - cause of death - septic shock .**(Para - 4)**

HELD:-No premeditation for applicant to commit such offence as alleged against him - deceased admitted in hospital - remained under treatment in hospital for 8 days - died after 8 days – septicemia - main cause of death of the deceased - fit case for grant of bail.**(Para - 12,13)**

Bail application allowed. (E-7)

List of Cases cited:-

1. St. of A.P. Vs Rayavarapu Punnayya & Anr. , (1976) 4 SCC 382

2. Maniben Vs St. of Guj. , (2009) 8 SCC 796

3. Chirra Shivraj Vs St. of A.P. , (2010) 14 SCC 444

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. This is a second bail application on behalf of the applicant. The first bail application was rejected by a co-ordinate Bench of this Court vide order dated 30.01.2019 passed in Criminal Misc. Bail Application No.8363 of 2014.

2. Heard Mr. Ram Babu Sharma , learned counsel for the applicant, Mr. R.P. Mishra, learned Additional Government Advocate for the State.

3. By means of this application, the applicant is seeking enlargement on bail during the trial in Case Crime No.255 of 2013 (S.T. No.584 of 2013), under Sections 498-A, 302, 326, 323, 504, 506 IPC, Police Station Jhangha, District Gorakhpur.

4. In short, the facts in brief are that the impugned FIR has been lodged by the informant/complainant, who is the father of the deceased, alleging that he solemnized marriage of her daughter, namely, Sunita with the applicant Ganesh s/o Harishchandra, resident of Kona, Police Station Jhangha, District Gorakhpur and in the said marriage, sufficient dowry was given but her son-in-law (applicant) and his family members were not happy with the dowry given in the said marriage. It is

further alleged that when the daughter of informant went to the house of the applicant, she was tortured and harassed by the applicant and his family members and she was also beaten by the accused persons. It is further alleged that the applicant pressurized her daughter to bring Rs.2 lakhs from her parents and when the said demand was not fulfilled, the applicant and other co-accused persons abused and threatened to kill his daughter by burning. It is further alleged that applicant was having illicit relationship with the wife of his brother. Ultimately, on 25.07.2013 in the evening, the informant received a telephonic call from sasural of his daughter that his daughter has been burned by pouring kerosene oil by her husband and his family members and she is admitted in Sadar Hospital, Gorakhpur. The informant/complainant immediately rushed to the hospital where he saw that his daughter has been burned and she is struggling for her life. The informant/complainant asked his daughter about the incident, then she told that she has been burned by her husband, devrani Ranjana Devi, dever Kanhaiya, mother-in-law and father-in-law by pouring kerosene oil upon her. The victim Sunita was admitted in District Hospital, Gorakhpur where she died on 01.08.2013 at about 5.15 am. As per postmortem report, the cause of death is due to septic shock.

5. The contention as raised at the Bar by learned counsel for the applicant is that applicant-accused is quite innocent and has been falsely implicated in the present case. The applicant has never committed any offence as alleged in the impugned FIR. The applicant is the husband of the deceased. The whole case is based on the statement of the victim/deceased, who narrated the entire incident to the Investigating Officer as well as Magistrate. Learned counsel for the applicant has not disputed the dying declaration of the deceased and his sole argument is that even if it is assumed that the applicant has committed the offence as alleged in the impugned FIR as well as dying declaration, no offence under Section 302 IPC is made out against the applicant. The deceased in her statement has clearly stated that on the date of alleged incident i.e. on 25.07.2013 in noon, she could not prepare the food due to non availability of vegetable for which her husband lost his temper and started beating and poured kerosene oil upon her and burned. Maximum this case can travel up to the limits of offence under Section 304 Part II IPC because the deceased died after 8 days of the alleged incident due to septic shock and maximum punishment for the offence under Section 304 Part II of IPC is 10 years. Further contention is that the applicant is languishing in jail since 04.08.2013 having no previous criminal history and he has already served more than 9 and ½ years in jail, hence, the applicant may be enlarged on bail. 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.

6. No other point or argument has been raised by learned counsel for the applicant and confined his argument only on the above points.

7. Per contra, Mr. R.P. Mishra, learned Additional Government Advocate for the State has vehemently opposed the prayer for bail by submitting that being the custodian of his wife has misused his position and set his wife to flame, which ultimately resulted into her death. The applicant is perpetrator of the alleged crime

in question. Before death, the deceased has given dying declaration specifying that the applicant caused burn injuries. The offence is heinous in nature, hence, the applicant is not entitled for any relief and the bail application is liable to be rejected.

8. I have heard the rival submissions advanced by learned counsel for the parties and perused the material available on record.

9. Before proceeding further, it is relevant to refer to the provisions of Sections 299, 300 and 304 IPC, which read as under:

"299. Culpable homicide.--Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.--A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.--Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.--The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Murder.-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.-When culpable homicide is not murder. - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above Exception is subject to the following provisos:-

First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3. - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

304. Punishment for culpable homicide not amounting to murder.-- Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the

intention of causing death, or of causing such bodily injury as is likely to cause death,

Or

with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Para-I:Punishment-
Imprisonment for life, or imprisonment for 10 years and fine-Cognizable-Non-bailable- Triable by Court of Session-Non compoundable.

Para-II:Punishment-
Imprisonment for 10 years, or fine, or both-Cognizable-non bailale-Triable by Court of Session- Non- compoundable."

10. The question which arises for consideration is as to whether the act of the accused-appellant would fall within the definition of 'murder' or it would be 'culpable homicide not amounting to murder'.

11. 10. The Apex Court in ***State of A.P. vs. Rayavarapu Punnayya and Another, (1976) 4 SCC 382*** while drawing a distinction between Section 302 and Section 304 of IPC held as under:

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question

is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

12. Perusal of dying declaration of the deceased clearly shows that on the date of alleged incident i.e. on 25.07.2013 in noon, when the deceased could not prepare the food due to non availability of vegetable for which her husband lost his temper and started beating and poured kerosene oil upon her and burned. It means that there was no premeditation for the applicant to commit such offence as alleged against him.

13. It is also an admitted fact that the deceased was admitted in hospital and she remained under treatment in hospital for 8 days and thereafter she died after 8 days of the incident in question. During course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days, the injuries aggravated and worsened, as a result, she died due to septic shock.

14. Perusal of record shows that the victim Sunita was admitted in District Hospital, Gorakhpur on 25.7.2013 at about 6.30 pm and during treatment after 8 days of the alleged incident, she died on 01.08.2013 at about 5.15 am. It means that the deceased remained alive for about 8 days. Perusal of post mortem report of the deceased reveals that the deceased has received superficial to deep septic burn from face to umbilicus, whole back of both upper limb and cause of death has been mentioned as septic shock.

15. In ***Maniben vs. State of Gujarat [(2009) 8 SCC 796***], the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicaemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellants under Section 302 IPC. Hon'ble The Apex Court has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

16. In ***Chirra Shivraj vs. State of Andhra Pradesh [(2010) 14 SCC 444]***, incident took place on 21.4.1999. Deceased died on 1.8.1999. As per the prosecution version, kerosene oil was poured upon the deceased, who succumbed to the injuries. Cause of death was septicaemia. Accused was convicted under Section 304 Part-II IPC and sentenced for five years' simple imprisonment, which was confirmed by the High Court. Hon'ble The Apex Court dismissed the appeal holding that the deceased suffered from septicaemia, which was caused due to burn-injuries and as a result thereof, she expired on 1.8.1999.

17. Considering the overall facts and circumstances, the nature of allegations, the gravity of offence, the severity of the punishment, the evidence appearing against the accused, submission of learned counsel for the parties, considering the principle laid down by the Courts in the above referred case laws, I am of the view that it is a fit case for grant of bail. Accordingly, the bail application is **allowed.**

18. Let the applicant-**Ganesh** involved in the aforesaid case be released on bail on furnishing a personal bond and two heavy sureties each in the like amount to the satisfaction of the court concerned subject to following conditions :

(i) The applicant shall file an undertaking to the effect that he 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 his counsel. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A IPC.

(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., 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 him, 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 him 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.

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

20. 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.

(2022) 12 ILRA 665
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 9396 of 2022
And
Criminal Misc. Anticipatory Bail Application No.9378 of 2022
And
Criminal Misc. Anticipatory Bail Application No. 9363 of 2022

Kailash ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Akash Tomar

Counsel for the Opposite Party:

G.A.

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 438 - Anticipatory Bail - The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 18 - Section 438 of the Code not to apply to persons committing an offence under the Act , Section 18A(i) - No enquiry or approval required , Section 14A(2) - Appeal before high court - distinction - existence of the power to arrest and justification for exercise of it - an anticipatory bail in a crime where an offence under SC/ST is alleged can be granted only if the Court is satisfied that the allegations levelled do not prima facie make out a case under SC/ST Act - expression 'bail' in Section 14A of SC/ST Act includes anticipatory bail as well. (Para - 6,15,17)

Offence under SC/ST Act - Question of admissibility of jurisdiction of bails vide concurrent jurisdiction - enshrined in Section 438 of Cr.P.C. agitated**. (Para - 2,3)**

HELD:- Special Court while dealing with an application for anticipatory bail must ascertain whether a prima facie case for an offence punishable under the Act is made out, then only the application for anticipatory bail can be considered. Order granting or rejecting anticipatory bail under the provisions of SC/ST Act shall be amenable to the appellate jurisdiction of the High Court under Section 14A of the Act and not Section 438 Cr.P.C. **(Para - 18)**

Anticipatory bail application dismissed. (E-7)

List of Cases cited:-

1. Prathvi Raj Chauhan Vs U.O.I. & Ors., (2020) 4 SCC 727

2. Siddharth Vs St. of U.P. & Ors., (2021) SCC Online SC 615

3. St. of A.P. through I.G., N.I.A. Vs Mohd. Hussain @ Saleem, (2014) 1 SCC 250

4. St. of Guj. Vs Salimbhai Abdulgaffar Shaikh & Ors., (2003) 8 SCC 50

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard learned counsels for the parties as well as perused the material available on record.

2. The applicants in the aforesaid anticipatory bail applications are alleged to have committed offences punishable under the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as "SC/ST Act').

3. All the three anticipatory bail applications have been dismissed by the respective Special Judge SC/ST Act. The question of admissibility of jurisdiction of the aforesaid bails vide concurrent jurisdiction enshrined in Section 438 of Cr.P.C. has been agitated.

4. For the sake of verbiage, the contentions put by the learned counsels are concised below:

(i) As per the law laid down in ***Prathvi Raj Chauhan vs. Union of India & Others1,*** notwithstanding the bar under Sections 18 and 18-A of the Act, the application for anticipatory bail is maintainable.

(ii) The application for anticipatory bail under SC/ST Act can be filed under Section 438 Cr.P.C. in the High Court as well as Sessions Court.

5. It is argued on behalf of the applicants that as per the settled law of the Apex Court passed in case of ***Prathvi Raj Chauhan (supra)***, if the complaint does not make out a prima facie case for the applicability of the provisions of the SC/ST Act, 1989, the bar created by Sections 18 and 18A(i) shall not apply. The only caveat

is that the power has to be used sparingly and is not to be used so as to convert the jurisdiction into that under Section 438 of the Code of Criminal Procedure.

6. It is further argued on behalf of the applicants that the Apex Court in the judgment of ***Siddharth vs. State of U.P. and Others2***, has opined that if the Investigating Officer does not believe that the accused will abscond of disobey summons, he/she is not required to be produced in custody. It was also opined that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an Accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made a routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused.

7. The Apex Court in the matter of ***State of Andhra Pradesh through I.G., National Investigating Agency vs. Mohd. Hussain alias Saleem3*** has held that if an application of bail or pre-arrest bail in the case instituted under the Act is made under the provisions prescribed in Chapter XXXIII of the Code in a Special Court or an exclusive Special Court and it is granted or refused, an appeal under newly inserted Section 14A(2) of the Act would lie before the High Court.

8. In case of ***State of Gujarat vs. Salimbhai Abdulgaffar Shaikh and Others4***, it was provided that under the prevention of Terrorism Act, 2002, the exercise under Section 439 and 482 Cr.P.C. by the High Court was found illegal and the bail could be granted only under the special provision and an appeal under Section 34 of Prevention of Terrorism Act against the order of rejection or allowing a bail could only be filed in the High Court before a Double Bench.

9. In Section 21(4) of NIA Act, the expression used is "bail" without saying whether it is regular bail or anticipatory bail. S.437 to 439 of the Code state that a person accused of or suspected of the commission of offences of the type referred therein may be "released on bail". The only difference between S.437, S.439 and S.438 is that an order of anticipatory bail under S.438 insulates a person arrested from custody while an order of bail under S.437 or 439 enables him to be released from custody.

10. The *Advanced Law Lexicon, 3rd Edition* defines "bail" as under:

"Bail means to set liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called bail. A security such as cash or a bond; especially, security required by a Court for the release of a prisoner who must appear at a future time."

Anticipatory bail is explained as meaning, "an order of anticipatory bail

constituting an insurance against Police custody following upon arrest for some offence or offences in respect of which the order is issued".

11. In *Black's Law Dictionary, 9th Edition*, the expression 'bail' is given the meaning, "A security such as cash or a bond; especially security required by a Court for the release of a prisoner who must appear in Court at a future time".

12. The expression "bail" only means the security given by the person accused or suspected of the commission of offence for his release from custody or to insulate him from custody. The expression 'bail' used in S.21(4) of the NIA Act could therefore be regular bail as well as anticipatory bail. Such a view is required to be adopted to avoid, as aforesaid unintelligible, absurd or unreasonable results.

13. The basic rule of interpretation is to give effect to the plain meaning of the statute. If it is not clear and ambiguous, then the court can take recourse to other modes of interpretation. There are two types of aids of interpretation- internal and external. Internal aids are within the statutes as title, preamble, schedule and other provisions of the said Act. If the ambiguity is still not clear, then the court can use external aids to interpret a particular provision i.e. dictionary, parliamentary debates, foreign judgments, provisions of other Acts (pari materia).

14. An unembellished inspection of Section 21 of the NIA Act vis-à-vis Section 14A of the Act, reveals that clause (1) and (4) of the NIA Act are in pari materia to the newly inserted Section 14A(1) and (2) of the Act.

15. After the decision in **Prathvi Raj Chauhan (supra)**, the legal position is that an anticipatory bail in a crime where an offence under SC/ST is alleged can be granted only if the Court is satisfied that the allegations levelled do not prima facie make out a case under SC/ST Act. The position of law remains same even after the enactment of Section 18A of the Act.

16. Under SC/ST Act, there is special procedure and Special Courts/Exclusive Special Courts for dealing with the cases involved in the offences against the scheduled castes and scheduled tribes. A reading of the provisions of Sections 2(d), 2(bd) and Section 14 categorically indicate that the said offences are exclusively triable by Special Courts as contemplated by the legislature.

17. It is further to be kept in mind that under the special provisions of the SC/ST Act, the right of the victim and the witnesses are on a higher pedestal than provided under Cr.P.C. From the entire scheme of the act, including the powers of the Special Courts, it can be concluded that the Act has given primacy and exclusivity to the Special Courts over normal Courts. The expression 'bail' in Section 14A of SC/ST Act includes anticipatory bail as well.

18. Thus, in view of the aforesaid principles enumerated above, the Special Court while dealing with an application for anticipatory bail must ascertain whether a prima facie case for an offence punishable under the Act is made out, then only the application for anticipatory bail can be considered. The order granting or rejecting the anticipatory bail under the provisions of SC/ST Act shall be amenable to the appellate jurisdiction of the High Court under Section 14A of the Act and not Section 438 Cr.P.C.

19. In view of the aforesaid observations, the present anticipatory bail applications are ***dismissed.***

20. In the interest of justice and proper adjudication, the applicants are at liberty to file an appeal under Section 14A of the SC/ST Act.

21. The certified copy of the orders and other relevant documents shall be returned to the counsels for the applicants after obtaining photostat copies, which shall be kept on record.

(2022) 12 ILRA 669
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.11.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Misc. Bail Application No. 12007 of 2022

Kapil Wadhawan & Anr. ...Applicants
Versus
State thru. C.B.I. ...Opposite Party

Counsel for the Applicants:
Sri Pranjal Krishna

Counsel for the Opposite Party:
Anurag Kumar Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 439 - Bail , Section 167 – Procedure when investigation cannot be completed in twenty four hours - Indian Penal Code, 1860 - Sections- 120B, 409, 420, 467, 468, 471, Prevention to the Corruption Act, 1988 - Sections 7A, 8, 13(2),13(1)(d) - Any offence for which the sentence provided is more than 10 years, custody period would be extendable to 90 days. (Para -32)

Accused allegedly involved in commission of offence(s) - Mind-boggling financial fraud - regarding siphoning and misappropriation of public funds of thousands of crores - punishment up to "for life' - minimum punishment of "ten years not provided - whether entitled to default bail - on expiry of 60 days - under provisions of section 167(1)(a)(ii), Cr.P.C. - charge sheet not filed within a period of sixty days.**(Para - 33)**

(B) Interpretation of Statute - golden rule of interpretation - words used by legislature should be given their natural meaning - text of section 167 of Cr.P.C. - explicit and needs no great interpretation - legislature in its wisdom extended a custody period of 90 days without filing charge sheet - respect of three kinds of Offences where punishment is prescribed - a. death; b. imprisonment for life; or c. minimum sentence provided is not less than 10 years. (Para 32)

HELD:-Extended period of 90 days would be available to the investigating agency. Accused-applicants not entitled to default bail on an expiry of 60 days from the date of their custody. **(Para -33)**

Bail application rejected. (E-7)

List of Cases cited:-

1. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67

2. M. Ravindran Vs Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485

3. Sohan Lal Vs St. of U.P., 1991 SCC OnLine All 469

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

1. The present application under Section 439, read with section 167 of the Code of Criminal Procedure 1973 (hereinafter referred to as "Cr.P.C.") has been filed by the applicants, Kapil Wadhawan and Dheeraj Wadhawan, seeking default bail in Crime No. RC No.0062020A0005 under Sections- 120B,

409, 420, 467, 468, 471 of The Indian Penal Code, 1860 (hereinafter referred to as "I.P.C.") read with Sections 7A, 8, 13(2),13(1)(d) of Prevention to the Corruption Act, 1988 Police Station-CBI/ACB, Lucknow, after their bail application for default bail bearing Bail Application No. 7528 of 2022 got rejected by the learned Special Judge, Anti-Corruption, CBI (West), Lucknow, vide order dated 1st October 2022.

2. The facts in brief of the present case, which are relevant for the purposes of deciding the present bail application are mentioned as under:

3. On 2nd November 2019, an FIR No. 540 of 2019 came to be registered at Police Station Hazaratganj, Lucknow on the complaint of one I.M. Kaushal, Secretary, Trust of Uttar Pradesh Power Corporation Limited (hereinafter referred to as "U.P.P.C.L.") against Mr. Praveen Kumar Gupta, ex-Secretary (Trust) and Mr. Sudhanshu Dwivedi, who served U.P.P.C.L. in the capacity of Director (Finance) from June 2016 to June 2019. During the investigation names of several other accused came to the light as the investigating agency found these accused also involved and part of deep-rooted criminal conspiracy in the mega scam of several thousand crores Rupees. Investigation of the said case was transferred to the Central Bureau of Investigation (CBI) and CBI registered the Regular Case and undertook the investigation.

4. As per the FIR, in pursuance of the implementation of the Uttar Pradesh Electricity Reforms Transfer Scheme, 2000, the Uttar Pradesh State Electricity Board was divided on 14th January 2000 into 3 Companies i.e. (i) Uttar Pradesh Power Corporation Limited, (ii) Uttar Pradesh Rajya Vidut Utpadan Nigam Limited, and (iii) Uttar Pradesh Hydro Power Corporation Limited. On 14th January 2000, the employees working in the Uttar Pradesh State Electricity Board were assigned to the aforesaid three corporations established in pursuance of the Reform Scheme. In respect of all the employees working in these three power corporations, Uttar Pradesh State Power Sector Employees Trust was constituted on 29th April 2000 under the provisions of the Provident Fund Act, 1952 to manage the general provident fund, gratuity fund, and pension fund of the employees of three electricity corporations so constituted.

5. A Trust-deed was executed on 24th April 2000 for the creation of the Trust. As per the trust deed, the aforesaid three funds namely, General Provident Fund, Gratuity Fund, and Pension Fund created for the benefit of employees of three power corporations shall be called "Uttar Pradesh State Power Sector Employees General Provident Fund", "Uttar Pradesh State Power Sector Employees Gratuity Fund" and "Uttar Pradesh State Power Sector Employees Pension Fund". These funds collectively would be referred to as "Funds".

6. As per the Trust-deed, the funds vest in the Board of Trustees who shall administer the Funds in accordance with the Rules as set out in the Schedule of the Trust-deed. The First Trustees are:

(i) "Chairman cum Managing Director, U.P.P.C.L.' Chairman of the Trust;

(ii) "Chairman cum Managing Director of U.P.R.V.U.N.L.' Member; and

(iii) "Chairman cum Managing Director, U.P. Hydro Power Corporation Ltd.', Member.

7. For the management of the provident fund of the employees joining the U.P.P.C.L. on 14.01.2000 or later, Uttar Pradesh Power Corporation Contributory Provident Fund Rules, 2004 was enacted and made applicable with effect from 1st April 2004. Uttar Pradesh Power Corporation Contributory Provident Trust (hereinafter referred to as "CPF") was constituted on 25th June 2006 under the Provident Fund Act, 1952.

8. Appropriation and the management of Provident Funds of the employees of the Uttar Pradesh State Power Sector Employees Trust and the Uttar Pradesh Corporation C.P.F. Trust were the responsibility of the Secretary (Trust) and Director (Finance) U.P.P.C.L. The management and appropriation and other related actions concerning the provident fund's account of the employees were to be performed by the Secretary (Trust) and Director (Finance) of both the Trusts in accordance with the directions issued by the Central Government from time to time.

9. The amount deducted from the salaries of the member employees of the Uttar Pradesh State Power Sector Employees Trust and the Uttar Pradesh Corporation Contributory Provident Fund Trust were forwarded to the Trust office by all three Corporations which then were required to be invested by the Secretary (Trust) on the approval of Director (Finance) and trustees and in accordance with the directions issued from time to time by the Board of Trustees in various approved schemes.

10. On 08.05.2013, it was resolved by the Board of Trustees of the U.P. State Power Sector Employees Trust that the amount of the General Provident Fund would be invested in term deposits of the nationalized Banks for a period of 1 to 3 years. Further, it was resolved in the meeting of the Board of Trustees of the Uttar Pradesh State Power Sector Employees Trust on 21st April 2014 that in case there were alternative investment avenues available that were as safe as an investment in the Banks and offered more assured interest, they should be presented after deliberations and considerations and, if needed then the Director (Finance) should be duly authorized to take the services of an investment advisor.

11. In pursuance of the aforesaid resolutions till October 2016, Provident Fund amounts of the two Trusts were deposited in the Nationalized Banks in term deposits accruing interest.

12. However, in the month of December 2016 on the proposal of the then Secretary of the Trust, Mr. Praveen Kumar Gupta, after obtaining the approvals from the then Director (Finance), Mr. Sudhanshu Dwivedi, and the then Managing Director, U.P.P.C.L., Mr. A.P. Mishra who was working as Managing Director, U.P.P.C.L., started investing the G.P.F. and C.P.F. funds in the P.N.B. Housing term deposits. In the same series, the G.P.F. and C.P.F. funds were invested as term deposits by Mr. Sudhanshu Dwivedi and Mr. Praveen Kumar Gupta from March 2017 in a private institution named Deewan Housing Finance Ltd (hereinafter referred to as "DHFL') with the approval of the Managing Director, U.P.P.C.L. Mr. A.P. Mishra without any authority of law in illegal and mala fide manner for personal gains. Mr. A.P. Mishra approved investing the amount of two Funds in NBFC, i.e. DHFL in active connivance and furtherance of deep-rooted criminal conspiracy with the purpose and

motive of earning huge illegal brokerage and misappropriation of thousand crores Rupees of the contributions made by employees in power companies by the accused. The applicants were the Managing Director and Director of DHFL and they were in complete control of the affairs of DHFL at the relevant time.

13. It is alleged that forged and fabricated minutes of the meeting of the Board of Trustees of the Contributory Provident Fund allegedly held on 24th March 2017 were prepared to justify the illegal investment of a huge sum of money from two funds in DHFL. In the aforesaid meeting, it was allegedly resolved that "the Board of Trustees agreed to consider the investment proposals as per the government notification dated 2nd March 2015 in the securities with higher security and high-interest rates other than deposits of nationalized banks in AAA-rated Companies. As per prevailing practice, further investment and the securities would be decided by Secretary (Trust) on a case-to-case basis with the consent/approval of Director (Finance), U.P.P.C.L. trustee."

14. It has been alleged that as per records available in the office of trust from March 2017 to December 2018, the then Secretary (Trust) Mr. Praveen Kumar Gupta who was in charge of both C.P.F. and G.P.F. Trust after obtaining approval from the then Director (Finance), Mr. Sudhanshu Dwivedi and Mr. A.P. Mishra who was working as Managing Director of U.P.P.C.L. and transgressing the clear directives of the Government of India as contained in its notification dated 2nd March 2015 which specifically provide that the money of the employees Provident Fund should not be invested in any of the institutions other than scheduled/unscheduled commercial banks, with ill intentions invested more than 50% of the amount of two trusts in term deposit of DHFL, in connivance and furtherance of criminal conspiracy of accused including the present accused-applicants knowing fully well that it did not fall in the category of unscheduled commercial banks and, it was an unsecured private institution.

15. It is also alleged that according to the records available, GPF contributions amounting to Rs.2631.20 crores were invested in DHFL out of which only Rs.1185.50 crores have been received by the trust office and an amount of Rs.1445.70 crores plus interest is yet to be received. Similarly, an amount of Rs.1491.5 crores of the Contributory Provident Fund was invested in the DHFL, out of which Rs.669.3 crores have been received by the office of the trust and Rs.822.2 crores plus interest is yet to be received. Thus, the total amount of Rs.2267.90 crores (Principal Amount) and interest could not be received from the DHFL and DHFL itself has gone into liquidation.

16. Thus, allegations in sum and substance are that the accused in furtherance of criminal conspiracy with mala fide intention for personal gain and in violation of the relevant provisions of the law have invested a huge amount of two funds i.e. Uttar Pradesh Power Sector Employees General Provident Fund and Uttar Pradesh Power Corporation Limited Contributory Provident Fund in DHFL, a company incorporated under the Companies Act. Their mala fide decision has caused a huge loss to these funds to the extent of Rs.2267.9 crores (Principal Amount) besides interest. The investigation has revealed that the investments have been

made in the DHFL by the accused for personal gain as they have received a huge amount from DHFL as a commission for making such investments.

17. The applicants were produced before the learned Special Judge, Anti-Corruption, CBI (West), Lucknow on 26.5.2022 by the CBI and they were remanded to the custody of the CBI on the same day. After custody of the applicants for 15 days got over, the accused-applicants were remanded to judicial custody on 9.6.2022 in connection with the F.I.R. in question.

18. According to the applicants, 60 days got expired on 24.7.2022 from the date of their custody, i.e., 26.5.2022. It is said that no charge sheet was filed against the applicants within the prescribed time of 60 days and, therefore, the applicants had preferred an application seeking default bail under section 167 of the Cr.P.C. on the said ground. The CBI filed an objection to the said application and said that since the offence under sections 409 and 467 of the I.P.C. had been invoked against the applicants, for which punishment provided is for life and the CBI had already filed charge sheet within the stipulated period of 90 days as per section 167(2) of the Cr.P.C. therefore, the application filed on behalf of the accused-applicants for seeking default bail was to be rejected being misconceived.

19. Sri S.C. Mishra and Sri Nandit Srivastava, learned Senior Advocates assisted by Sri Pranjal Krishna, Smt. Janaki Garade, Smt. Urvi Purve, and Sri Samarth Agarwal, learned Advocates, have submitted that under the provisions of section 167 of the Cr.P.C, if the investigating agency has failed to file a charge sheet in respect of the offences for which the accused-applicants have been charged within a period of 60 days from the date of their initial custody, they are entitled to be enlarged on default bail. Learned Senior Advocate has submitted that there is no dispute in respect of the fact that 60 days got expired on 24.7.2022 and the CBI could not file the charge sheet within the outer limit of 60 days and, therefore, the applicants are entitled to be enlarged on default bail.

20. It is further submitted that it is the mandate of section 167(2)(a)(ii) of the Cr.P.C. that if the investigating agency fails to file the charge sheet for offences, where the minimum period of 10 years imprisonment as punishment is not provided, the accused is entitled to be enlarged on bail after the lapse of 60 days irrespective of maximum punishment of life.

21. In support of the aforesaid submissions Sri Mishra has placed reliance on judgments in the case of **Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67; M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485;** and a judgment of this court in the case of **Sohan Lal v. State of U.P., 1991 SCC OnLine All 469.**

22. On the other hand, Sri Anurag Kumar Singh, learned counsel appearing for the CBI has submitted that the accused-applicants are charge-sheeted, inter alia, for the offences under section 407, 467, I.P.C. and these offences entail maximum punishment up to 'for life'. He has submitted that the accused-applicants have been charge-sheeted for committing offences under section 120-B, read with sections 409, 420, 467, 468, 471, I.P.C. and

section 7A, 8, 13(2), read with section 13(1)(d) of Prevention to the Corruption Act, 1988. As per section 109 of the I.P.C. punishment for the said offences would be the same, if the accused-applicants have been charged without the aid of section 120-B IPC. Sri Anurag Kumar Singh learned counsel for the CBI has further submitted that the judgments relied on by Sri Mishra, Learned Senior Counsel do not support his submission. Sri Anurag Kumar Singh has also placed reliance on the same very judgments to buttress his submission that since the punishment for which the accused-applicants have been charged, the punishment provided is up to "for life', the accused-applicants cannot claim that since the charge sheet could not be filed within 60 days, they are entitled to default bail under section 167(2) of the Cr.P.C.

23. The applicants were not named as accused in the F.I.R. or the charge sheet and supplementary charge sheet earlier filed. The applicants were in CBI custody in Mumbai for some other offences allegedly committed by them. The accused-applicants are Managing Director/ Directors of the company Dewan Housing Development Finance Ltd. (DHFL) where the investment of Rs. 4,122.7 crores from four GPF and CPF Trusts of Uttar Pradesh Power Companies was made unauthorizedly in connivance with the accused-applicants to earn huge commission offered by the accused-applicants on behalf of M/s DHFL and out of this amount of Rs. 4,122.7 crores Rs. 2267.9 crores and interest thereon allegedly got misappropriated by the DHFL, a company controlled by the accused-applicants. The CBI had investigated their role in the commission of fund misappropriation of thousands of crores, i.e. public money by them and a charge sheet has been filed against them. DHFL and accused-applicants are accused of misappropriating several thousand crores of rupees from financial institutions of the country besides the amount of two trusts of power companies of the Government of Uttar Pradesh.

24. The only question which requires consideration in the present case is whether the accused who are allegedly involved in the commission of the offence(s) for which punishment is up to "for life', but minimum punishment of "ten years is not provided, would he be entitled to default bail under the provisions of section 167(1)(a)(ii), Cr.P.C. as the charge sheet has not been filed within a period of sixty days.

25. Section 167 of the Cr.P.C. reads as under:

"Section 167, Cr.P.C.- ***Procedure when investigation cannot be completed in twenty-four hours.***

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not

jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life, or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this subsection shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered on this behalf by the High Court, shall authorize detention in the custody of the police. Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;] Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorizing detention.]

(2A) Notwithstanding anything contained in sub- section (1) or sub- section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub- inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section."

26. A three judges Bench of the Supreme Court in *Rakesh Kumar Paul*

(supra) considered the question that whether the accused charged with an offence punishable with imprisonment for a period from 4-10 years would be entitled to default bail on expiry of 60 days on the ground that no charge sheet has been filed within the statutory period and whether the period of investigation for such an offence would be 60 or 90 days. The majority view is of Hon'ble Mr. Justice Madan B. Lokur and Hon'ble Mr. Justice Deepak Gupta. Hon'ble Mr. Justice Madan B. Lokur held that an offence punishable with a sentence of death or imprisonment for life or imprisonment for a term which may extend to 10 years is a serious offence requiring intensive or perhaps extensive investigation and it would, therefore, appear that given the seriousness of the offence, the extended period of 90 days should be available to the investigating officer in such cases. Paragraph 27 of the said judgment, which is relevant is extracted hereinbelow:

"27. Indeed, an offence punishable with a sentence of death or imprisonment for life or imprisonment for a term that may extend to 10 years is a serious offence entailing intensive and perhaps extensive investigation. It would therefore appear that given the seriousness of the offence, the extended period of 90 days should be available to the investigating officer in such cases. In other words, the period of investigation should be relatable to the gravity of the offence - understandably so. This could be contrasted with an offence where the maximum punishment under the IPC or any other penal statute is (say) 7 years, the offence being not grave enough to warrant an extended period of 90 days of investigation. This is certainly a possible view and indeed the Cr.P.C. makes a distinction in the period of investigation for 'default bail' depending on the gravity of the offense. Nevertheless, to avoid any uncertainty or ambiguity in interpretation, the law was enacted with two compartments. Offences punishable with imprisonment of not less than ten years have been kept in one compartment equating them with Offences punishable with death or imprisonment for life. This category of Offences undoubtedly calls for deeper investigation since the minimum punishment is pretty stiff. All other Offences have been placed in a separate compartment, since they provide for a lesser minimum sentence, even though the maximum punishment could be more than ten years imprisonment. While such Offences might also require deeper investigation (since the maximum is quite high) they have been kept in a different compartment because of the lower minimum imposable by the sentencing court, thereby reducing the period of incarceration during investigations that must be concluded expeditiously. The cut-off, whether one likes it or not, is based on the wisdom of the Legislature and must be respected."

27. Hon'ble Mr. Justice Deepak Gupta, who along with Hon'ble Mr. Justice Madan B. Lokur constituted a majority in the said judgment made the position categorical and clear and held that if the offence was punishable with life imprisonment, even if the minimum sentence provided is less than 10 years, the period of detention for default bail would be 90 days. Paragraphs 62-67 which are relevant are extracted hereinbelow:

"62. We are only concerned with the interpretation of the phrase "for a term of not less than ten years" occurring in Section 167(2)(a)(i), which provides a

period of 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years.

63. In my view, without indulging in semantic gymnastics, this provision's meaning is absolutely clear. It envisages three types of Offences:

(i) Offences that are punishable with death;

(ii) Offences that are punishable with imprisonment for life;

(iii) Offences that are punishable with a term not less than 10 years.

64. In my view the language of the statute is unambiguous. Out of the three categories of Offences, we need to deal only with that category of Offences where the punishment prescribed is not less than 10 years. If an offence is punishable by death then whatever the minimum punishment, the period of investigation permissible would be 90 days. Similarly, if the offence is punishable with life imprisonment, even if the minimum sentence provided is less than 10 years, the period of detention before 'default bail' is available would be 90 days.

65. Keeping in view the legislative history of Section 167, it is clear that the legislature was carving out the more serious Offences and giving the investigating agency another 30 days to complete the investigation before the accused became entitled to a grant of 'default bail'. It categorizes these Offences into three classes:

I. the first category comprises those Offences where the maximum punishment was death;

II. the Second category comprises those Offences where the maximum punishment is life imprisonment.

III. The third category comprises Offences that are punishable with a term of fewer than 10 years.

66. In the first two categories, the legislature made reference only to the maximum punishment imposable, regardless of the minimum punishment, which may be imposed. Therefore, if a person is charged with an offense, which is punishable by death or life imprisonment, but the minimum imprisonment is less than 10 years, then also the period of 90 days will apply. However, when we look at the third category, the words used by the legislature are "not less than ten years". This means that the punishment should be 10 years or more. This cannot include Offences where the maximum punishment is 10 years. It means that the minimum punishment is 10 years whatever the maximum punishment.

67. While interpreting any statutory provision, it has always been accepted as a golden rule of interpretation that the words used by the legislature should be given their natural meaning. Normally, the courts should be hesitant to add words or subtract words from the statutory provision. ....."

28. In paragraph 75 of the said judgment also it has been said that in respect of offence under section 304-B of I.P.C. that since the offence is punishable with imprisonment for a term, which shall not be less than 7 years, but may extend to imprisonment for life, then the fact that the minimum sentence provided is 7 years would make no difference. It is only when

the maximum sentence is less than life imprisonment, then the minimum sentence must be 10 years to fall into the third category of cases.

29. Hon'ble Mr. Justice Gupta had given examples of such cases, e.g. Offences punishable under sections 21-C and 22-C of the Narcotic Drug and Psychotropic Substances Act, 1985 which provide a minimum sentence of 10 years and a maximum sentence of 20 years. The conclusions have been recorded in paragraphs 84.1 to 84.4, which reads as under:

"84.1. I agree with both my learned brothers that the amendment made to the Prevention of Corruption Act,1988 by the Lokpal and Lokayuktas Act, 2013 applies to all accused charged with Offences under this Act irrespective of the fact whether the action is initiated under the Lokpal and Lokayuktas Act, 2013, or any other law;

84.2. Section 167(2)(a)(i) of the Code is applicable only in cases where the accused is charged with (a) Offences punishable with death and any lower sentence; (b) Offences punishable with life imprisonment and any lower sentence and (c) Offences punishable with a minimum sentence of 10 years;

84.3. In all cases where the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment then Section 167(2)(a)(ii) will apply and the accused will be entitled to grant of 'default bail' after 60 days in case charge-sheet is not filed.

84.4. The right to get this bail is an indefeasible right and this right must be exercised by the accused by offering to furnish bail."

30. In the case of M. Ravindran (supra) question before the Supreme Court was as to whether the indefeasible right accruing to the accused under section 167(2) of the Cr.P.C. gets extinguished by the subsequent filing of an additional complaint by the investigating officer. The Supreme Court in passing remarks in paragraph 17.7 in the said judgment observed that the majority opinion in Rakesh Kumar Paul (supra) was that 90 days remand extension under section 167(2)(a)(i) would be available in respect of Offences where the minimum period of the sentence is 10 years stipulated.

31. Paragraph 17.7 is extracted hereinbelow:

"17.7 Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention and must be interpreted in a manner that serves this purpose. In this regard we find it useful to refer to the decision of the three-Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67, which laid down certain seminal principles as to the interpretation of Section 167(2), CrPC though the questions of law involved were somewhat different from the present case. The questions before the three-Judge Bench in Rakesh Kumar Paul were whether, firstly, the 90-day remand extension under Section 167(2)(a)(i) would be applicable in respect of Offences where the maximum period of imprisonment was 10 years, though the minimum period was less than 10 years. Secondly, whether the application

for bail filed by the accused could be construed as an application for default bail, even though the expiry of the statutory period under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90-day limit is only available in respect of Offences where a minimum ten-year imprisonment period is stipulated and that the oral arguments for default bail made by the counsel for the accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the Court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently observed as follows:

"29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and within an otherwise timebound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and to hold the investigating agency accountable that time limits have been laid down by the legislature...

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32...Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure the expeditious conclusion of investigations so that an accused person is not unnecessarily deprived of his or her liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of the expeditious conclusion of investigations and the angle of personal liberty and not from a pure dictionary or textual perspective as canvassed by the learned counsel for the State.

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41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and other writs being entertained even based on a letter addressed to the Chief Justice or the Court." (emphasis supplied)

Therefore, the Courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21."

32. The said judgment in M. Ravindran (supra) was not on the issue regarding a custody period of 90 days for offences where the maximum punishment is imprisonment "for life' but the minimum punishment is not prescribed in the statute, as the issue is in the present case. The language of section 167(2)(a)(i) of the Cr.P.C. is clear and while interpreting any statutory provision it is the golden rule of interpretation that the words used by the legislature should be given their natural meaning. The text of section 167 of the Cr.P.C. is explicit and needs no great interpretation. The legislature in its wisdom has extended a custody period of 90 days without filing the charge sheet in respect of the three kinds of Offences where punishment is prescribed: a. death; b.

imprisonment for life; or c. minimum sentence provided is not less than 10 years. If the punishment provided for an offence is life, then the custody period is extendable to 90 days irrespective of the fact that a minimum sentence of 10 years is not provided as in the case of an offence under section 304-B of the I.P.C. Any offence for which the sentence provided is more than 10 years, custody period would be extendable to 90 days.

33. The offences for which the accused-applicants have been charge sheeted involve intensive and extensive investigation as mind-boggling financial fraud regarding siphoning and misappropriation of public funds of thousands of crores is involved in the present case. The role of the accused-applicants was required to be investigated deeply and further, the offence is under sections 467 and 409 of the I.P.C. provide punishment up to "for life' and, therefore, I am of the view that the extended period of 90 days would be available to the investigating agency for such an offence. In view thereof, I do not find much substance in the submissions of Sri S.C. Mishra, learned Senior Advocate. The accused-applicants did not get entitled to default bail on an expiry of 60 days from the date of their custody in the present case. The present application thus is hereby rejected.

(2022) 12 ILRA 680
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 27563 of 2020

Pushpendra Chauhan
...Applicant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Mohit Singh,Sri Dhirendra Kumar Srivastava, Sri Rajiv Sisodia, Sri Sadaful Islam Jafri, Sri N.I. Jafri

Counsel for the Opposite Partiy:
G.A., Sri Shivam Yadav

(A) Criminal Law - Bail - The Code of Criminal Procedure, 1973 - Sections 161,164 , Section 2 (wa) - Victim - Indian Penal Code, 1860 - Section 375,376D,506 - Against her will - Without her consent - Protection of Children from Sexual Offences Act, 2012 - Sections 5/6

Victim in touch with applicant - mobile chatting - enticed her away - committed rape to the victim - co-accused and unknown person also committed rape - threatened to kill her father and brother – on disclosing their identity - Investigating Officer exonerated other named accused persons in the final report - charge-sheet filed against applicant only - conversations between the applicant and the victim - indicate proximity between the two - one quilt and two packets of condoms were recovered.**(Para -3,12,16)**

HELD:- Consent can be obtained by putting someone in fear or under pressure or by persuasive influence or other more subtle methods. Thus, the consent, if any, pales into insignificance. Not a fit case for granting bail to the applicant.**(Para -20,22)**

Bail application dismissed. (E-7)

List of Cases cited:-

1. Kalim Vs St. of U.P. & anr., Criminal revision no. 568 of 2022

2. Sushil Kumar Vs Rakesh Kumar, (2003) 8 SCC 673

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Mohit Singh, learned counsel for the applicant and Sri Shivam Yadav, learned counsel for the informant as well as Sri P.K. Srivastava, learned AGA for the State and also perused the material placed on record.

2. By means of the present bail application, the applicant seeks bail in Special Sessions Trial No. 291 of 2020 arising out of Case Crime No. 30 of 2020, under Section 376D Indian Penal Code1 and Sections 5/6 of Protection of Children from Sexual Offences Act, 20122, Police Station- Hasanpur, District- Amroha, during the pendency of trial.

PROSECUTION STORY

3. The facts of the case in a nutshell are that the victim was in touch with the applicant through mobile chatting. On 17.01.2020, the victim had gone to the house of her aunt and at about 06:30 PM, she had gone to the crossing at Gajraula and the applicant is stated to have enticed her away on the pretext of giving her some gifts on the promise that they shall return within a period of one hour. On the way to Hasanpur, the applicant is stated to have taken her in a room near tubewell wherein one unknown person was standing guard, armed with a country made pistol and the applicant is stated to have committed rape to the victim. It is also alleged in the FIR that after some time, the co-accused, Jaiveer Chauhan and Kovind Chauhan and the said unknown person are also stated to have committed rape with the victim and later on, threatened her to kill her father and brother if she ever reveals their identity to anyone. It is also alleged in the FIR that the applicant had deleted all the chats from the mobile phone of the victim at the time of said incident. The victim is also stated to have been threatened by the applicant of his high connections in high echelons of the society. Somehow the victim had contacted her father and also dialled 100 number to the police whereupon the police is stated to have retrieved her. The FIR was lodged on 18.01.2020 at about 05:10 PM by the victim/informant against the applicant and co-accused persons, Jaiveer Chauhan, Kovind Chauhan and one unknown person u/s 376D & 506 IPC and Section 5/6 of POCSO Act.

RIVAL CONTENTIONS

4. Learned counsel for the applicant has stated that the applicant has been falsely implicated in the present case. The victim is a consenting party. Learned counsel has further stated that the FIR is delayed by about eight hours and there is no explanation of the said delay caused. It is indicated in the FIR itself that the victim had called the police in the morning itself and she was retrieved by the police. Learned counsel has further stated that as per ossification test report, the age of the victim was 18 years. Learned counsel has stated that more often than not the age of the wards is indicated much less by their parents. To buttress his argument, learned counsel has placed much reliance upon the judgement of this Court passed in Kalim Vs. State of U.P. and Another3 of which the relevant para-11 of the judgement is reproduced hereunder:-

"11. In Sanjeev Kumar Gupta (supra), the credibility and authenticity of the matriculation certificate for the purpose of determination of age under Section 7(A) of the Juvenile Justice Act, 2000 came up for consideration. In the said case, the Juvenile Justice Board had rejected the claim of the juvenility and that decision of

the Juvenile Justice Board was restored by the Hon'ble Apex Court by rejecting the order of the Hon'ble High Court. It was observed therein that the records maintained by the C.B.S.C. were purely on the basis of final list of the students forwarded by the Senior Secondary School where the juvenile had studied from Class 5 to 10 and not on the basis of any other underlying documents. On the other hand, there was clear and unimpeachable evidence of date of birth which had been recorded in the records of another school, which the second respondent therein had attended till class 4 and which was supported by voluntary disclosure made by the accused while obtaining both, Aadhaar Card and driving license. ***It was observed that the date of birth reflected in the matriculation certificate could not be accepted as authentic or credible.*** *In the said case, it was held that the date of birth of the second respondent therein was 17.12.1995 and that he was not entitled to claim juvenility as the date of the alleged incident was 18.08.2015."*

(Emphasis Added)

5. Learned counsel for the applicant has also placed much reliance upon the settled case law of the Apex Court in **Sushil Kumar vs. Rakesh Kumar4**, wherein it has been stated that it is more often in the Indian Society that person shows the age of their wards much below than their actual age. Learned counsel has vehemently argued that the final report of the police categorically indicates that no offence of rape has been committed by the applicant and he has to be tried on account of the age of minority of the victim. The Apex Court in umpteen number of cases has opined that a leverage of two years may be granted to the applicant with respect to the age referred in ossification test report.

6. Learned counsel for the applicant has also stated that to date, no efforts have been made and it has not been revealed as to who was the unknown person who was carrying a country made pistol and threatened the victim at the time of offence. At the time of submitting the final report (charge-sheet), the Investigating Officer was pleased to exonerate the co-accused persons altogether from all the offences. As per the CDRs, the said co-accused persons, namely, Jaiveer Chauhan and Kovind Chauhan were not found to be present at the place of occurrence.

7. Learned counsel for the applicant has further stated that even the Investigating Officer has not found the applicant to have committed the offence rather the applicant has been made an accused only on the basis of age of minority of the victim. Neither the injuries sustained by the victim have been disclosed in the FIR nor in her statements recorded u/s 161 and 164 Cr.P.C. In the injury report, no duration of the injuries has been indicated which falsifies the prosecution story. Learned counsel has also stated that the injury report indicates that hymen represented old healed tags meaning thereby the victim was used to sexual intercourse.

8. Learned counsel for the applicant has placed much reliance on the detailed chats of the victim and the applicant filed with the supplementary affidavit indicating their close contiguity.

9. Learned counsel has also placed much reliance upon the statement of one Smt. Neeraj who has categorically stated that the applicant has been falsely implicated in the present case at the behest of one conman Chandra Mohan who runs

various institutions in the State of Uttarakhand and Uttar Pradesh. The co-accused persons, Jaiveer and Kovind had filed several applications against the conman Chandra Mohan and the named accused persons have been implicated due to the said Chandra Mohan Maharaj who himself is a history-sheeter. The co-accused person Jaiveer Chauhan is the cousin of the applicant. The said conman has misused his power and money by foisting the present false case upon the applicant and other co-accused persons using victim as a conduit.

10. Learned counsel for the applicant has further indicated that the police has recovered two condom packets from the place of occurrence at the instance of the victim which indicates that the said act committed, if any, was with the consent of the victim.

11. Learned counsel for the applicant has also stated that the impugned order passed by the High Court on 30.3.2022 granting bail to the applicant is correct. Learned counsel has also stated that the Apex Court has not cancelled the bail of the applicant rather has remanded back the bail application to be re-heard on merits. The Apex Court at the time of remanding the matter back has even granted interim protection to the applicant till 30.11.2022. The applicant has no other criminal history except two cases in which closure report has already been filed and, therefore, the applicant deserves to be released on bail. In case, the applicant is released on bail, he will not misuse the liberty of bail and shall cooperate with the trial.

12. Per contra, Sri Shivam Yadav, learned counsel for the informant has vehemently opposed the prayer for bail and has categorically stated at Bar that as per the school certificate of the victim, her age is 17 years and 4 months only. Her date of birth is 10.9.2002 and as per her medical report, her age is 18 years. Learned counsel has further stated that as per the settled law of the Apex Court, a leverage of two years may be granted on either side and why not, it should be read on lower side. Learned counsel has placed much reliance upon the recovery memo dated 20.1.2020 which was taken from the place of occurrence at the instance of the victim herein wherein one quilt and two packets of condoms were recovered in which one was found empty and another contained two unused condoms. The recovery of condoms indicates towards the commissioning of offence.

13. Learned counsel for the informant has also placed much reliance upon the medical report of the injured person wherein the medical examination of the victim was conducted promptly on 18.1.2020 at about 06:35 PM at the CHC Hospital, Gajraula. The doctor had found following injuries on the body of the victim/injured but for the sake of brevity, only the relevant part of injury is being reproduced hereunder:-

External Examination -

Reddish abrasion over both chests Size- 2.5 cm × 2 cm each. Reddish abrasion 2 cm × 1 cm over dorsal aspect of Rt. Hand at the time of examination.

Internal Examination -

Lacerated wound 2 cm × 0.5 cm × muscle deep over lower part of vagina at 6 O' clock position.

Reddish contusion over inner part of vagina at the time of examination.

Hymen represented by old healed tags.

14. Learned counsel for the informant has also stated that the said injuries indicate the resistance by the victim at the time of commissioning of the said offence with her. Learned counsel has also stated that in the ossification test report of the victim, it has been observed that sternal end of clavicle bone epiphysis appeared but not fused which indicates that the age of the victim is below 18 years and, thus, corroborated by her age certificate.

15. Learned AGA has also opposed the prayer for bail and has stated that the learned Special Judge at the stage of taking cognizance has summoned the exonerated accused persons Jaiveer Chauhan and Kovind Chauhan as well. Thus, the bail application of the applicant deserves to be rejected.

CONCLUSION

16. It is true that the Investigating Officer has exonerated the other named accused persons in the final report (charge-sheet) filed against the applicant only. It has been indicated in the said final report that the conversations between the applicant and the victim indicate proximity between the two. The final report has been filed owing to the age of the victim falling below 18 years, the legal age of the consent.

17. For the sake of verbiage, only the relevant part of the definition of rape is being discussed hereinafter. The offence of rape is defined u/s 375 IPC as sexual intercourse under the circumstances falling under any of the following seven descriptions -

First.- Against her will.
Secondly.- Without her consent.
Thirdly.- ....

...

18. It is not without reason that both the phrases are put in separately in the definition of rape. Consent can be obtained by putting someone in fear or under pressure or by persuasive influence or other more subtle methods.

19. It is not without reason that the word "consent" is prefixed with "without" and the word "willingness" is prefixed with "against".

20. The age of the victim is just above 17 years, her date of birth being 10.09.2002. Thus, the consent, if any, pales into insignificance. In addition to it even if, as suggested by the learned counsel for the applicant, the consent is presumed, willingness was absent as is amply indicated by the medical examination report of the victim. The nature, the seat of injury just deflates the claim of defence that it was not rape.

21. The Courts are under duty to deal with cases of such nature with utmost responsibility and sensitivity. It is impudent to look for expression willingness or unwillingness. The act was resisted by her is too obvious by the medical report and that brings the act within the definition of rape as it was against her will. It is true that the liberty of the applicant is at stake but the Courts have to look into the larger interest of the society as well and even the

interest of the victim/accuser has also to be taken into consideration as of late even the role of the victim has been accorded a wider view in light of the amendment in the Cr.P.C. by adding the definition of victim u/s 2(wa).

22. Considering the rival submissions adduced by the learned counsel for the parties, the facts of the case, evidence adduced and also considering the nature of offence, I do not find it a fit case for granting bail to the applicant.

23. Accordingly, the application is found devoid of merits and is **dismissed.**

24. The Trial Court is expected to expedite the trial of the case and conclude it in accordance with law, preferably within a period of one year from the date of this order, if there is no other legal impediment.

25. It is also made clear that observations made in dismissing the 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 and evidence on record.

(2022) 12 ILRA 685
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Bail Application No. 46497 of 2022

Ramesh Rai @ Matru Rai
...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ran Vijay Singh, Sri Atharva Dixit, Sri Praveen Kumar Singh, Sri Manish Tiwari (Sr. Adv.)

Counsel for the Opposite Party:
G.A., Sri Ajay Singh

(A) Criminal Law - Gangsters bail - The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 3 (1) - Penalty, Section 19 (4) - opportunity to the public prosecutor to oppose the application for release of a person on bail - no provision giving such right to any person other than the Public Prosecutor , The Uttar Pradesh Regulation of Money-Lending Act, 1976 - Sections 10 (i), 10 (ii), 22 and 23 , Indian Penal Code, 1860 - Sections 448, 386, 504, 506, 420, 120-B, 34 - unless an allegation is there concerning an act or omission on the part of an accused, covered by the definition of the term "gang" or "gangster", no F.I.R. should be maintainable - Whether the allegations are true or false will be a matter for investigation, but unless the allegations of an offence under the Act are indicated, as F.I.R. may not be justifiable whatever large the number of past acts be alleged against him. (Para -6,32)

Application - seeking release of applicant on bail - allegation - member of a gang - engaged in commission of several offences - gang-chart - terror of gang - no person comes forward to lodge a complaint - informant not only filed an F.I.R. against applicant – even come to oppose bail application of applicant in present case - applicant implicated in present case merely because he has a criminal history - applicant languishing in jail. **(Para -19,33,34)**

(B) Criminal Law - The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - for booking a person under the provisions of the Act, the authorities have to be prima facie satisfied that a person has acted - Provisions of the Act cannot be used as a weapon to wreak vengeance or harass or intimidate

innocent citizens or to settle scores on political or other fronts . (Para - 31)

HELD:-No reasonable ground for prima facie believing that applicant is guilty of offence alleged. Granted bail in all cases mentioned in Gang-chart. Applicant entitled to claim his release on bail on ground of parity. **(Para - 35,38,39)**

Bail application allowed. (E-7)

List of Cases cited:-

1. Jagjeet Singh Vs Ashish Mishra @ Monu, (2022) 9 SCC 321

2. Zeba Rizwan Vs St. of U.P., 2022 SCC OnLine All 352 : (2022) 4 All LJ 175

3. Sudha Singh Vs St. of U.P., (2021) 4 SCC 781

4. Ashok Kumar Dixit Vs St. of U. P. , AIR 1987 All 235

5. Subhash Vs St. of U.P., 1998 All.L.J. 4870 : 1998 SCC OnLine All 973

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

1. Heard Sri Manish Tiwari Senior Advocate, assisted by Sri Praveen Kumar Singh Advocate, the learned counsel for the applicant, Sri Arun Kumar Pandey, the learned A.G.A. for the State and Sri Ajay Singh Advocate, the learned counsel for the informant / victim in Case Crime No. 74 of 2022.

2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 126 of 2022, under Section 3 (1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (which will hereinafter be referred to as "the Gangsters Act), Police Station Chetganj, District Varanasi. A copy of the Gang-chart accompanying the F.I.R. mentions involvement of the applicant in four cases, one of which is Case Crime No. 74 of 2022 under Sections 448, 386, 504, 506, 420, 120-B, 34 IPC and Sections 10 (i), 10 (ii), 22 and 23 of the Uttar Pradesh Regulation of Money-Lending Act, 1976, Police Station Chetganj, Commissionerate Varanasi.

3. Sri Ajay Singh, Advocate has put in appearance on behalf of the informant of Case Crime No. 74 of 2022 and he has sought to oppose the bail application.

4. Sri. Manish Tiwari Senior Advocate has opposed the intervention of the informant of Case Crime No. 74 of 2022 in the present case, i.e. Case Crime No. 126 of 2022 and he has submitted that the informant of Case Crime No. 74 of 2022 does not fall within the definition of victim of the present case and, therefore, he has no right to oppose the prayer for grant of bail to the applicant in the present case. He has further submitted that the Gangsters Act is a special enactment having an overriding effect on any other law, as provided by Section 20 of the Act, which is as follows: -

"20. Overriding effect. - The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other enactment."

5. The provision for grant of bail to a person accused of an offence under the Gangsters is provided in Section 19 of the Act, the relevant portion whereof is as follows: -

"19. Modified application of certain provisions of the Code. -

* * *

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless :

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code."

6. Section 19 (4) contains a provision for giving an opportunity to the public prosecutor to oppose the application for release of a person on bail but there is no provision giving such right to any person other than the Public Prosecutor.

7. Replying to the aforesaid objection, Sri Ajay Singh has stated that although the present case has been registered on the basis of an F.I.R. lodged by the Inspector In-charge, the F.I.R. mentions that the applicant is involved in commission of several offences, one of which being Case Crime No. 74 of 2022. He has further submitted that since Case Crime No. 74 of 2022 forms the basis for lodging of the present case, the victim of Case Crime No. 74 of 2022 is also a victim of the present case.

8. Sri Ajay Singh, Advocate has placed reliance on a decision of the Hon'ble Supreme Court in Jagjeet Singh Vs. Ashish Mishra @ Monu (2022) 9 SCC 321.

9. I have given a thoughtful consideration to the aforesaid submissions made on behalf of the parties.

10. The question whether a victim of a predicate offence can claim a right of hearing to oppose the bail application of a person accused under the Gangsters Act has been dealt with by a co-ordinate Bench of this Court in **Zeba Rizwan versus State of U.P.**, 2022 SCC OnLine All 352 : (2022) 4 All LJ 175. It would be appropriate to note the following submissions which raised in the aforesaid case: -

"8. Learned counsel has relied on the judgment of the Supreme Court passed in Jagjeet Singh v. Ashish Mishra @ Monu (2022) 9 SCC 321, wherein it has been stated that a "victim' within the meaning of Cr.P.C. cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings.

9. Learned counsel has further relied on the judgment of the Supreme Court passed in Sudha Singh v. State of Uttar Pradesh (2021) 4 SCC 781, wherein it has been opined that the accused person, who has been prosecuted in fifteen cases for serious offences including murder, attempt to murder and criminal conspiracy, should not have been granted bail under the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, and the said bail was set aside by the Supreme Court."

11. While dealing with the submissions, this Court held that: -

"15. If the said victims of the predicate offence are permitted to appear and oppose the bail applications in the matters of Gangsters Act, it shall open a Pandora's box and prove hurdle in proper disposal of the case.

* * *

22. Of late, the criminal jurisprudence has developed that the victim is being accorded proper opportunity of being heard not only at the various stages of trial and even at the stage of disposal of bail. But the story herein is a bit different. The matter in question is under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, and not under the IPC or any other Special Act and the complainant of the said case is the S.H.O. of the police station. So the counsel for the victim of the predicate offence i.e. FIR No. 002 of 2022 does not come within the category of "victim" pertaining to the present case. Inspite of the provisions discussed above, the counsel for victim in the offence u/s 302 IPC has been heard at length."

12. What appears from a reading of the aforesaid judgment, is that although Jagjeet Singh and Sudha Singh (Supra) were taken note of, the Court has held that the victim of a predicate offence cannot be treated to be a victim of an offence under the Gangsters Act and doing so will open a pandora's box and it will create hurdles in disposal of cases.

13. In **Jagjeet Singh** (Supra), the Hon'ble Supreme Court has been pleased to hold as follows: -

"19. On the domestic front, recent amendments to the Cr.P.C. have recognised a victim's rights in the Indian criminal justice system. The genesis of such rights lies in the 154th Report of the Law Commission of India, wherein, radical recommendations on the aspect of compensatory justice to a victim under a compensation scheme were made. Thereafter, a Committee on the Reforms of Criminal Justice System in its Report in 2003, suggested ways and means to develop a cohesive system in which all parts are to work in coordination to achieve the common goal of restoring the lost confidence of the people in the criminal justice system. ***The Committee recommended the rights of the victim or his/her legal representative "to be impleaded as a party in every criminal proceeding where the charges punishable with seven years' imprisonment or more".***

20. It was further recommended that the victim be armed with a right to be represented by an advocate of his/her choice, and if he/she is not in a position to afford the same, to provide an advocate at the State's expense. The victim's right to participate in criminal trial and his/her right to know the status of investigation, and take necessary steps, or to be heard at every crucial stage of the criminal proceedings, including at the time of grant or cancellation of bail, were also duly recognised by the Committee. Repeated judicial intervention, coupled with the recommendations made from time to time as briefly noticed above, prompted the Parliament to bring into force the Code of Criminal Procedure (Amendment) Act, 2008, which not only inserted the definition of a "victim' under Section 2 (wa) but also statutorily recognised various rights of such victims at different stages of trial.

*21. It is pertinent to mention that the legislature has thoughtfully given a wide and expansive meaning to the expression "victim' which "**means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir".***

22. It cannot be gainsaid that the rights of a victim under the amended CrPC are substantive, enforceable, and are another facet of human rights. The victim's right, therefore, cannot be termed or construed restrictively like a brutum fulmen. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the CrPC. The presence of "State" in the proceedings, therefore, does not tantamount to according a hearing to a "victim" of the crime.

23. A "victim" within the meaning of CrPC cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a "victim" has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. We may hasten to clarify that "victim" and "complainant/informant" are two distinct connotations in criminal jurisprudence. It is not always necessary that the complainant/informant is also a "victim", for even a stranger to the act of crime can be an "informant", and similarly, a "victim" need not be the complainant or informant of a felony."

24. The abovestated enunciations are not to be conflated with certain statutory provisions, such as those present in the Special Acts like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where there is a legal obligation to hear the victim at the time of granting bail. Instead, what must be taken note of is that:

24.1.First, the Indian jurisprudence is constantly evolving, whereby, the right of victims to be heard, especially in cases involving heinous crimes, is increasingly being acknowledged.

24.2.Second, where the victims themselves have come forward to participate in a criminal proceeding, they must be accorded with an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal, is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses."

(Emphasis supplied)

14. In **Sudha Singh v. State of U.P.**, (2021) 4 SCC 781, the Hon'ble Supreme Court entertained and allowed an appeal filed by the wife of a person, who had been allegedly murdered by the accused, against an order of this Court granting bail to the accused in a case involving commission of offence punishable under Section 3(1) of the Gangsters Act.

15. From the aforesaid discussion, it naturally follows that the term "victim" cannot be taken to be a synonym of the terms "complainant" or "informant" and "victim" need not be the complainant or informant of an offence. If a victim of a predicate offence can file appeal challenging an order granting bail in an offence under the Gangsters Act, he certainly has the right to have an opportunity to oppose the application for grant of bail in an offence under the Act and for that purpose, he will have to be treated as a victim of the offence under the Gangsters Act. Where the victim of a predicate offence has come forward to participate in the proceeding by making submissions in opposition of a bail application, he must be given an opportunity of hearing.

16. It appears that although Jagjeet Singh and Sudha Singh (Supra) have been taken note of by the Bench deciding Zeba Rizwan (Supra), the true purport of the aforesaid judgments has somehow escaped attention of this Court and, therefore, which utmost respect to the co-ordinate bench which decided Zeba Rizwan, I find myself unable to follow the law laid down in it, as it runs contrary to the law laid down by the Hon'ble Supreme Court in the aforesaid cases.

17. Since the F.I.R. of the present case mentions Case Crime No. 74 of 2022 as one of the predicate offences forming basis of lodging of the present F.I.R., and the informant claims to be a victim of the aforesaid predicate offence, he has to be treated as a victim of the present offence and he has the right to make submissions in opposition of the bail application. It is interesting to note that even in Zeba Rizwan (Supra), after holding that the victim of a predicate offence was not the victim of the offence under the Gangsters Act, the Court provided him an opportunity of hearing before deciding the bail application.

18. In view of the aforesaid discussion, the objection raised on behalf of the applicant is hereby rejected and the Court proceeds to decide the application on its merits after taking into consideration the submissions made by the learned Counsel for the informant in Case Crime No. 74 of 2022 in opposition of the bail application.

19. The allegation against the applicant is that he is a member of a gang, which is engaged in commission of several offences, and the gang-chart mentions involvement of the applicant in the following offence:

(i) Case Crime No. 72/2022 under Sections 386, 504, 506, 420, 120-B, 34 IPC and Sections 10 (i), 10 (ii), 22 and 23 of the Uttar Pradesh Regulation of Money-Lending Act, 1976, Police Station Chetganj, Commissionerate Varanasi

(ii) Case Crime No. 74 of 2022 under Sections 448, 386, 504, 506, 420, 120-B, 34 IPC and Sections 10 (i), 10 (ii), 22 and 23 of the Uttar Pradesh Regulation of Money-Lending Act, 1976, Police Station Chetganj, Commissionerate Varanasi

(iii) Case Crime No. 111 of 2021 under Sections 379, 506, 411 IPC, Police Station Chetganj, Commissionerate Varanasi

(iv) Case Crime No. 1099 of 2018 under Sections 504, 506 IPC, Police Station Cantt. Varanasi

20. Case Crime No. 74 of 2022 was lodged on the basis of F.I.R. alleging that the informant's father had started business of Sarees in the year 1982-83. For meeting his business requirements, he had taken a loan of Rs.25,00,000/- from the co-accused Kashi Singh and he had executed an agreement on 21.11.2006 surrendering one of his shops in favour of wife of Kashi Singh. It was alleged in the F.I.R. that after taking the loan, the informant's father came to know that the accused persons are members of a gang involved in earning interest and committing crimes and, therefore, he refunded the money, yet Kashi Singh and others continued to extract money from him and they got the informant's flat transferred in the name of wife of Kashi Singh and in the year 2016, the accused person took possession of another shop belonging to the informant. The F.I.R. alleges that the informant and his father have paid about 70-80 lakhs Rupees and they have got written acknowledgment from Kashi Singh and the applicant in respect of some of the amount paid.

21. As per the F.I.R. allegations, the informant's father had taken a loan of Rs.25,00,000/- from the co-accused Kashi Singh and an agreement was executed on a stamp paper and the sale deed of the flat was executed in favour of wife of Kashi Nath. The informant claims that he and his father have repaid about 70-80 lakhs and they have written acknowledgment in respect of some of the amount paid, but the exact amount repaid by them and exact amount for which they have written acknowledgments has not been disclosed. Considering the facts of the case, the learned Session Judge, Varanasi has passed an order dated 14.09.2022 ordering the applicant's release on bail in Case Crime No. 74 of 2022.

22. In two of the three other cases mentioned in the gang-chart, namely Case Crime No. 72/2022 and Case Crime No. 1099 of 2018, the applicant has already been granted bail by the Session Judge Varanasi and in Case Crime No. 111 of 2021 the applicant has been granted bail by the Chief Judicial Magistrate, Varanasi.

23. A supplementary affidavit filed in support of the bail application mentions the criminal history of the applicant of eleven more cases, in four of which, the applicant has already been acquitted, a Complaint Case No. 93 of 2014 under Sections 420, 506 IPC has been rejected under Section 203 Cr.P.C., in two cases bearing Case Crime No. 208 of 2019 under Sections 341, 504, 506 IPC and Case Crime No. 990 of 2020 under Sections 420, 406, 504, 506 IPC, the Police has submitted final reports which have been accepted by the Trial Court.

24. In the remaining four cases, the applicant has been granted bail and copies of the bail orders have been annexed with the supplementary affidavit.

25. Co-accused Kashi Nath Singh has already been granted bail in the present case by means of an order dated 03-11-2022 passed by this Court in Criminal Misc. Bail Application No. 45869 of 2022. The other co-accused person Prem Shankar Singh @ Meethe has also been granted bail by means of an order dated 21-10-2022 passed by this Court in Criminal Misc. Bail Application No. 45765 of 2022.

26. Sri. Arun Kumar Pandey, the learned AGA and Sri. Ajay Singh Advocate, the learned Counsel for the victim have opposed the prayer for grant of bail and they have submitted that the allegations against the applicant are of serious nature. However, they could not

dispute the aforesaid aspects of the matter and the fact that both the other co-accused persons have already been granted bail.

27. Case Crime No. 126 of 2022, under Section 3 (1) of the Gangsters Act, in which the applicant is seeking bail, has been registered by means of an F.I.R. dated 27.08.2022 lodged by the Inspector in-charge against three named accused persons, including the applicant, alleging that while the Inspector was involved in patrolling of the area in Government Vehicle No. UP 65 AG 0845 alongwith a Head Constable, three Constables and the Chauki In-charge Sub-Inspector Angad Kumar Singh, from the record available in the Police Station and verification of the information received, he found that all the accused persons have formed an organized gang which is led by the applicant and they are engaged in commission of offences like illegal interest earning, money lending, extortion etc. The FIR further alleges that because of the fear of the offences committed by the gang, no person dares to lodge a complaint or give evidence against it. It is further averred in the F.I.R. that a Gang-chart prepared for preventing the criminal activities of the members of the gang has already been approved by the Commissioner of Police, Varanasi.

28. A *copy* of the Gang-chart accompanying the F.I.R. indicates that it mentions three persons as the members of the gang - (i) Ramesh Rai - the applicant, (ii) Kashi Nath Singh and (iii) Premshankar Singh alias Meethe. The Gang-chart mentions involvement of the applicant in four cases. The Gang-chart appears to have been prepared by the Inspector In-charge on 18-08-2022 and after having been forwarded by various officers, ultimately it was forwarded by the Deputy Commissioner of Police on 27-08-2022 and thereafter it was approved by the Commissioner of Police, Varanasi.

29. The Inspector-in-charge, who himself had prepared and forwarded the Gang-chart on 18-08-2022, states in the F.I.R. lodged by himself on 27-08-2022 that while he was involved in patrolling of the area in Government Vehicle No. UP 65 AG 0845 alongwith a Head Constable, three Constables and the Chauki In-charge Sub-Inspector Angad Kumar Singh, from the record available in the Police Station and verification of the information received, he found that all the accused persons have formed an organized gang which is led by the applicant and they are engaged into commission of offences like illegal interest earning, money lending, extortion etc., and a bare reading of this narration indicates that the F.I.R. has been lodged in a mechanical manner, on a stereotyped proforma, without application of mind to the facts of the individual case.

30. Sri. Manish Tiwari Senior Advocate has submitted that a perusal of the narration made in the F.I.R. indicates that the applicant has been implicated in the present case solely on the basis of perusal of records available with the police, and that too, during patrolling in a jeep, which prima facie indicates that the applicant has been implicated by the police without any material against him to establish that he is a gangster.

31. In **Ashok Kumar Dixit versus State of U. P. AIR 1987 All 235**, while upholding the constitutional validity of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, a Full Bench of this Court held that: -

"73....If we advert to Section 2(b) of the Act, which defines the term

"gangster' we would find significant words. They are "acting", "singly or collectively', "violence or show of violence', "intimidation', "coercion', or "unlawful means'. Thus, ***for booking a person under the provisions of the Act, the authorities have to be prima facie satisfied that a person has acted. The authority has to be satisfied that there is a reasonable and proximate connection between the occurrence and the activity of the person sought to be apprehended and that such activities were to achieve undue temporal, physical, economic or other advantage.*** *There need not be any overt or positive act of the person intended to be apprehended at the place. It is enough to prove active complicity which has a bearing on the crime.*

74. While laying down so, we should not be oblivious of the avowed object of the Act. Under the ordinary criminal law, it is sometimes difficult to bring to book the overlords of crime and underworld because they seldom operate in person or in the public gaze. They indulge in clandestine operations which threaten to tear apart the very fabric of society. It is this purpose which the Act seeks to achieve.

*75. But nevertheless we must sound a note of caution. P****rovisions of the Act cannot be used as a weapon to wreak vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt."***

(Emphasis supplied)

32. In Subhash versus State of U.P., 1998 All.L.J. 4870 : 1998 SCC OnLine All 973, a Division Bench of this Court held that: -

We are to see, if under the concept of the offence, created by the Act, there must be some allegation of any act or omission towards commission of the offence. While taking up the question of constitutional validity of the Act in the case of Ashok Kumar Dixit [Ashok Kumar Dixit v. State of U.P., 1987 ACC 164 : (1987 All LJ 806)], the Full Bench had made certain very important observations which are relevant for the present point. It was observed that a person was not liable to be punished under the Act merely because he happened to be a member of the group. The Court was, rather, of the view that a person could be accused of an offence only if he had chosen to join a group which indulges in anti-social activities, defined under the Act, with use of force for obtaining material or other advantages to himself or to any person. The Court was of the view "The element of actus reus is hence clearly present in the offence created under the statute." Whenever any act or omission covered by Sections 2 and 3 of the Act is reported an offence is made out and as a corollary it may be indicated without any fear of contradiction that ***unless an allegation is there concerning an act or omission on the part of an accused, covered by the definition of the term "gang" or "gangster", no F.I.R. should be maintainable. Whether the allegations are true or false will be a matter for investigation, but unless the allegations of an offence under the Act are indicated, as F.I.R. may not be justifiable whatever large the number of past acts be alleged against him."***

(Emphasis supplied)

33. Upon scrutinizing the facts of the case in light of the aforesaid law, what prima facie appears at this stage is that

although the F.I.R. alleges because of the terror of the gang, of which the applicant is a member, no person comes forward to lodge a complaint against them, numerous F.I.Rs. have been filed against the applicant. The informant of Case Crime No. 174 of 2022 has not only filed an F.I.R. against the applicant, but he has even come to oppose the bail application of the applicant in the present case.

34. The accusation made by the Inspector is that while he was engaged in patrolling in a jeep, he found from the record available in the Police Station and verification of the information received, that all the accused persons have formed an organized gang, without any particulars of any act committed by the applicant as a member of the gang. Prima facie it appears that the applicant has been implicated in the present case merely because he has a criminal history and the applicant is languishing in jail since 26.08.2022.

35. In view of the aforesaid discussion, there appears to be no reasonable ground for prima facie believing that the applicant is guilty of the offence alleged.

36. The minimum punishment which can be imposed in case of the applicant's conviction is imprisonment for two years.

37. There is nothing on record which may give rise to a reasonable apprehension that the applicant may tamper with the evidence or influence the witnesses or that the applicant will abscond and will not face the trial or that he is likely to commit any other offence in case he is released on bail.

38. The applicant has already been granted bail in all the cases mentioned in the Gang-chart and in four other cases in which he is involved, he stands acquitted in four cases, the police has filed final reports in two cases and a complaint filed against him stands rejected and there is no material indicate that the larger interest of the public or the State would be affected in case the applicant is enlarged on bail.

39. Both the other co-accused persons have already been granted bail in the present case and the allegations leveled in the F.I.R. against all the accused persons are the same and, therefore, the applicant is entitled to claim his release on bail on the ground of parity also.

40. In view of the aforesaid discussion, without expressing any opinion on the merits of the case, this Court is of the view that the applicant is entitled to be released on bail.

41. In view of the aforesaid discussion, the bail application is **allowed**.

42. Let the applicant **Ramesh Rai @ Matru Rai** be released on bail in Case Crime No. 126 of 2022, under Section 3 (1), Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Chetganj, District Varanasi, on his furnishing a personal bond and two reliable sureties, each of the like amount, to the satisfaction of the court concerned subject to following conditions:--

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the dates fixed, unless personal presence is exempted.

(iv) The applicant shall not directly or indirectly make inducement, threat or promise to any person acquainted

with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

43. In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application before this Court seeking cancellation of bail.

(2022) 12 ILRA 695
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 981 of 2021

Minor 'X' Through His Natural Guardian Father Alok Kumar Srivastava
....Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ankit Kapoor, Sri Lal Chandra Mishra

Counsel for the Opposite Parties:
G.A.

A. Criminal Law -Juvenile Justice Act, 2015-Section 102 - Indian Penal Code, 1860-Sections 376-AB, 323 5(Da)/6 POCSO Act-application-rejection-Juvenile Justice Board as well as the Appellate Court rejected the bail application-victim statement u/s 161 and 164 Cr.P.C. supported the version of FIR-Lack of injury is not sufficient to suggest that the victim did not undergo the ordeal perpetrated on her-Crime has been committed in a friendly neighborhood whom she might have trusted-The view taken by Juvenile Justice Board and appellate Court upheld.(Para 1 to 23)

The revision is dismissed. (E-6)

List of Cases cited:

1. Amit Kumar Vs St. of U.P. CRLR No. 2732 of 2010

2. Kanchan Sonkar Vs St. of U.P. CRLR No. 1266 of 2020

3. Amit Vs St. of U.P. CRLR No. 1852 of 2015

4. Prakash Vs St. of Raj. (2006) Cri.L.J.1373

5. Vijendra Kumar Mali Vs St. of U.P. (2003) 1 JIC 103

6. Om Prakash Vs St. of Raj. & anr. (2012) 5 SCC 201

7. Mangesh Rajbhar Vs St. of U.P. &anr. (2018) 2 ACR 1941

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. It appears that name of the revisionist-juvenile has been disclosed in the memo of revision. This fault from the side of revisionist escaped detection by the Registry. The concerned Officer of the Registry is directed to delete the name of the revisionist-minor from the title of the revision as fed and shown in the data on website and represent him as **"Minor 'X' Through His Natural Guardian Father Alok Kumar Srivastava".**

2. Heard learned counsel for the revisionist as well as learned AGA for the State and perused the record.

3. This criminal revision under Section 102 of the Juvenile Justice Act, 2015 has been filed on behalf of the minor 'X' through his natural guardian/father Alok Kumar Srivastava S/o Dinesh Narayan R/o Mohalla Ashok Nagar Vanshi Nagla, Near Neelkanth Mandi, Police Station Subhash Nagar, Bareilly with the prayer to admit the

minor to bail alongwith the prayer to set aside the order dated 06.02.2021 passed by the Juvenile Justice Board, Bareilly and order dated 16.03.2021 passed by the Additional Sessions Judge/Special Judge, POCSO Act, Court No. 2, Bareilly in Criminal Appeal No. 16/2021 arising out of Case Crime No. 937 of 2020 under Sections 376AB, 323 IPC and 5(Da)/6 of POCSO Act, Police Station-Subhash Nagar, District-Bareilly by which the criminal appeal was rejected.

4. As per the version of the FIR, the juvenile abducted a nine years old daughter of the informant on 02.12.2020 at about 8 pm from her house when she was alone, on the pretext of getting a quilt from his house and took her to the roof of his own house which was under construction and ravished her. The FIR was lodged at 02.07 hours on 02/03.12.2020. On the basis of this FIR Crime No. 0937/2020 under Sections 376AB/323 IPC and Section 5(Da)/6 of POCSO Act was registered at Police Station Subhash Nagar, District Bareilly, and investigated upon.

5. A bail application was preferred before the Juvenile Justice Board through his father on 22.01.2021 and the same was rejected by the Juvenile Justice Board mainly on the basis of the social investigation reports submitted by the District Probation Officer. The appeal preferred against the above order before the children Court was also dismissed.

6. Aggrieved by the above two orders, the revisionist has come in criminal revision before this Court.

7. It is contended on behalf of the juvenile that the learned courts below did not consider the medical report of the victim which showed no mark of injury and that the FIR was lodged after a long delay. It is also contended that the Juvenile Justice Board had rejected the bail application on the ground of gravity of offence which is against the settled position of law. There has been no eye-witness of the incident. The lower appellate court did not apply its independent mind and simply concurred with the opinion of the Juvenile Justice Board. Hence, the orders are not sustainable in the eyes of law.

8. First and foremost contention is that gravity of the offence is not relevant consideration for refusing bail to the juvenile as has been held by a coordinate Bench of this Court in **Criminal Revision No. 2732 of 2010 (Amit Kumar vs. State of U.P.) decided on 14.09.2010, Criminal Revision No. 1266 of 2020 (Kanchan Sonkar vs. State of U.P.) decided on 01.12.2020, Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.) decided on 16.03.2016** and held by the Apex Court in **Prakash vs. State of Rajasthan, 2006 Cri.L.J. 1373.**

9 . In **Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.)** decided on 16.03.2016, this Court referred to the earlier judgement in **Vijendra Kumar Mali vs. State of U.P., 2003 (1) J.I.C. 103,** wherein it is reiterated that in a number of judgements, it has been categorically held that bail to the juvenile can only be refused if one of the grounds as provided in proviso to Section 12(1) of the Juvenile Justice Act, 2015 existed. So far as the ground of gravity is concerned, it is not covered under the relevant provisions. If the bail application of the juvenile was to be considered under the provisions of Cr.P.C., there would have been absolutely no necessity for the enactment of the aforesaid

Act. The Section 12 of the Act contains a non-obstante clause, which indicates that the general provisions of Cr.P.C. shall not apply. Therefore, the gravity or seriousness of the offence should not be taken as an obstacle or hindrance to refuse the bail to delinquent juvenile.

10. It is contended that there existed no material to justify rejection of bail on the grounds envisaged in Section 12 of the Act. In view of the above provisions, the 'child in conflict with law', who has been in custody for quite some time deserves to be released on bail otherwise, the purpose of provisions of Section 12 of the Juvenile Justice Act shall stand defeated. It is also contended that care of the juvenile in a child care institution cannot be preferred over his care in his biological family.

11. Learned AGA has opposed the prayer for bail.

12. I perused the impugned orders. The Juvenile Justice Board referred to the social investigation report of the District Probation Officer and highlighted the fact that the incident allegedly happened in the house of the juvenile which existed in neighbourhood; the juvenile was not keeping a good company, thereafter, the Board observed that in case the juvenile is released on bail, he shall again be relegated to same environs where he had been earlier and which was instrumental in bringing him to this juncture of commission of crime and that in all likelihood, he will be exposed to physical, moral and psychological danger and that his release shall defeat the ends of justice.

13. In the appellate order, this was noticed that the victim in her statement told that all other family members had gone to a temple and she was alone. Meanwhile, the juvenile took her away and forcibly assaulted her sexually and that she was also put to physical violence and threatened. The Appellate Court also gave an opinion that in case the juvenile is released on bail, he shall slip again and fall off into same kind of environment, which led him to commission of this kind of atrocious crime.

14. In **Om Prakash vs. State of Rajasthan and another; (2012) 5 SCC 201**, the Hon'ble Apex Court observed that the Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of juvenile as it was felt that child became delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. It was further observed that in cases where accused is involved in grave and serious offence which he committed in a well planned manner reflecting his maturity of mind, the court ought to be more careful. Thus, the Hon'ble Apex Court has brought in focus the nature of crime as well as the conduct of an accused as reflected in the method employed in the commission of crime as a relevant consideration while considering the matters of juvenile offenders.

15. It may be noted that the Hon'ble Apex Court gave this view in the background of the facts that age of the juvenile as determined by the courts below was not free from doubts. In the circumstances, the Court gave a view that where accused commits grave and heinous offence and thereafter attempt to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording his age, is not acceptable. It is

also observed that the shelter of the principle of benevolent legislation of the Juvenile Justice Act is meant for minors, who are innocent law breakers.

16. In **Mangesh Rajbhar vs. State of U.P. and Another; 2018 (2) ACR 1941,** it was observed by a coordinate Bench of this Court as below:

"13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353 in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

17. Ordinarily, the merits of the matter may not be important where the Courts are inclined to give benefit of bail as envisaged in Section 12 of the Juvenile Justice Act. This is not to say that once a person is found a juvenile, it is mandatory to grant him bail and that merits of matter shall have no relevance. In fact nature of the crime as well merits of the case have been brought in focus by the Apex Court in Om Prakash (supra) case. The nature of crime including other merits of the matter may be quite significant when the Court has to form an opinion about the ends of justice. It may be noted that the phrase 'ends of justice', cannot stand in a vacuum. Unarguably and undeniably, the Courts are

under obligation to address the concerns of both the sides and strike a delicate balance between competing and often conflicting demands of justice of the two sides.

18. When viewing the matters of bail from this particular angle of deciphering the ends of justice not only the nature of crime, but the manner of commission thereof, methodology applied, the mental state, the extent of involvement, the evidence available shall be the factors to reckon with. The phrase 'ends of justice' may bring in within its interpretation such factors which may otherwise seem not so material or may be seemingly extraneous, irrelevant or unimportant at first glance for the purpose of applicability of last part of the proviso to Section 12(1) of the Juvenile Justice Act.

19. It clearly appears that the Juvenile Justice Board as well as the Appellate Court, while dismissing the bail applications, definitely had this fact in mind that in case the juvenile is released on bail, he shall fall off in the same environment from where perhaps he needed to be rescued for his own welfare. In my view, this aspect of the matter is not far away from ends of justice though it is also specifically covered in the general principles described in Section 3 of the Juvenile Justice Act, 2015 under the head "Principle of Best Interest".

20. These facts are undisputed that the revisionist was found to be of the age of seventeen and half years. This fact is also undisputed that the victim in this case is a girl of tender age of nine years and that she in her statement given under Section 161 and 164 Cr.P.C., supported the version of the FIR and stated that sexual assault was committed by the juvenile and that she was also physically assaulted before the commission of this crime. There is no material before this Court to suggest that there was any probability of false implication of the juvenile. This Court is of the view that at a tender age of mere 9 years the victim might not have fully understood the nature of crime to which she was being put through, though, she might be perplexed and overawed. Physical resistance from a child of this age may be too much to expect. It appears that the victim was known to the juvenile and she lived in the neighbourhood. At the time of occurrence, she was slapped and threatened to keep mum. Lack of any injury on the person of a girl of 9 years is not sufficient to suggest that she did not undergo the ordeal perpetrated on her. The totality of the circumstances, give a fair indication that the revisionist had attained sufficient maturity of mind and that he took advantage of the fact that the girl was alone in her house and that nobody was around to catch him and perhaps, he also had an impression in his mind that he was in a position to not only over power her but also to keep her mouth shut and probably she will not tell anybody and matter may not be discovered.

21. In the circumstances of the case, following facts assume importance. Firstly, nature of the crime-that a girl living next door who was merely a nine year old and not even in position to physically resist a grown up boy was overawed and made to surrender by threats and slaps and was put to undergo ordeal of such atrocious crime. Crime has been committed in a friendly neighbourhood whom she might have trusted. Secondly, when a boy who is a borderline case, quite near to attaining majority, commits such a crime, in my view, certainly he needs professional counselling or behavioural

therapy to inculcate in him the respect for females of all the ages, learn the worth and dignity of female body and grow into an adult with a healthy mind inside. Thirdly, the aim and object of the Juvenile Justice Act cannot be achieved if crimes committed by juveniles are not viewed from the angle of their own welfare and concerns of society at large as well. From this angle i.e., angle of the best interest of the juvenile, the angle of his own welfare and well-being and the angle of striking a balance between the demands of justice for both the sides including the concerns of the society at large, the social investigation report may give good indicators to be followed. However, I hasten to add a word caution that the social investigation report which are ordinarily prepared without proper research and in unscientific manner on printed formats may not be wholly reliable, even then a judicially trained mind may search for clues and take assistance for drawing a conclusion from this point of view.

22. The learned Court and the Board took a concurrent view that it shall not at all be fit to release the juvenile to his parents or family members for his own welfare and to serve the ends of justice. This view cannot be faulted and I am in agreement with the final conclusions arrived at by the Juvenile Justice Board and the appellate Court. There is no such invalidity or impropriety in the order to prompt this Court to interfere in the impugned order in this revision.

23. The revision is, accordingly, **dismissed.**

24. Copy of the order be certified to the Court concerned.

25. The Court/concerned Board is directed to expedite the hearing and conclude the same at the earliest without getting influenced by any of the observations made in this order.

Order Date :- 12.9.2022

Vik/-SFH

Note- Copy of the order be sent to concerned Section of the Registry for immediate compliance of direction given in Para-1 of the order.

(2022) 12 ILRA 700
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2022

BEFORE

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

Transfer Application (Civil) No. 643 of 2022

Smt. Ghazala Begum ...Applicant
Versus
Mohd. Musarraf & Ors. ...Opposite Parties

Counsel for the Applicant:
Mr. Anil Kumar Gupta, Sri Santosh Kumar Rai

Counsel for the Opposite Parties:

(A) Civil Law - Transfer of Case - Code of Civil Procedure,1908 - Section 24(1)(a) - transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same - The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - Section 51 - Establishment of Land Acquisition, Rehabilitation and Resettlement Authority(LARRA) - "Authority" , Section 3(e)(i) - appropriate Government , Section 53 - Qualifications for appointment as Presiding Officer -

LARRA not an established Civil Court, but an adjudicating authority established by a notification by the State Government. (Para - 5)

Transfer application - seeking transfer - from Land Acquisition, Rehabilitation and Resettlement Authority (LARRA), Allahabad - to any other Court of competent jurisdiction - ground - no incumbent Presiding Officer functioning as LARRA. **(Para - 2)**

HELD:-LARRA is not a Court subordinate to this Court within the meaning of Section 24(1)(a) of the Code of Civil Procedure, 1908. LARRA, described under the Act of 2013 as an "Authority", may be regarded as a Tribunal subordinate to this Court for the purpose of superintendence under Article 227 of the Constitution, but not a Court subordinate to this Court under the Code. Transfer application not maintainable. (**Para -5)**

Transfer application rejected. (E-7)

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

Heard learned Counsel for the applicant in support of the application.

2. This transfer application has been moved, seeking transfer of Case No. 30 of 2019, Mohd. Musarraf v. State of U.P. and others, from the Land Acquisition, Rehabilitation and Resettlement Authority, Allahabad1 to any other Court of competent jurisdiction.

3. The ground for transfer is that there is no incumbent Presiding Officer functioning as the LARRA. This Court required the Registrar General to submit a report in the matter after verification. It transpires that the fact is correct that there is no Presiding Officer incumbent to discharge the functions of the LARRA for the time being. This Court, however, notices that the LARRA is an "Authority" established by the appropriate Government under Section 51 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 20132 for the purpose of providing speedy disposal of disputes relating to land acquisition, compensation, rehabilitation and resettlement. The said Authority, which can be one or more, is to be established by notification. The appropriate Government is defined under Section 3(e)(i) of the Act of 2013 to mean the State Government in relation to acquisition of land situate within the territory of the State. Since the acquisition here relates to a land situate in the State of Uttar Pradesh, the LARRA at Allahabad or elsewhere would be established by the Government of U.P. through a notification. The territorial jurisdiction of the LARRA, wherever established, is also to be specified by the State Government under sub-Section (2) of Section 50 of the Act of 2013. Section 53 spells out the qualifications for the Presiding Officer of the LARRA, which reads :

53. Qualifications for appointment as Presiding Officer.-(1) A person shall not be qualified for appointment as the Presiding Officer of an Authority unless,--

(a) he is or has been a District Judge; or

(b) he is a qualified legal practitioner for not less than seven years.

(2) A Presiding Officer shall be appointed by the appropriate Government in consultation with the Chief Justice of a High Court in whose jurisdiction the Authority is proposed to be established.

4. The Presiding Officer of the LARRA is an appointee of the State Government. In the event he is a serving District Judge, the appointment would be on deputation, of course, with this Court's permission on the administrative side. In all other contingencies contemplated by Clauses (a) and (b) of sub-Section (1) of Section 53, the appointment of the Presiding Officer of the LARRA is to be made by the State on such terms and conditions as the law prescribes. Section 54 of the Act of 2013 spells out some of these conditions.

5. The trappings and the essential character of the LARRA show it to be not an established Civil Court, but an adjudicating authority established by a notification by the State Government for the purpose indicated in Section 51 of the Act of 2013. The Presiding Officer of the said Authority is also to be appointed by the State Government. The Presiding Officer in one contingency may be a serving District Judge, who could be appointed on deputation with this Court's permission. Else, the Presiding Officer recruited from any other source would be appointed by the State Government, of course, in consultation with the Chief Justice of the High Court, in whose jurisdiction, the Authority is proposed to be established. By no means, therefore, the LARRA is a Court subordinate to this Court within the meaning of Section 24(1)(a) of the Code of Civil Procedure, 19083. The LARRA, described under the Act of 2013 as an "Authority", may be regarded as a Tribunal subordinate to this Court for the purpose of superintendence under Article 227 of the Constitution, but not a Court subordinate to this Court under the Code.

6. In this view of the matter, this transfer application is not maintainable. It is, accordingly, **rejected.**

7. This order will, however, not prevent the applicant from seeking such remedies as may be advised

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(2022) 12 ILRA 702
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Appeal U/s 37 of Arbitration and Conciliation Act 1996 No. 16 of 2022

U.P.E.I.D.A. ...Appellant
Versus
M/S Sahakar Global Ltd. ...Respondent

Counsel for the Appellant:
Brijesh Kumar, Amal Rastogi, Utkarsh Srivastava

Counsel for the Respondent:
British Kumar

Arbitration and Conciliation Act, 1996 - Section 9 - Interim measures - Civil Procedure Code, 1908 – Order 39 - R. 1 - Grant of Injunction - Bank Guarantee - principles for grant or refusal to grant of Injunction to restrain enforcement of a bank guarantee - If the bank guarantee is conditional, then, if the conditions have not been fulfilled, injunction, against encashment and invocation, may unquestionably follow - If, however, the bank guarantee is unconditional, then injunction can be granted only if egregious fraud, irretrievable injustice, or special equities/ exceptional circumstances, exist, and not otherwise - *Fraud* - mere pleadings do not make a strong case of prima facie fraud, which had to be shown by "material and evidence" - fraud must be pleaded and proved and it cannot be presumed - a fraud in the execution of the Bank

Guarantee has to be pleaded and not the Main contract or the subsequent events - enquiry is confined to, whether on the basis of the documents, a case of fraud of egregious nature in the matter of obtaining/furnishing BGs, is made out - *Irretrievable injustice* - Irretrievable injustice, as an exception to the rule of non-interference with encashment of BGs, is not a mere loss - what has to be proved and made out to obtain an injunction against encashment, is that it will be impossible to recover the monies so wrongfully received by encashment - *Special equities* have to partake the character of irretrievable injustice - any reference to the original dispute between the parties, relating to the performance of the contract, is completely irrelevant, insofar as the issue of stay of invocation of the bank guarantees is concerned - person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible (Para 28, 35)

In the instant case the Bank Guarantee in unequivocal terms says that any demand made by the Appellant on the Bank shall be conclusive and binding notwithstanding any difference between the Appellant and the respondent or any dispute pending before any Court, Tribunal, Arbitrator or any other authority - It is very much contained in the BG that the Bank has agreed that the Guarantee contained shall be irrevocable and shall continue to be enforceable till the Appellant discharges this guarantee - appellant is a public sector undertaking and a ground of not able to recover from a PSU has to be grounded on strong footings and not merely on apprehension or pleadings - it cannot be said that any case of special equities has been made out by the respondent, as would justify interdicting invocation of the subject bank guarantees - none of the three circumstances, in which stay of invocation of unconditional bank guarantees, can be granted by the Court, exists in favour of the respondent in the present case and as such it was not well within the Jurisdiction of the Commercial Court to pass a status quo order, which in effect has interdicted the invocation of the performance Bank Guarantee. (Para 30, 41)

Allowed. (E-5)

List of Cases cited :

1. U.P. Cooperative Federation Ltd. Vs Singh Consultants and Engineers (P) Ltd. (1988 (1) SCC 174)

2. Swenska Handeksbanken Vs M/s. Indian Charge Chrome & ors., (1994) 1 SCC

3. State Trading Corporation of India Ltd. Vs Jainsons Clothing corporation (1994) 6 SCC 597

4. U.P. State Sugar Corp. Vs Sumac International Ltd, (1997) 1 SCC 568

5. Himadri Chemicals Industries Ltd. Vs Coal Tar Refining Co.: (2007) 8 SCC 110

6. Daewoo Motors India Ltd, Vs U.O.I. & ors., (2003) 4 SCC 690

7. BSES Ltd, (now Reliance Energy Ltd. Vs, Fenner India Ltd.& anr., (2006) 2 SCC 728

8. Vintec Electronics Pvt. Ltd, Vs HCL Infosystems Ltd., (2008) 1 SCC 544

9. Ansal Engineering Projects Ltd. Vs Tehri Hydro Development Corp. Ltd,& anr., (1996) 5 SCC 450

10. General Electric Technical Services Comp. INC Vs Punj Sons (P) Ltd,& anr., (1991) 4 SCC 230

11. Consortium of Deepak Cable India Ltd. & Abir Infrastructure Pvt. Ltd. (DCIL-AIPL) v. Teestavalley Power Transmission Limited 2014 SCC Online Del 4741

12. Gujarat Maritime Board Vs Larsen & Toubro Infrastructure Development Projects Limited (2016) 10 SCC 46

13. Standard Chartered Bank Vs Heavy Engineering Corporation Ltd.,(2020)13SCC 574

14. Hindustan Construction Co. Ltd.& anr. Vs Satluj Jal Vidyut Nigam Ltd. 2005 SCC OnLine Del 1249

15. Hindustan Steel Workers Construction Ltd. Vs G.S. Atwal & Co (Engineers) Pvt. Ltd. 1995 (6) SCC 76

16. Hindustan Steel Workers Construction Ltd. Vs Tarapore & Co, 1996 (5) SCC 34

(Delivered by Hon'ble Om Prakash Shukla, J.)

1. Heard Mr Brijesh Kumar Saxena Learned Advocate appearing for UPEIDA and Mr. Jaideep Narain Mathur, Learned Senior Advocate along with Mr . Pritish Kumar representing M/s Sahakar Global Ltd.

2. A short but seminal question arises in the present Appeal filed under section 37 of the Arbitration & Conciliation Act, 1996 (as amended) by the Uttar Pradesh Expressways industrial Development Authority (for short UPEIDA) against an ad-interim Injunction order dated 12.09.2022 (Impugned Order) passed by the Learned Commercial Court, Lucknow under section 9 of the Arbitration & Conciliation Act, 19969 (as amended). Apparently, in the said impugned order the Learned Commercial Court has directed the parties to maintain "status quo" with respect to the performance Bank Guarantee, furnished by the Respondent Contractor - M/s Sahakar Global Ltd.

3. The Appellants have submitted that the said "Status Quo" order passed by the Learned Commercial Court, Lucknow as per the impugned order, not only amounts to restraining the invocation and/or encashment of Performance Bank Guarantee by them but also amounts to final adjudication of the pending section 9 petition itself as the nature of relief, which can be obtained/granted under a proceeding under section 9 of the Arbitration & Conciliation Act, 1996 can be only interim in nature as any dispute can be finally decided in an arbitration proceedings before the Learned Arbitral Tribunal. Thus, it has been urged by the appellant that since a status quo order has been passed nothing remains in the pending section 9 petition to be decided and as such this court has been called upon to set aside the impugned order as well as dismiss the pending section 9 petition.

4. The genesis of dispute in the present case can be capitulated in the following manner:

(i) UPEIDA and M/s Sahakar Global Ltd. entered into a Contract Agreement dated 13.10.2020, which provided collection of user fee at such rates from the vehicles in terms of the U.P. Toll Rules, 2020 at the 17 designated Toll Plazas, located on the Agra-Lucknow Express way.

(ii) M/s Sahakar Global Ltd. was required to pay one year contract amount of Rs.402,39,00000/- (Rupees Four Hundred Two Crores and Thirty Lakhs only) divided by number of days in a year (365 or 366 as the case may be) and multiplied by seven on weekly basis every Thursday to UPEIDA. For the subsequent second year of contract, the

(iii) The period of contract commenced on 15.10.2020 (00:00 hours) until 14.10.2022 (23:59:59 hours).

(iv) In terms of the contract, M/s Sahakar Global Ltd furnished five Bank Guarantees all valid and subsisting upto January 31, 2023 for a total sum of Rs.33,53,25,000/- (Rupees Thirty Three Crore Fifty Three lakhs and Twenty Five

Thousand only) in favour of the present Appellant as performance security.

(v) As per M/s Sahakar global Ltd. a serious dispute arose between the parties in connection with the contract Agreement with regard to (a) Stamp Duty and (b) Force Majeure reliefs, which required to be adjudicated by a duly constituted Arbitral Tribunal.

(vi) As far as the dispute relating to Stamp duty is concerned, UPEIDA has claimed a uniform rate of 4% stamp duty on the contract value for the contract period as per clause 39 of the contract dated 13.10.2020, which translates into Rs. 33,80,07,600/-, whereas it is the claim of M/s Sahakar global Ltd, that the contract attracts initial stamp duty @ 2% on the contract value for the contract period and an additional 2% is leviable only on such toll plazas which falls within the notified/ development area in terms of the law. Thus, according to Ms Sahakar Global Ltd they have deposited the initial stamp duty @ 2% of the contract value amounting to Rs. 16,90,03,800/- and have claimed that they are required to deposit the propionate additional 2% stamp duty for 3 out of 17 toll plazas only and as such the demand of UPEIDA for payment of stamp duty @ 4% of the contract value was not correct. Further, as to whether they have paid the proportionate additional 2% stamp duty for 3 out of 17 toll plazas or not is not clear and whether they are required to pay 4% stamp duty on the entire contract value or not is also debatable.

(vii) Similarly, as far as the issue relating to force majure relief is concerned, M/s M/s Sahakar global Ltd has claimed the total force majeure relief for three different periods being (i) for duration between 02.05.2021 to 07.06.2021 for an amount of Rs. 11,36,66,013/-, (ii) for duration between 29.06.2021 to 01.11.2021 for an amount of Rs. 14,59,09,302, and (iii) for duration between 04.01.2022 to 08.08.2022 for an amount of Rs. 23,26,70,489/-. However, UPEIDA has notified for force majeure relief for Rs. 11,38,11,932/- for the duration 02.05.2021 to 07.06.2021 only and that too with certain conditions of signing a settlement-cum-close out agreement for no further claims on account of force majure etc.

(viii) Thus, it is the case of M/s Sahakar global Ltd that UPEIDA is threatening to invoke and encash the Bank Guarantee contrary to the terms of the Contract as according to them UPEIDA on the one hand is not fulfilling its obligation to grant force majeure relief to them and on the other hand demanding deposit of full contractual remittance and in that regard is threatening to forfeit the performance securities by encashing the Bank Guarantees.

5. Thus, the Respondent filed an application under section 9 of the Act seeking interim relief vide Arbitration Case No. 57 of 2022 on 27.08.2022. Since the said application was not heard / decided by the commercial Court, Lucknow on an appeal being filed by the respondent herein, thus Court in an earlier round of litigation had directed vide its order dated 30.08.2022 in Appeal Under Section 37 of Arbitration and Conciliation Act, 1996 bearing no. 12 of 2022 as inter-alia;

"Exercising our jurisdiction under Section 13 of Commercial Courts Act read with Section 37 of the Arbitration and Conciliation Act as well as Article 227 of the Constitution of India, we hereby direct the Commercial Court, Lucknow to consider and decide the pending application for interim relief filed by the appellant alongwith the application under

Section 9 of the Arbitration and Conciliation Act, 1996 expeditiously, preferably, on or before 5.9.2022. The appellant shall make an application for pre-ponement of date before the Commercial Court within a period of two days from today. The bank guarantee extended by the appellant shall not be invoked till 5.9.2022 subject to the outcome of interim relief application. The protection granted to the appellant may not be understood for this Court to have dealt with the matter on merit which the court below may decide in accordance with law. This order is passed in the peculiar facts and circumstances of the case. The parties are expected to co-operate with the proceedings. The bank guarantee shall also adhere to the terms and conditions of the agreement. The appeal is accordingly disposed of. Copy of the order shall be made available to the learned Chief Standing Counsel."

6. The Appellant on its part filed a detailed objection to the said petition on 05.09.2022. The Learned Commercial court after hearing the parties at length and after considering rival submission of the parties, passed a detailed impugned order dated 12.09.2022 granting status quo order relating to the invocation of the Bank Guarantees. Thus, the appellant chose to file the present Appeal.

7. There is another aspect of the matter, in as much as during the pendency of the aforesaid section 9 petition before the Learned Commercial Court, Lucknow, the contract Agreement dated 13.10.2020 stood expired by efflux of time and the respondent has already handed over the operations to some new contractor on 13.10.2022. The respondent has also vide a notice dated 04.11.2022 invoked the arbitration clause by serving a notice through email to the Appellant.

8. The fulcrum of the argument pressed upon by Learned Advocate for the appeallant is that the learned Commercial Court below passed the impugned order (a) without considering the principles of law relating to and as applicable to the invocation and encashment of unconditional bank guarantees (b) the Respondent on the basis of the allegations made in the Petition under Section 9 of the Act, has failed to show the existence of egregious fraud, irretrievable injustice or injury or special equity in their favour (c) In any case, the dispute or the clauses of the contract dated 13.10.2020 entered between the parties are wholly immaterial and irrelevant while considering the relief claimed by the Respondent to restrain the Appellant from invoking and encashing unconditional bank guarantees.

9. The Learned Counsel appearing for UPEIDA has taken this court to the averments made by the Respondent in the pending section 9 petition to buttress his point that a dispute exists between the parties. It has been vehemently contended by the Learned Counsel that the so called special equities pleaded by the respondent in their petition relates to a single ground that invocation of Bank Guarantee would drive to financial ruins. According to him the threat to encash the bank guarantees is wholly unfounded and the pleadings regarding egregious fraud or Irretrievable Injustice also relates merely to adversely affecting the commercial viability of the respondent. In any case, the Learned Counsel contends that the special equity as claimed by the respondent towards Covid pandemic for the relief was also considered & granted by the Appellant, however the

respondent claimed further amounts which has been denied by the appellant and since this was a dispute on the quantum of money/relief to be granted to the respondent, which is a disputed fact, the same cannot be a ground for interdicting the performance Bank guarantee, which are unconditional and irrevocable in nature.

10. It is the further case of the Appellant that there was a short remittance of Rs. 39,21,09,614/- even after giving the force majeure relief of Rs. 11,38,11,932- to the respondent and as such the present case was neither a case of irretrievable injustice or egregious fraud. Further, the Bank Guarantee secured the amount to the tune of Rs. 33.53 Crores only while the short remittances were more than Rs. 39 Crores and as such even after invocation of the Bank Guarantee the entire outstanding would not be recoverable, inspite of the fact that an undertaking affidavit had been given by them before the Learned Commercial court that the Bank Guarantee would not be encashed towards the recovery of stamp Duty.

11. It has also been argued that though the Learned Commercial Court noted the cases cited by the Appellant, but failed to consider the settled legal principles as laid down in the case of Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. (1996) 5 SCC Page 450 and Standard Chartered Bank Vs. Heavy Engineering Corporation Ltd. and others, (2020) 13 SCC Page 574. The Learned Counsel has vehemently explained that the Hon'ble Supreme Court in these Judgment while considering the unconditional bank guarantee, held, that the object behind is to inculcate respect for free flow of commerce, trade and faith in the commercial bank transactions, unhedged by pending dispute between the beneficiary and the contractor.

12. The Learned Counsel for the appellant has stressed on the point that the nature and terms of the Bank guarantees are unconditional and the amounts are payable merely on demand to be made by the beneficiary without any demur, reservation, contest, recourse, cavil, argument or protest and/or without reference to any inquiry from the Respondent and without needing to prove or show grounds or reasons for the demand in respect of the sum specified. It has been urged that any such demand made by the Appellant on the bank shall be conclusive and binding notwithstanding any difference between the Appellant and the Respondent or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority. The Learned Counsel referred to the following Judgments relating to the law for invocation of unconditional bank guarantees:

(i) Swenska Handeksbanken V/s M/s. Indian Charge Chrome and others, (1994) 1 SCC Page 502.

(ii) U.P. State Sugar Corporation V/s Sumac International Ltd, (1997) 1 SCC Page 568.

(iii) Daewoo Motors India Ltd, V/s Union of India and others, (2003) 4 SCC Page 690,

(iv) BSES Ltd, (now Reliance Energy Ltd. Vs, Fenner India Ltd. and another, (2006) 2 SCC Page 728;

(v) Vintec Electronics Private Ltd, Vs. HCL Infosystems Ltd., (2008) 1 SCC Page 544

(vi) Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd, and another, (1996) 5 SCC Page 450;

(vii) General Electric Technical Services Company INC Vs. Punj Sons (P) Ltd, and another, (1991) 4 SCC Page 230.

13. Thus, in sum & substance, the appellant attacked the impugned order by

submitting that (i) The unconditional Bank guarantee is an independent and distinct contract; (ii) The mere fact that the dispute relating to force majure will be decided by Arbitral tribunal and the Respondent intends to keep the Bank Guarantee alive does not create a prima-facie case in favour of the respondent; (iii) Balance of convenience has been vaguely considered by the Learned Commercial Court; (iv) the ground of financial hardships and effect on reputation in the business world cannot be extended to mean irreparable injury or irretrievable injustice or even special equity relating to Covid pandemic and (v) The respondent have failed to pay a sum of more than Rs.39 Crore towards short remittances and now the said amount has surmounted to more than Rs.96 Crore being inclusive of penalties and taxes.

14. As far as the respondents are concerned, they defended the impugned order and the defence was led by the Learned Senior Counsel Mr. Jaideep Narain Mathur, who flawlessly articulated his argument by raising various issues. The first issue raised by Mr. Mathur was relating to maintainability of the present Appeal on the ground of it being premature. Mr. Mathur, stressed on the point that since the impugned order is interim in nature and the Learned Commercial court has posted the matter for hearing next on 08.12.2022, any decision by this court in the present Appeal would render the pending section 9 petition infructous. The Learned Senior Counsel relied on the judgment of Essar House Pvt. Ltd. v. Arcellor Mittal Nippon Steel India reported as AIR 2022 SC 4294 to drive home his point that the commercial court has rightly while deciding the application under section 9 petition has taken into account the principles of Injunction enshrined in order 39 CPC.

15. The Learned Senior Counsel negated the argument of the Appellant relating to Bank Guarantee being an independent contract and the same must be honoured by the Bank despite of any dispute or difference between the parties, by submitting that the Bank Guarantee being primarily given for performance can be only invoked if there was any deficiency of performance in agreement and not for shortfall of weekly remittance. According to him, the shortfall of remittance was due to force majure reasons of Covid 2nd & 3rd wave and the same was covered under clause 26(b)(ii) of the Main Contract. Thus, it has been impressed upon by the Learned Counsel that since the plea of the respondent are yet to be examined by the appellant relating to their claim under the Force Majure Clause, the BG given for performance cannot be invoked. Mr. Mathur, took this court to the next leg of argument by submitting that clause 18(b) and clause 20 of the Main Contract itself bars the appellant from adjusting the performance security towards the instalment due to them and any action contrary to the said clauses amounts to overriding the terms of the agreement and the demand is as such wholly illegitimate & wrongful and further any endeavour on the part of the appellant to invoke the BG in violation of the terms of the contract would amount to "egregious fraud".

16. It has been submitted by the Learned Senior Counsel that since the PBG are alive till 31.01.2023 and further the respondent have given an undertaking before the Learned Commercial Court that they would keep the said BG alive till conclusion of the arbitral proceedings, they have a bonafide prima-facie case in their favour. The Learned Counsel has stressed that in case the Bank Guarantee is allowed to be encashed, the respondent would suffer irretrievable harm and injustice, since it

would be impossible for them to be reimbursed from the Appellant. He further contends that there does not exist any contractual relationship with the appellant and as such they would never be able to recover the money from adjustment of payments due to it and has contended that any encashment of Bank Guarantee would lead to irretrievable injustice in term of the respondent's commercial viability, good will and future prospect. The Learned Senior Counsel tried to explain this court as to how a Bank guarantee facility is availed by the respondent and has in this endeavour enumerated several negative implications on the respondent's financial stability in case the Bank guarantee is invoked.

17. The Learned Senior Counsel has strenuously argued that the conduct of the Appellant in trying to invoke the Bank Guarantee is vitiated by fraud as it is not the case of the Appellant that there were any shortcomings or defect in the performance of the Respondent during the entire tenure of the Contract Agreement. He has relied on the judgment of the Delhi High Court passed in Continental Construction Ltd. v. Satluj Jal VidyutNigam Ltd. reported as 2006 SCC OnLine Del 56 to argue that a beneficiary is not vested with an unquestionable or unequivocal legal right to encash the bank guarantee on demand. He has also relied on Hindustan Construction Co Ltd. & Anr. V. Satluj Jal Vidyut Nigam Ltd. reported as 2005 SCC OnLine Del 1249 to impress upon this court that invocation of the Bank guarantee can be stayed and the same may be kept alive till the award was published by the Arbitrator. The respondent has also relied on the case of Union of India v. Millenium Delhi Broadcasts LLP, reported as AIR 2022 SC (Civil) 1682 to justify that the Bank Guarantee can be stayed, if the conditions were not fulfilled as per the tender and the terms of the contract has also to be read along with the terms of the Bank guarantee.

18. It is the case of the respondent that Clause 18(d) read with Clause 20 of the Contract Agreement bars the Appellant from encashing the Performance Bank Guarantee against the shortfall in remittance and further taking into account the situation of Covid-19 pandemic and the consequences of encashment of performance Bank Guarantee, the Learned Senior Counsel argues that the Learned Commercial Court was justified in holding that since the circumstances falls into special equities/ exceptional circumstances and the Respondent would suffer irretrievable injustice, the parties should maintain 'status-quo' with respect to the Bank Guarantees.

19. Having given a careful thought to the rival submissions, this court is of the firm view that the law with respect to grant of an injunction which has the effect of restraining encashment of a bank guarantee, is no longer res integra. In the earliest case of **U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (1988 (1) SCC 174),** which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, the Hon'ble Supreme Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The Apex court observed that a bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not,

nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. The court went on to hold that there are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, the Apex Court in the said case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984 [1] AER 351 at 352):

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged".

Thus, the Apex Court in the said case, set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

20. The next case being referred by this court is the case of ***Svenska Handelsbanken Vs Indian Charge Chrome (1994) 1 SCC 502***, wherein the Apex court noticed that the confirmed or irrevocable Bank Guarantee cannot be interfered with unless there is established fraud or irretrievable Injustice involved in the case. It was observed in the said judgment that irretrievable injury had to be of the nature noticed in the case of *Itek Corporation V/s First National Bank of Boston 566 fed Supp. 1210*. The Hon'ble Court explained in that case to avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established and a mere apprehension that the party will not be able to pay, is not enough.

21. In **State Trading Corporation of India Ltd. Vs Jainsons Clothing corporation (1994) 6 SCC 597,** the Hon'ble Court held that the grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to a cause nor is the court justified on that basis, to issue an injunction from enforcing the contract, i.e., bank guarantee. The parties are not left with no remedy. In the event of the dispute in the main contract ends in the party's favour, he/it is entitled to damages or other consequential reliefs.

22. The Hon'ble Supreme court in **U.P State Sugar Corporation Vs Sumac International Limited (1997) 1 SCC 568**

held that the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of Bank Guarantees. In Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal & Co (Engineers) Pvt. Ltd. 1995 (6) SCC 76, wherein bank guarantees were given towards due performance of the contract, the Hon'ble Apex Court held that the bank guarantees being irrevocable and unconditional and as the beneficiary was made the sole judge on the question of breach of performance of the contract and the extent of loss or damages an injunction restraining the beneficiary from invoking the bank guarantees could not have been granted.

23. In **Hindustan Steel Workers Construction Ltd. Vs. Tarapore & Co, 1996 (5) SCC 34**, the Hon'ble Apex court was examining the relief for injunction, which was sought by the contractor on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which had been pleaded in that case, was that a serious dispute on the question as to who has committed breach of the contract. It was contended by the contractor that he has a counter claim against the appellant and that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. The Hon'ble Apex Court, held that, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees.

24. The Hon'ble Supreme Court, clarifying the law on the grant of stay or otherwise in Bank Guarantee matters gave exhaustive direction in that regard in ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.: (2007) 8 SCC 110*** in para 14 of the said judgment, which inter-alia stated:

"14. From the discussion made hereinabove relating to the principles for grant or refusal to grant of Injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of Injunction to restrain the encashment of a bank guarantee or a letter of credit:

"(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or Letter of Credit.

(iv) Since a Bank Guarantee or Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantee or Letter of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

25. The Learned Counsel for the appellant has heavily relied on the judgment passed in the case of Vintec Electronics Private Ltd, Vs. HCL Infosystems Ltd., (2008) 1 SCC 544, which, in turn, took note of the earlier decisions in U.P. State Sugar Corporation (1997) 1 SCC 568, B.S.E.S. Ltd v. Fenner India Ltd, (2006) 2 SCC 728, Himadri Chemicals (2007) 8 SCC 110 and Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Coop. Ltd(2007) 6 SCC 470. The Hon'ble Supreme Court proceeded to hold thus in paras 11, 12 and 14 of the said judgment.

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 this Court observed that: (SCC p. 574, para 12)

"12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases."

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Ltd. v. Fenner India Ltd. [(2006) 2 SCC 728] this Court held: (SCC pp. 733-34, para 10)

"10. There are, however, two exceptions to this rule. The first is when

there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 this Court, correctly declared that the law was 'settled'."

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14. In Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., (2007) 6 SCC 470 this Court observed: (SCC p. 471b-d)

"If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one."

26. The legal position was further explained more recently, in ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited (2016) 10 SCC 46*** and in ***Standard Chartered Bank V/s Heavy Engineering Corporation Ltd.,(2020)*****13SCC 574,** which has consistently followed the earlier case law passed by the Supreme Court.

27. Having traced the law on the subject, this court finds it profitable to quote the terms of the Bank Guarantee, which is an issue in the present case. It is seen that there are altogether five performance Bank Guarantees total amounting to Rs. 33,53,25,000/-, which has been furnished by the Respondent. These BG's being:

Sl. No.	Bank Guarantee's Particular	Amount (Rs.)	Validity
1.	BG No. 495701GL0010720 dated 06.10.2020 issued by Union Bank of India, Mid Corporate Branch, Nariman Point, Mumbai.	9,00,00,000	31.01.2023
2.	BG No. 26111GP00861220 dated 08.10.2020 issued by Bank of Baroda, International Business Branch, Kandivali (W), Mumbai.	10,00,00,000	31.01.2023
3.	BG No. 495701GL0011220 dated 08.10.2020 issued by Union Bank of India, Mid	6,10,59,000	31.01.2023

	Corporate Branch, Nariman Point, Mumbai.		
4.	BG No. 00611LG006020 dated 09.10.2020 issued by Punjab National Bank, IIaco House, Fort, Mumbai.	5,00,00,000	31.01.2023
5.	BG No. 00611LG006120 dated 09.10.2020 issued by Punjab National Bank, IIaco House, Fort, Mumbai.	3,42,66,000	31.01.2023
Total 33,53,25,000			

The recital of all the Bank Guarantee are identical and as such the terms of one of the BG is being taken into consideration. Apparently, the terms inter-alia states:

"..We, Union Bank of India MID Corporate Branch Mumbai South having registered office at Ground Floor, Union Bank Bhavan, 239, Vidhan Bhavan, Marg Nariman Point, Mumbai - 100021,India, a body registered/constituted under the 1956 (herein after referred to as the Bank), which expression shall, unless repugnant to the context of meaning thereof, include its successors, administrators, executors and assigns do hereby guarantee and undertake to pay the Client immediately on demand, without any deductions, set-off or counterclaim whatsoever, any or, all money payable by the contractor to the extent Rs. 9,00,00,000/- (Rupee Nine Crore only) as aforesaid at any time up to 31.01.2024 without any demur, reservation, contest, recourse, cavil, arguments, or protest and/or without any reference to or enquiry from the Contractor and without your needing to prove or show grounds or reasons for your demand for the sum specified therein. Any such demand made by the client on the Bank shall be conclusive and binding notwithstanding any difference between the client and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. We agree that the Guarantee herein contained shall be irrevocable and shall continue to be enforceable till the Client discharges this guarantee.

The Client shall have the fullest liberty without affecting in any way the liability of the Bank under this Guarantee, from time to time to vary or to extend the time for performance of the contract by the Contractor. The Client shall have the fullest liberty without affecting this guarantee, to postpone from time to time the exercise of any powers vested in them or of any right which they might have against the Contractor of they might have against the Contractor and to exercise the same at any time in any manner, and either to enforce or to forbear to enforce any covenants, contained or implied, in the Contract between the Client and the Contractor any other course or remedy or security available to the Client. The Bank shall not be relieved of its obligations under these present by any exercise by the Client of its liberty with reference to the matters aforesaid or any of them or by reasons of any other act or forbearance or other acts of omission or commission on the part of the Client or any other indulgence shown by the Client or by any other matter or thing whatsoever which under law would but for this provision have the effect of relieving the Bank.

The Bank also agrees that the Client at its option shall be entitled to enforce this guarantee against the Bank as a principal debtor, in the first instance without proceeding against the Contractor and notwithstanding any security or other guarantee that the Client may have in relation to the Contractor's liabilities.

Any demand shall be deemed to be served, if delivered by hand, when left at

the property address for service: and if given or made by pre-paid registered post or facsimile transmission, on receipt.

Any waivers, extensions of time or other forbearance given or variations required under the Contract or any invalidity, unenforceability or illegality of the whole or any part of the contactor or rights or any Party thereto or amendment or other modifications of the Contract, or any other, circumstances, provision of other modifications of the contract or any other fact, circumstances, provisions of statute of law which might entitle the Bank to be released in whole or in part from its undertaking, whether in the knowledge of the Bank or not or whether notified to the Bank or not shall not in any way release the Bank from its obligations under this Bank guarantee.

"The guarantee shall also be operatable at our Union Bank of India branch at Lucknow, from whom, confirmation, regarding the issue of this guarantee or extension/renewal thereof shall be made available on demand. In the contingency of this guarantee being invoked and payment there under claimed, the said branch shall accept such invocation letter and make payment of amounts so demanded under the said invocation".

Notwithstanding anything contained herein,

1. Our liability under this Bank Guarantee shall not exceed Rs. 9, 00, 00,000/- (Rupees Nine Crore only).

2. This shall be Valid up to 31.01.2023.

3. We are liable to pay the guarantee amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or demand on or before 31.01.2024.

4. At the end of claim period that is on or after 31.01.2024 all your rights under this guarantee shall stand-extinguished and we shall be discharged from all our liabilities under this guarantee irrespective of receipt of original Bank Guarantee duly discharged by Bank."

28. The judgement in Vintec Electronics Private Ltd, Vs. HCL Infosystems Ltd., (2008) 1 SCC 544 makes it abundantly clear that the first aspect, to be taken into consideration, is the bank guarantee itself, and the terms thereof. If the bank guarantee is conditional, then, if the conditions have not been fulfilled, injunction, against encashment and invocation, may unquestionably follow. If, however, the bank guarantee is unconditional, then injunction can be granted only if egregious fraud, irretrievable injustice, or special equities, exist, and not otherwise.

29. Clearly, the Bank Guarantees are unconditional and irrevocable. Under the Bank Guarantee, the bank undertakes to pay the appellant immediately on demand, without any deductions, set-off or counterclaim whatsoever, any or, all money payable by the Respondent without any demur, reservation, contest, recourse, cavil, arguments, or protest and/or without any reference to or enquiry from the Respondent and without the appellant needing to prove or show grounds or reasons for their demand for the sum specified therein.

30. The Bank Guarantee in unequivocal terms says that any demand made by the Appellant on the Bank shall be conclusive and binding notwithstanding any difference between the Appellant and the respondent or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. It is very much

contained in the BG that the Bank has agreed that the Guarantee contained shall be irrevocable and shall continue to be enforceable till the Appellant discharges this guarantee.

31. Having said so, it has to be understood that the jurisdiction of the Court to interfere, in such cases, is, however, not irrevocably foreclosed and as such the exceptions of egregious fraud, irretrievable injustice, or special equities have been devised by the court to injunct the invocation of the bank guarantee(s). As to what follows from egregious fraud, the meaning and implications thereof are settled. The Hon'ble Supreme court as far back as some 50 years ago in the case of Union of India Vs. Chaturbhai M. Patel & Co (1976) 1 SCC 747 relying on the judgement of Lord Atkin in A.L.N. Narayanan Chettyar v. Official Assignee, High Court, Rangoon, AIR 1941 PC 93 held that "fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt." The aspect was further clarified by holding that "however suspicious may be the circumstances, however strange the coincidences, and however grave the doubt, suspicion alone can never take the place of proof." The Supreme court in Svenska Handelsbanken v. Indian Charge Chrome (1994) 1 SCC 502 , went on to say that mere pleadings do not make a strong case of prima facie fraud, which had to be shown by "material and evidence". Thus, fraud must be pleaded and proved and it cannot be presumed.

32. Coming back to the facts of the present case, the reason, which has been accorded for fraud by Learned Senior counsel for the respondent is twofold; (i) it is not the case of the Appellants that there had been any shortcomings or defect in the performance of the respondent during the entire tenure of the Contract Agreement and (ii) that Clause 18(d) read with Clause 20 of the Contract Agreement bars the Appellant from encashing the Performance Bank Guarantee against the shortfall in remittance.

33. First & foremost, the terms of the Bank Guarantee, clearly says that for invocation no such statement of shortcoming or defect in performance is required to be made by the appellant to the Bank. The Learned Senior Counsel may be right that there is no pleading of shortcomings or defect in performance by the appellant, but at the same time the appellant have controverted the said contention by claiming that over Rs. 39 Crores is due and outstanding against the respondent towards remittance. Now, whether the contention of the appellant towards shortfall of remittance can be extended to mean a shortcoming or defect in performance is in the realms of interpretation, which obviously is still to be adjudicated between the parties. However, at this juncture, this court is not concerned with the said interpretation and is merely concerned with the wording of the Bank guarantee, which clearly uses the wording "without any demur, reservation, contest, recourse, cavil, arguments, or protest and/or without any reference to or enquiry from the Contractor and without your needing to prove or show grounds or reasons for your demand for the sum specified therein". The said Bank Guarantee specifically specifies that any such demand made by the Appellant on the Bank shall be conclusive and binding notwithstanding any difference between the client and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority.

34. Further, we are unable to agree with the contention of the Learned Senior counsel for the Respondent that this Court, when approached for the interim measure of interference with unequivocal, absolute and unconditional BGs, is required to interpret the contract and/or form a prima facie opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. Such exercise, in the view of this court is to be done in a substantive proceeding of Arbitration, for recovery of the monies of the BGs, if contended to have been wrongly taken by the Appellant by encashment of BGs. Naturally, if any interim relief is also claimed in the said substantive proceedings, the need for taking a prima facie view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs, which has to be obviously on the basis of the terms of the Bank Guarantee Agreement.

35. In view of the well crystallized law on the subject, any reference to the original dispute between the parties, relating to the performance of the contract, is completely irrelevant, insofar as the issue of stay of invocation of the bank guarantees is concerned. That dispute has necessarily to form substratum of an entirely different proceeding, to be resolved either by arbitration or by adjudication by a Court. Thus, in the present interim proceedings, the enquiry is confined to, whether on the basis of the documents, a case of fraud of egregious nature in the matter of obtaining/furnishing BGs, is made out.

36. This court has burdened itself to go through the clauses mentioned by the Respondent's in the argument and is not able to appreciate to the contention of the Learned Senior Counsel. Clause 18(d) has to be read in conjunction to clause 18(c) (ii), which speaks of default to perform or observe any of the covenants, conditions or provisions contained in the contract, so that both can coexist. The other clause relied upon by the Learned Counsel is relating to penalty for failure to pay instalment. Without entering into the arena of interpretation, this court finds it apt to quote para 9 of the judgement passed by the Hon'ble Apex court in **State Trading Corporation of India Ltd. Vs Jainsons Clothing corporation (1994) 6 SCC 597, wherein it was inter-alia held:**

"9. It is settled law that the court, before issuing the injunction under Order 39, Rules 1 and 2, CPC should prima facie be satisfied that there is triable issue strong prima facie case of fraud or irretrievable injury and balance of convenience is in favour of issuing injunction to prevent irremediable injury. The court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract of guarantee unless there is a specific plea of fraud or special equities in favour of the plaintiff. ***He must necessarily plead and produce all the necessary evidence in proof of the fraud in execution-of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as a ground for fraud."***

37. Moreover, at this juncture, it would be profitable to quote Mahatma Gandhi Sahakra Sakkare Karkhane case, wherein at paragraph 24 of the judgment, it was held;

24: "If the bank guarantee furnished is an unconditional and

irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."

Thus, this court holds that, in view of the afore-extracted categorical exposition of the law, it is clear that the condition, in the agreement between the parties, under which the bank guarantees could be enforced, cannot be cited as a ground to stay the invocation and encashment thereof. Further, this principle of the law, as enunciated in Mahatma Gandhi Sahakra Sakkare Karkhane, was quoted, with approval, by the Supreme Court, in Vinitec Electronics, which went on, on the basis thereof, to hold that "what is relevant are the terms incorporated in the guarantee executed by the bank".

38. Thus, the law on the subject is clear, a fraud in the execution of the Bank Guarantee has to be pleaded and not the Main contract or the subsequent events as has been argued by the Learned Senior Counsel. Fraud, as an exception to the rule of non-interference with encashment of BGs, is not any fraud but a fraud of an egregious nature, going to the root i.e. to the foundation of the bank guarantee and an established fraud. The entire case of the Respondent, we are afraid, fails to qualify so and we are not able to subscribe to the views contended by the Learned Senior Counsel for the respondent.

39. As far as the argument of the senior counsel for the Respondent, relating to special equities is concerned, the same is but a facet of the second exception aforesaid of irretrievable injury or injustice. Needless to state that from the entire arguments of the senior counsel for the respondent, no case of fraud of egregious nature in the matter of making/obtaining of the BGs is made out. All that emerges is that there are some disputes between the appellant and the respondent, relating to the grant of relief under the force majure clause and it is not even whispered that the Appellant built the entire façade of entering into the contract, only to obtain BGs and to profiteer from the Respondent.

40. The Respondent has stated that the issue relating to Force Majure has not been decided and in case the same is decided in their favour, the amount sought to be appropriated by invoking the present Bank guarantees would not be recoverable from the appellant. However, this court finds that the Appellant is a Public Sector Undertaking and the monies, if ultimately found due to the Respondent from the appellant, can always be recovered by the Respondent from the Appellant. There is no pleadings on record that the Appellant are running away from the Jurisdiction of this court or are closing their operations, so as to adversely affect the recovery of the Respondent. In fact the Appellant have filed a document on record, showing a total short remittance till 10.10.2022 to the tune of Rs. 49,97,14,399/- after giving relief of force majeure for Rs. 11,38,11,932/- and as such it is the case of the appellant that even after invocation of the Bank guarantee in question, there would be substantial

amount left to be recovered from the respondent. However, this court does not wish to enter into the arena of any figure at this nascent stage as the rights and contention of the parties are still to be decided in a Arbitral Proceedings and any findings returned, may adversely impact the case of the concerned party.

41. Further, this court cannot lose sight of the fact that Irretrievable injustice, as an exception to the rule of non-interference with encashment of BGs, is again not a mere loss, which any person at whose instance bank guarantee is furnished, suffers on encashment thereof, because it is always open to such person to sue for recovery of the amount wrongfully recovered. Thus, what has to be proved and made out to obtain an injunction against encashment, is that it will be impossible to recover the monies so wrongfully received by encashment. On the facts of the present case, this court holds that the said contention is a mere apprehension only and not on the basis of any material on record. In any case, the appellant is a public sector undertaking and a ground of not able to recover from a PSU has to be grounded on strong footings and not merely on apprehension or pleadings.

42. The next ground taken by the respondent is relating to "special equity". Without extracting the specific references, to the existence of "special equities", as made in the petition, suffice it to state that the only ground, on which the petitioner has urged the existence of such "special equities", is its averment that its claim under the force majure clause, if accepted, there would not be any amount payable to the appellant and as such the money being appropriated by the appellant due to Invocation of bank guarantees is not legally valid. There is no other ground, on which the existence of "special equities" has been pleaded.

43. Special equities, as held by the Supreme Court in UP State Sugar Corporation1 and in Svenska Handelsbanken case (Supra), have to partake the character of irretrievable injustice. Even otherwise, it cannot be said that any such case of special equities has been made out by the respondent, as would justify interdicting invocation of the subject bank guarantees. Indeed, the contentions of learned Senior Counsel for the respondent essentially revolved around compliance with the conditions stipulated in the Main Contract for concession under the Force majoure Clause. It is rather preposterous to estimate that can a mere claim, of the respondent against the appellant- the sustainability of which is yet to be adjudicated - constitute "special equities", so as to justify injuncting the invocation of unconditional bank guarantees, issued by the bank, at the respondent's instance, in favour of Appellant, even if such a claim is in excess of the amount covered by the bank guarantees. In the considered opinion of this court, the answer has to be in negative. In view thereof, it cannot be said that, within the boundaries of the law relating to interdiction of invocation of the irrevocable bank guarantees, a case for such interdiction has been made out by the petitioner in the present case, insofar as the subject bank guarantees are concerned.

44. Thus, it would be right in holding that none of the three circumstances, in which stay of invocation of unconditional bank guarantees, can be granted by the Court, exists in favour of the respondent in the present case and as such it was not well within the Jurisdiction of the Learned

Commercial Court to pass a status quo order, which in effect has interdicted the invocation of the performance Bank Guarantee.

45. Another issue, which has been agitated by the Counsel for the Respondent is that a mere interim order of status quo has been passed by the Learned Commercial court and since the matter is engaging the attention of the said commercial court, this court should lay its hands of the present matter as the said petition filed under section 9 of the Arbitration & Conciliation Act would be rendered infructuous. Unfortunately, we are not able to subscribe to the view of the Learned Senior Counsel for the Respondent. It may be mentioned herein that section 9 of the Act, itself bears the heading "Interim measure etc. by court", which sufficiently means that the power of the court has been given for interim measure only as the substantial dispute has to be decided in an Arbitration proceeding. The said interim measure is of special importance as it intends to give immediate succour to a party as the very first line of the section mentions that the party may approach the court, before or during arbitral proceedings or at any time after the making of the arbitral award. Thus, the proceedings by its very nature is interim in nature under section 9 of the Arbitration & Conciliation Act and thus by that analogy as is being proposed by the Respondent, the impugned order seems to be an interim order of an interim relief. However, we find that the Learned Commercial court, lucknow has extensively dealt with all the allegations and counter-allegation of the parties to arrive at a lengthy order of fourteen pages to arrive at a conclusion that if the benefit of the force majoure clause is given to the respondent during the Covid-19 period, there would not be any amount payable to the Appellant. The Learned Commercial court in its pursuit to grant a status quo order has recorded that the respondent was ready to keep the BG live during the arbitration proceedings to hold that there was a prima-facie case in favour of the respondent and that in case the BG is invoked the respondent would suffer irreparable loss. Thus, the commercial court on the triple test of prima-facie case, irreparable loss and balance of convenience granted status quo order, thereby interdicting the invocation of BG. Having recorded so, this court cannot agree to the contention of the Learned Senior Counsel that an interim order has been only passed by the commercial court. Infact, there was nothing left in the petition under section 9 of the Arbitration & conciliation Act to be adjudicated any further. Thus, the commercial court has passed the interim order in the nature of final order as far as section 9 of the Arbitration & Conciliation Act is concerned and as such there was no occasion for the commercial court to keep the matter pending.

46. Mr. Mathur has also placed reliance on the judgment of Continental Construction Ltd. v/s Sutluj Jal Vidyut Nigam Ltd. 2006 SCC Online Del 56, passed by the Hon'ble Delhi High Court to buttress his submission that a beneficiary is not vested with an unquestionable or unequivocal legal right to encash the bank guarantee of demand. This court finds that the said judgment was passed in the peculiar facts of that case, wherein the Delhi high Court returned a categorical finding that the BG was not invoked as per the terms of the Bank guarantee itself. The Learned Counsel has also relied on the Single Bench judgment passed by the Delhi high court in Hindustan Construction Co.

Ltd & Anr. Vs. Sutlej Jal vidyut Nigam Ltd. 2005 SCC Online Del 1249 and order of the Division Bench of the Delhi high Court in FAO(OS) 77/2006 (Satluj Jal Vidyut Vikas Nigam Ltd v. Hindustan Construction Co Ltd), which was passed noticing the order, dated 3rd April, 2006, of the Supreme Court in SLP (C) 5456/2006 (Satluj Jal Vidyut Nigam Ltd v. Jai Prakash Hyundai Consortium. Pertinently, the Supreme Court order, dated 3rd April, 2006, merely dismissed the SLP, preferred by Satluj Jal Vidyut Vikas Nigam Ltd. against the judgement of the Division Bench and did not, therefore, declare any law within the meaning of Article 141 of the Constitution of India

47. The judgement of the Division Bench of the Delhi High Court in Satluj Jal Vidyut Vikas Nigam Ltd is prior, in point of time, to the decision of the Supreme Court in Mahatma Gandhi Sahakra Sakkare Karkhane case, as well as the latter decision in Vinitec Electronics case , which clearly held that an injunction, from enforcement of a bank guarantee, cannot be granted on the ground that the condition for enforcement of the bank guarantee in terms of the agreement between the parties has not been fulfilled. This court therefore differs with the view taken by the Division Bench of the Delhi High Court in Satluj Jal Vidyut Vikas Nigam Ltd.

48. A Division Bench of the Delhi High Court while giving a very exhaustive Judgment on the aspect of invocation of Ban guarantee held in the case of ***Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (DCIL-AIPL) v. Teestavalley Power Transmission Limited 2014 SCC Online Del 4741*** that a plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee.

49. In view of the facts & the authoritative law on the subject, this court finds that the law on interdicting an unconditional Bank Guarantee is settled, however the impugned order has been passed dehors these authoritative judgment and as such the same is unsustainable in the eyes of law. This court finds its bounden duty to quote an observation made by a three Judge Bench of the Supreme Court in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. (1997) 6 SCC 450, relevant to the context, wherein their lordship inter-alia observed;

"It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled."

Similarly, in the present case, when the law on interdicting an unconditional Bank guarantee, although stands settled by a series of consistent judgments by the Hon'ble Supreme Court since the last more than four decade, the courts are still flooded with Bank guarantee matters, which take substantial time in adjudicating the issue, which this court thought to be well-settled.

50. Thus, for all the aforesaid reasons, this court is inclined to allow the present

Appeal. Accordingly, the impugned order dated 12.09.2022 passed by the Commercial court, Lucknow in Arbitration Case No. 57/2022 (M/s Sahakar Global Company Ltd. Vs U.P Expressway Industrial development Authority) is set-aside. There shall be no order as to cost.

(2022) 12 ILRA 722
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Appeal U/s 37 of Arbitration and Conciliation Act 1996 Defective No. 121 of 2022

U.O.I. ...Appellant
Versus
M/s Bharat Construction ...Respondent

Counsel for the Appellant:
Sri Manoj Kumar Singh

Counsel for the Respondent:
Sri Sanjay Kumar Pandey, Sri Sujeet Kumar, Sri Sunil Kumar Upadhyay

Arbitration and Conciliation Application Act, 1996 - Section 37 - Delay condonation in filing Appeal u/s 37 - delay beyond the prescribed period can only be condoned 'by way of exception and not by way of rule' - In the instant case appeal reported to be beyond time by 258 days - Held - explanation proffered by the applicant/ appellant to demonstrate sufficient cause for delayed filing of the appeal is no explanation in the eyes of law - averments are vague and do not reflect any specific dates in support of the averments - delay seemingly occurred because the appellant could not decide whether it had to challenge the impugned order or not, despite being aware of the limitation prescribed - appellant miserably failed to demonstrate diligence and bonafide to make out 'sufficient cause' for condoning the delay - delay condonation application rejected. (Para 7, 10)

Dismissed. (E-3)

List of Cases cited:

1. N.V. International Vs St. of Assam & ors. (2020) 2 SCC 109

2. Government of Maharashtra Vs M/s Borse Brothers Engineers & Contractors Pvt. Ltd, (2021) 6 SCC 460

3. CIT Vs Hindustan Bulk Carriers (2003) 3 SCC 57

4. Ajmer Kaur Vs St. of Pun. (2004) 7 SCC 381

5. Brahampal Vs National Insurance Comp. (2021) 6 SCC 512

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Shri Manoj Kumar Singh, counsel for the appellant and Shri Sujeet Kumar, counsel for the respondents.

2. The instant appeal under Section 37 of the Arbitration and Conciliation Act, 19961 has been filed challenging the order dated 23.11.2021 passed by the Presiding Officer, Commercial Court, Moradabad, dismissing an application under Section 34 of the Act of 1996 in Arbitration Case No. 3 of 2021 (Union of India Vs. M/S Bharat Construction and another). The appeal is reported to be beyond time by 258 days. The appeal has been filed along with a delay condonation application supported by an affidavit, which application is first being taken up for consideration.

Delay Condonation Application No. 1 of 2022

3. When the matter was listed on 20.10.2022, learned counsel for the respondent relied upon a judgement of the Supreme Court in the case of **N.V. International Vs. State of Assam and others2** to contend that the delay in filing the aforesaid appeal cannot be condoned. He contended that the present appellate proceeding is in continuation of the original proceeding and the delay in filing this appeal would defeat the overall statutory purpose of arbitration proceedings which require that the proceedings be decided expeditiously. Learned counsel appearing for the appellant sought time to ascertain whether the aforesaid judgement of the Supreme Court still holds the field or not.

4. Today, learned counsel for the appellant has relied upon a judgement of the Supreme Court in the case of **Government of Maharashtra Vs. M/s Borse Brothers Engineers and Contractors Private Limited3** to contend that the aforesaid judgement in **N.V. International** has been overruled. Learned counsel has referred to paragraph no. 52 of the judgement in Borse Brothers in support of his contention.

5. A perusal of judgement in Borse Brothers reveals that though the judgement of the Supreme Court in **N.V. International** was held to have been wrongly decided and therefore, overruled, the question further posed by the Supreme Court related to the application of Section 5 of the Limitation Act to appeals which are governed by a uniform 60-day period of limitation. The Supreme Court observed that it would have to steer a middle course between the two extremes; one being the judgement in **N.V. International** which does not allow condonation of delay beyond 30 days, and, the other, being an open-ended provision in which any amount of time can be condoned, provided sufficient cause is shown. While referring to its judgement in **CIT Vs. Hindustan Bulk Carriers4** regarding harmonious construction of statutes, the Supreme Court, while reading Section 37 of the Act of 1996 with either Article 116 or 117 of the Limitation Act, or Section 13 (1A) of the Commercial Courts Act, observed that the object and context provided by the aforesaid statutes, read as a whole, is the speedy disposal of appeals filed under Section 37 of the Act of 1996. The Supreme Court observed as follows:

"55. Reading the Arbitration Act and the Commercial Courts Act as a whole, it is clear that when Section 37 of the Arbitration Act is read with either Article 116 or 117 of the Limitation Act or Section 13(1-A) of the Commercial Courts Act, the object and context provided by the aforesaid statutes, read as a whole, is the speedy disposal of appeals filed under Section 37 of the Arbitration Act. To read Section 5 of the Limitation Act consistently with the aforesaid object, it is necessary to discover as to what the expression "sufficient cause" means in the context of condoning delay in filing appeals under Section 37 of the Arbitration Act."

6. The Supreme Court further referred to the judgement in **Ajmer Kaur Vs. State of Punjab5** and **Brahampal Vs. National Insurance Company6** and observed as follows:

"58. Given the object sought to be achieved under both the Arbitration Act and the Commercial Courts Act, that is, the speedy resolution of disputes, the expression "sufficient cause" is not elastic enough to cover long delays beyond the

period provided by the appeal provision itself. Besides, the expression "sufficient cause" is not itself a loose panacea for the ill of pressing negligent and stale claims. This Court, in *Basawaraj v. LAO [Basawaraj v. LAO,* (2013) 14 SCC 81] , has held : (SCC pp. 85-88, paras 9-15)

"9. Sufficient cause is the cause for which the defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the viewpoint of a reasonable standard of a cautious man. *In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive".* However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. *(See Manindra Land & Building Corpn. v. Bhutnath Banerjee [Manindra Land & Building Corpn. v. Bhutnath Banerjee, AIR* 1964 SC 1336] , *Mata Din v. A. Narayanan [Mata Din v. A. Narayanan,* (1969) 2 SCC 770] , *Parimal v. Veena [Parimal v. Veena,* (2011) 3 SCC 545 : (2011) 2 *SCC (Civ) 1] and Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai [Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai,* (2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24] .)

10. In *Arjun Singh v. Mohindra Kumar [Arjun Singh v. Mohindra Kumar,* AIR 1964 SC 993] this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause".

11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only *so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned,* whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide Madanlal v. Shyamlal [(2002) 1 SCC 535] and *Ram Nath Sao v. Gobardhan Sao* [(2002) 3 SCC 195] .)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation.' The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex*

which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to *Halsbury's Laws of England*, Vol. 28, Para 605 p. 266:

"605. *Policy of the Limitation Acts.*-- The courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence.'

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches. (See *Popat & Kotecha Property v. SBI Staff Assn.* [(2005) 7 SCC 510] , *Rajender Singh v. Santa Singh* [(1973) 2 SCC 705] *and Pundlik Jalam Patil v. Jalgaon Medium Project* [(2008) 17 SCC 448] .)

14. In *P. Ramachandra Rao v. State of Karnataka* [(2002) 4 SCC 578] this Court held that judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in *Abdul Rehman Antulay v. R.S. Nayak* [(1992) 1 SCC 225] .

15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature."

7. In the said judgement, the Supreme Court also considered the submission that in cases involving Government and its instrumentalities, a liberal approach should be adopted. The delay in filing the appeal was of 131 days beyond the prescribed period of 60 days. The contention was repelled, holding that the explanation furnished is nothing but the usual "file-pushing and administrative exigencies'. It is held that having regard to the object of the Commercial Courts Act, any delay beyond the prescribed period can only be condoned "by way of exception and not by way of rule'. It is apposite to quote some more paragraphs from the judgement dealing with the issue -

59. Likewise, merely because the Government is involved, a different yardstick for condonation of delay cannot be laid down. This was felicitously stated in

Postmaster General v. Living Media (India) Ltd. [(2012) 3 SCC 563] *["Postmaster General"]*, as follows : (SCC pp. 573-74, paras 27-29)

"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

8. Thereafter, the Supreme Court also referred to various other judgements where the Supreme Court deprecated inordinate delay in filing appeals. The Supreme Court further held as follows:

"62. Also, it must be remembered that merely because sufficient cause has been made out in the facts of a given case, there is no right in the appellant to have delay condoned. This was felicitously put in *Ramlal v. Rewa Coalfields Ltd.* [AIR 1962 SC 361] as follows : (SCR p. 771 : AIR p. 365, para 12)

"12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant. It cannot justify an enquiry

as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of bona fides or due diligence are always material and relevant when the Court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14."

63. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under Section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or Section 13(1-A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches."

9. Coming to the facts of the instant case, a perusal of the affidavit filed in support of the delay condonation application reads as follows:

"1. That, the deponent is presently posted as Senior Divisional Engineer, Head Quarter, Moradabad in the office of DRM, Moradabad and has been duly authorize by the competent authority to swear this affidavit on behalf of the Applicants in the above noted Review petition and as such the deponent is fully acquainted with the facts deposed to below.

2. That, after obtaining the certified copy of the impugned order dated 23.11.2021 passed by Presiding Officer, Commercial Court, Moradabad in Arbitration Case no.03 of 2021 (Union of India Vs. M/s Bharat Construction and Another) same was served in the office of Senior Divisional Engineer Northern Railway, D.R.M. office, Moradabad.

3. That, thereafter after going through the impugned order dated 23.11.2021 passed by learned Prescribed Officer, Commercial Court, Moradabad in Arbitration Case no.03 of 2021 (Union of India Vs. M/s Bharat Construction and Another) as well as the record, the matter was sent for legal opinion in respect of taking any further action in the matter.

4. That, after obtaining the legal opinion from the Railway Counsel, entire document pertaining to the aforesaid case was forwarded to the Headquarter Northern Railway, Delhi for further action.

5. That, earlier, the Railway Authorities at D.R.M. Office, Moradabad, were of opinion that the award passed by the Arbitrator award may be complied with after getting the same affirm by the impugned judgment dated 23.11.2021 of Prescribed Officer, Commercial Court, Moradabad in Arbitration Case no.03 of 2021 (Union of India Vs. M/s Bharat Construction and Another). However considering the legal opinion of the railway counsel, the higher authorities at headquarter, N.R. Railway has decided to take another legal opinion from the Additional Solicitor General of India at Allahabad.

6. That, after taking legal opinion from Additional Solicitor General of India at Allahabad, all the documents along with legal opinion was sent to the Headquarter of Northern Railway, Delhi for taking further action.

7. That, thereafter, the competent authority after considering the facts and law, has decided to file an appeal before this Hon'ble Court as such all documents pertaining to the same was sent to the office of Additional Solicitor General of India at Allahabad with the request to entrust any Central Govt. Counsel for drafting an appeal u/s 37 Arbitration and Conciliation Act.

8. That thereafter, learned Additional Solicitor General of India at Allahabad entrusted Sri Manoj Kumar Singh, Central Govt. counsel to prepare and filed the present Appeal against the impugned judgment dated 23.11.2021 passed by learned Prescribed Officer, Commercial Court, Moradabad in Arbitration Case no.03 of 2021 (Union of India Vs. M/s Bharat Construction and Another) and Award Dated 04.03.2020 passed by the sole Arbitrator.

9. That thereafter, relevant documents were handed over to the counsel for the appellant however, the certified copy of impugned order dated 23.11.2021 was not available as such the counsel of the appellant requested concern officer to get the same so that the appeal may be prepared and filed forthwith.

10. That thereafter, on the basis of documents provided by Department the present appeal has been drafted by counsel for the appellant and was sent for vetting to the competent authority at Headquarter Northern Railway Delhi.

11. That after taking any necessary approval from the competent authority, deponent has been authorized to swear and sign the present affidavit so that the appeal may be filed before this Hon'ble Court.

12. That on 10.10.2022 the deponent after taking necessary permission has signed the affidavit as such without any further the present appeals is being filed before this Hon'ble Court.

13. That delay in filing the present appeal is not intentional but the same is procedural, as the department has to take various sanctions at different level for filing the present appeal.

14. That, therefore in view of the facts and reasons stated above, it would be expedient in the interest of justice that this Hon'ble Court may graciously be pleased to condone the delay, if any, in filing the present arbitration appeal filed against the impugned order dated 23.11.2021 passed by learned Prescribed Officer, Commercial Court, Moradabad in Arbitration Case no.03 of 2021 (Union of India Vs. M/s Bharat Construction and Another) and award dated 04.03.2020 passed by the sole arbitrator and treat the same as filed within time, otherwise the appellant shall be put to irreparable loss and hardship."

10. The aforesaid explanation proffered by the applicant/ appellant to demonstrate sufficient cause for delayed filing of the appeal is no explanation in the eyes of law. The averments are vague and do not reflect any specific dates in support of the averments. The only date that has been mentioned in paragraph no. 12 which is 10.10.2022 on which date the deponent is said to have signed the affidavit after taking necessary permission. The delay seemingly occurred because the appellant could not decide whether it had to challenge the impugned order or not, despite being aware of the limitation prescribed. The appellant

has miserably failed to demonstrate diligence and bonafide to make out 'sufficient cause' for condoning the delay. Therefore, it is held that delay in filing this appeal has not been sufficiently explained and there exists no sufficient cause for condoning the delay in filing the aforesaid appeal. Under the facts and circumstances, the delay condonation application is rejected.

Order on Appeal

11. Since, the delay condonation application has been rejected, the present appeal also stands **dismissed.**

(2022) 12 ILRA 729
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Appeal U/S 37 of Arbitration & Conciliation Act 1996 Defective No. 46 of 2022

M/s L.R. Print Solutions
...Defendant/Appellant
Versus
M/s Exflo Sanitation Pvt. Ltd.
...Plaintiff/Respondent

Counsel for the Appellant:
Sri Ashish Kumar Singh, Sri Ishwar Kumar Upadhyay, Sri Rakesh Pande, Sr. Advocate

Counsel for the Respondents:
Sri Ishir Sripat

Civil Law - Arbitration and Conciliation Application Act, 1996 - Section 8 - Power to refer parties to arbitration where there is an arbitration agreement - A judicial authority, before which, an action is brought, in a matter, which is the subject of an arbitration agreement, shall refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists - Notwithstanding that an application has been made u/s 8(1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made – i.e. there is no embargo for a party to approach the arbitral tribunal for getting the dispute decided during pendency of the suit - It would be an ideal scenario if the parties themselves respect their contractual commitment & approach the arbitrator without the judicial authority compelling them to do so under Section 8 of the Act. (Para 15)

Civil Law -Arbitration and Conciliation Application Act, 1996 - Section 8 - Order 7 Rule 11 C.P.C. - Appellant, a proprietorship concern, entered into an agreement of tenancy with the respondent in respect of an industrial property - clause 14 of the lease deed provided that in the event of any dispute or difference arising out of lease agreement, the same was to be referred to an arbitrator appointed by the lessor - As the appellant failed to vacate the tenanted premises, the respondent instituted a suit - trial court rejected the plaint in exercise of power under Order 7, Rule 11 (d) CPC holding that the suit is barred by S. 8 of the Act - Court simply rejected the plaint and did not make reference of the dispute u/s 8 of the Act - Appellant contended that unless the court refers the parties to arbitration, the parties themselves cannot invoke the arbitral machinery nor the arbitral tribunal gets jurisdiction to decide the dispute and differences between the parties - *Held* - although the trial court while deciding the issue relating to bar u/s 8 had rejected the plaint without referring the parties to arbitration and to that extent it's order is erroneous, but that in no manner was an impediment in invoking the mechanism of redressal viz. arbitration agreed to by the parties themselves - Court held that the submission of learned counsel for the appellant is inherently contrary to the legislative intent and cannot be countenanced and hence rejected (Para 15)

Dismissed. (E-3)

List of Cases cited:

1. Vidya Drolia & ors. Vs Durga Trading Corporation 2021 (2) SCC

2. Himangni Enterprises Vs Kamaljeet Singh Ahluwalia 2017 10 SCC 706

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

1. The instant appeal is directed against the order dated 30.06.2022 passed by the Presiding Officer, Commercial Court, Gautam Budh Nagar rejecting the objection of the appellant filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Objection Case No.150 of 2017).

2. The facts in brief are as follows:-

(a) The appellant is a proprietorship concern. It entered into an agreement of tenancy for a period of 11 months dated 11.06.2008 with the respondent (M/s Exflo Sanitation Pvt Ltd.) in respect of an industrial property No.C-156, Sector 10, Noida. The tenancy was for a period of 11 months starting from 1.07.2008 at the rate of Rs.8000/- per month. Under Clause 4 of the lease deed, it was provided that the lease rent will be enhanced by 10% after expiry of 11 months. Clause 7 gave option to both lessee and lessor to terminate the lease after giving one month notice. Under Clause 14, in the event of any dispute or difference arising out of lease agreement, the same would be referred to an arbitrator appointed by the lessor. The decision of the arbitrator was made binding on both the parties.

(b) The respondent by notice dated 13.09.2011 demanded arrears of rent amounting to Rs.80,688/- and also terminated the lease after expiry of 30 days.

(c) As the appellant failed to vacate the tenanted premises, the respondent instituted a suit (SCC Suit No.19 of 2011) for recovery of arrears of rent and damages as well as for eviction.

(d) The appellant filed an application in the suit purporting to be under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') read with Order 7 Rule 11 C.P.C. contending that as per the lease agreement, it was agreed between the parties that in case of any dispute or difference arising out of the same, it would be decided by the arbitrator and consequently, the court had no jurisdiction. As per Section 8 of the Act, the dispute can only be decided by the arbitrator, therefore, the plaint should be rejected under Order 7 Rule 11 C.P.C.

(e) The trial court accepted the objections and by order dated 19.09.2015 rejected the plaint in exercise of power under Order 7, Rule 11 (d) CPC holding that the suit is barred by Section 8 of the Act.

(f) The respondent thereafter nominated Sri Ashok Kumar Tripathi as arbitrator and filed a claim before him for arrears of rent; damages at the rate of Rs.25,000/- per month; interest at the rate of 18%; and eviction of the appellant.

(g) The appellant contested the claim by filing objections.

(h) The arbitrator framed five issues and gave his award dated 19.07.2017. The claim of the respondent was decreed for recovery of arrears of rent, damages and eviction of the appellant.

(i) The appellant filed objections under Section 34 of the Act against the award which was registered as Arbitration Objection Case No.150 of 2017. The court

below has rejected the objections by order dated 20.06.2022 and aggrieved thereby the instant appeal has been filed.

3. The appeal was admitted by order dated 10.08.2022. Counsel for the appellant on the date the appeal was admitted made a statement that he has annexed all relevant documents with the memo of appeal and it can be heard without calling for the records of the court below. Learned counsel for the respondent also made a statement to the same effect. Accordingly, we fixed a date for hearing of the appeal and it has been heard finally.

4. The sole submission of counsel for the appellant Sri Rakesh Pande, learned senior counsel assisted by Sri Ishwar Kumar Upadhyay, is that the arbitral tribunal does not get jurisdiction to decide dispute between the parties without dispute being referred to it by the court. It is submitted that the court simply rejected the plaint and did not make reference of the dispute under Section 8 of the Act. Thus, the contention is that unless the court refers the parties to arbitration, the parties themselves cannot invoke the arbitral machinery nor the arbitral tribunal gets jurisdiction to decide the dispute and differences between the parties. In support of his submission, he places reliance on paragraph 244.3 of the judgement of the Supreme Court in **Vidya Drolia and others Vs. Durga Trading Corporation.**

5. On the other hand, learned counsel for the respondent submitted that it is not necessary that the court should refer the parties to arbitration and the respondent was fully competent to appoint the arbitrator in terms of Clause 14 of the agreement and the arbitrator had rightly proceeded to decide the dispute between the parties. It is submitted that the appellant itself challenged the jurisdiction of the civil court on the ground that there was arbitration agreement between the parties and the respondent having invoked the said remedy, the appellant cannot be permitted to challenge the jurisdiction of the arbitral tribunal or the award given by him.

6. We have considered the rival submissions and perused the record.

7. As would appear, the facts to the extent noted above, are not in dispute between the parties. Before we proceed to dwell on the rival contentions, we would like to advert to the judgement of the Supreme Court in **Vidya Drolia** (supra). It is a judgement by a Three Judge Bench answering a Reference as to whether landlord-tenant disputes governed by the provisions of the Transfer of Property Act, 1882 can be decided through the mechanism of arbitration or recourse to such remedy would be against public policy. The Reference arose out of the order by a Two Judge Bench dated 28.02.2019 in Civil Appeal No.2402 of 2019 **Vidya Drolia and others Vs. Durga Trading Corporation** doubting the correctness of the law laid down in **Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia.**

8. Two larger issues were decided viz:-

"2.1. (i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and

2.2. (ii) the conundrum - "who decides" - whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.

2.3. The second aspect also relates to the scope and ambit of

jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short, the "Arbitration Act')."

9. The first issue relating to non-arbitrability of the subject matter of disputes between landlord and tenant was decided by holding that the disputes between them are, normally, arbitrable except where the dispute is covered by a legislation. The law laid down in **Himangni Enterprises** was accordingly overruled. The conclusion drawn is as follows:-

"80. In view of the aforesaid, we overrule the ratio laid down in Himangni Enterprises and hold that landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration."

10. While deciding the second issue as to who would be competent to decide a plea of non-arbitrability, the Supreme Court after noticing the statutory regime as it existed prior to Act No.3 of 2016, after the amending Act No.3 of 2016 and after Act No. 33 of 2019 held that Section 8 and Section 11 of the Act are complementary provisions. The object and purpose behind the two provisions is identical i.e. to compel and force the parties to abide by their contractual understanding. Section 11, it has been noted, does not prescribe any standard of judicial review for determining whether any arbitration agreement is in existence or not while Section 8 states that the judicial review at the stage of Reference is 'prima facie' and not final. The 'prima facie' satisfaction test regarding existence of an arbitration agreement in Section 11 can also be read in Section 8. Accordingly, it is held that a limited power of judicial review to the extent of prima facie examination of the existence of an arbitral agreement would effectuate the mechanism of arbitration rather than obstruct it. The conclusions have been crystallized in paragraph 154 as follows:-

"154.1. Ratio of the decision in Patel Engineering Ltd. on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34 (2)(a) or sub-clause (i) of Section 34 (2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie

certain that the arbitration agreement is non- existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

11. While laying down the above, a caveat was added. It has been held that while deciding the issue relating to existence of an arbitration agreement under Section 11 of the Act, if debatable and disputable facts are involved, the court would force the parties to abide by the arbitration agreement as the arbitral tribunal is fully competent to rule on its jurisdiction and non-arbitrability.

12. The Chief Justice in his separate but concurring judgment noted that the discretion in referring the parties to arbitration under the old Arbitration Act, 1940 has been done away with after coming into force of the 1996 Act. Section 8 of the new Act contains a mandate that where an action is brought before a judicial authority in a matter which is subject matter of an arbitration agreement, the parties have to be referred to arbitration. It is in said context that it was observed in paragraph 244.3 as follows:-

"The Court, under Sections 8 and 11, has to refer a matter to arbitration to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding."

13. The above observation is not intended to mean that when any dispute arises between the parties to the arbitration agreement, they cannot set the arbitral machinery in motion without intervention of the court. In fact, such an interpretation would be contrary to the object of the Act and also the interpretation given to the amendments made in Section 8 in **Vidya Drolia** (supra) .

14. As noted above, the primary aim behind Section 8 and Section 11 is to compel and force the parties to abide by their contractual commitment and get the dispute resolved through arbitration. For the said reason, even while applying prima facie test while exercising power of judicial review, the judicial authority/court has to steer through a very narrow path. It cannot enter into the arena of factual discord and appreciation of evidence. Where the court or the judicial authority feels that prima facie test would be inconclusive and inadequate as it requires detailed examination of facts, the matter has to be left for final determination by the arbitral tribunal selected by the parties. The underlying reason being to discourage the parties from using referral proceeding as a ruse to delay and obstruct.

15. While the provision of Section 8 is mandatory and obligates the court to refer the parties to arbitration where the subject matter of dispute is covered by arbitration agreement, it no where imposes any restriction on a party in invoking the arbitral machinery and getting the lis decided. In the instant case, although the trial court while deciding the issue relating to bar under Section 8 had rejected the plaint without referring the parties to arbitration and to that extent it's order is erroneous, but that in no manner was an impediment in invoking the mechanism of redressal viz. arbitration agreed to by the parties themselves. In fact, sub-section (3) of Section 8 when it provides that "notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made" is conclusive of the legislative intent that there is no embargo for a party to approach the arbitral tribunal for getting the dispute decided during pendency of the suit. It would be an ideal scenario if the parties themselves respect their contractual commitment and approach the arbitrator without the judicial authority compelling them to do so under Section 8 of the Act. The submission of learned counsel for the appellant is inherently contrary to the legislative intent and cannot be countenanced and hence rejected.

16. The appeal lacks merit and is dismissed.

(2022) 12 ILRA 734
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 2397 of 2016

With

First Appeal From Order No. 2697 of 2016 & 2507 of 2016

The New India Assurance Co. Ltd.
...Insurance Company/Defendant Appellant
Versus
Sunil Kumar Dwivedi & Ors.
...Claimants/Respondents

Counsel for the Appellant:
Sri Rahul Sahai

Counsel for the Respondents:
Sri Nigamendra Shukla, Sri Rakesh Kumar Porwal, Sri Ram Singh

A. Civil Law - Motor Accident Claim - Motor Vehicles Act, 1988 - Contributory Negligence - deceased was travelling in the Wagon R, which was being driven in its lane at 80 km per hour on the Yamuna Expressway in the morning hours - offending truck was moving in another lane - truck driver suddenly swerved into the lane of the WagonR at a very fast speed and abruptly halted - He did not alert the driver of the WagonR before changing lanes - driver of the Wagon-R had no time and opportunity to stop his car or take safety measures to prevent the accident - negligence was entirely on part of the offending truck driver and he was fully responsible for the accident - Negligence on part of the WagonR driver is not proved - offending driver had a valid driving license on the date of the accident - tribunal erred by imposing contributory negligence liability of 30% on the driver of the WagonR - finding reversed - insurance company liable to pay the full compensation

B. Civil Law -Motor Accident Claim - Motor Vehicles Act, 1988 - computation of the compensation - *Salary of the deceased* - House Rent Allowance - deceased was an Assistant Teacher in a government primary school - tribunal unlawfully deducted the House Rent Allowance amount from the salary of the deceased -

House Rent Allowance has to be treated as part of salary of the deceased while computing the compensation - *Deduction towards personal expenses* - deceased had four dependants - amount which is liable to be deduction towards personal expenses of the deceased is 1/4th - *Multiplier* - age of the victim was 38 years - applicable multiplier applicable as per the holdings in Sarla Verma and Pranay Sethi is 15 (Para 26 - 33)

Allowed. (E-5)

List of Cases cited:

1. Nishan Singh & ors. Vs Oriental Insurance Company Ltd. & ors. 2018 (6) SCC 765

2. Sarla Verma (Smt) & ors. Vs Delhi Transport Company & anr. 2009 (6) SCC 121

3. National Insurance Co. Ltd. Vs. Pranay Sethi & ors. 2017 (16) SCC 680

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Aditya Singh Parihar, learned counsel holding brief of Shri Rahul Sahai, learned counsel for the Insurance Company, Shri Rakesh Kumar Porwal, learned counsel for the owner of the vehicle, Shri Nigamendra Shukla, learned counsel for the driver and Shri Ram Singh, learned counsel for the claimants.

I. INTRODUCTION

2. The three appeals arise out of the same accident and an award made by the learned Motor Accident Claims Tribunal/ Additional District Judge, Fatehpur, in M.A.C.P. No. 256 of 2014 (Sunil Kumar Dwivedi and others Vs Rajesh Kumar and others) dated 25.04.2016 granting compensation to the claimants for the death of the deceased in the motor accident by partly allowing their claim. The appeals have been filed by the Insurance Company, claimants and owner of the vehicle respectively and are being decided by a common judgement.

II. Case of the claimants and respondents before the learned tribunal:

3. Briefly the case of the claimants before the learned tribunal was that the deceased died of injuries sustained in an accident which occurred on 23.04.2014 and was caused by the rash and negligent driving of the driver of Truck No. UP 78 CN 7781. The deceased was travelling in a WagonR car being driven by her husband on the Yamuna Expressway when the accident occurred. The claimants were dependant on the deceased. The insurance company resisted the claim by filing a written statement. Both parties adduced evidence in the trial.

III. Compensation awarded by the learned tribunal:

4. The learned tribunal in the impugned judgement dated 25.04.2016 awarded compensation as under:

Sr. No.	Heads	Amount Awarded by the tribunal
1.	Monthly Income (A)	31,740/-
2.	Annual Income (B) (Ax12=B)	3,80,880/-
3.	Future Prospects (C)	50% of 3,80,880/- =1,90,440/-
4.	Annual Income + Future Prospects (B+C=D)	3,80,880+1,90,440/- =5,71,320/-

5.	Deduction towards personal expenses (E) (1/3 of D)	1/3 of 5,71,320/- =1,90,440/-
6.	Annual Loss of Dependency (F) (D-E =F)	5,71,320-1,90,440/- = 3,80,880/-
7.	Multiplier (G)	16
8.	Total loss of dependency (F x G)	3,80,880 x 16 = 60,94,080/-
9.	Loss of love & Affection	5000/-
10.	Loss of Estate	
11.	Funeral	5000/-
12.	Deduction towards Contributory negligence	30%
13.	Total compensation	61,04,080 - 30% = 42,72,856/-
14.	Interest	7%

IV. Issues for Consideration:

5. After advancing their arguments, learned counsels for the respective parties agree that the following questions fall for consideration in these appeals:-

A. Whether the driver of the offending truck was in possession of a valid driving license at the time of the accident? Whether the truck owner was liable to pay compensation ?

B. Whether there was any contributory negligence on part of the driver of the Wagon-R?

C. Whether all the claimants were dependants of the deceased?

D. Whether while determining the compensation the learned tribunal had lawfully computed the amounts under various heads like multiplier, consortium amount, deduction towards personal expenses and interest?

E. What is the compensation to which the claimants are lawfully entitled?

IV A. Issue of validity of license of the truck driver and liability of the truck owner:

6. The learned tribunal in the impugned award found for the insurance company and against the owner on the issue of driving license. The learned tribunal references the recital in the transport authority report (document 49-Ga-1) that the licence was in the name of one Om Prakash S/o Ram Prakash. On this footing the learned tribunal held that the driving license of the driver Santosh Kumar S/o Shivram presented by the owner as evidence was fake. The learned tribunal added these grounds to support the conclusion. The driver had used the said license in the bail proceeding, and for release of the offending vehicle.

7. The driver Santosh Kumar had specifically asserted in the written statement that his driving license bearing number 133895/SRA/8 was issued by the licensing authority at Sant Ravidas Nagar. The license was valid from 25.10.2012 to 24.10.2015 for driving heavy transport vehicles and was effective on the date of the accident. The aforesaid driving license of the driver was also produced by him during the trial at the instance of the insurance company and upon specific order of the learned tribunal dated 10.02.2016. The driver Santosh Kumar had

affirmed and proved the said license produced by him before the learned tribunal.

8. The insurance company never confronted the driver in the witness box regarding the validity of the aforesaid license, nor was any challenge otherwise laid to its veracity. The said driving license was unrebutted throughout the trial proceedings.

9. The said driving license marked as Paper no. 78-ga was also noticed in the impugned award. However the learned tribunal neglected to return a finding on its validity or otherwise. This failure reflects of non application of mind by the learned tribunal to relevant facts and evidences in the record.

10. It is noteworthy that the stand of the driver that he had never used the license produced by the owner for enlargement on bail or for release of the vehicle remained unimpeached.

11. The insurance company failed to discharge its burden of proving the invalidity of the said driving license.

12. The evidence in the record establishes that the offending driver had a valid driving license on the date of the accident. The issue of the driving license is decided in favour of the owner and against insurance company.

13. The finding in the impugned award that the driver of the offending vehicle did not have a valid driving license is unsustainable in law and is set aside.

14. The truck was insured. There was no breach of the insurance policy. The truck owner is absolved of all liability to pay the compensation.

IV B. Issue of contributory negligence:

15. The learned tribunal has found the Wagon-R driver responsible for contributory negligence, and assessed his liability for the same at 30%.

16. The eye witness PW-1 Sunil Kumar testified that on the fateful day he was driving the WagonR in his lane on the Yamuna Expressway. There was no other vehicle ahead of him in that lane. The offending truck was in another lane. The truck driver rashly changed lanes and suddenly halted in front of his car causing the collision. The F.I.R. was lodged with promptitude. Credit of this witness was not shaken under cross examination. His version is liable to be accepted as true.

17. The second eye witness to the accident Santosh Kumar the driver of the offending vehicle denied any negligence. He deposed that the truck was standing at one side on the road when the Wagon-R drove into it negligently. Under cross examination he could not account for his lapses and his testimony was substantially impeached. The witness did not lodge an FIR. He fled after the accident. His denial of negligence is an afterthought. The credit of the witness was shaken and his testimony is unworthy of belief.

18. The deceased was travelling in the Wagon R. The Wagon-R vehicle was being driven in its lane at 80 km per hour on the Yamuna Expressway in the morning hours of the fateful day. Good visibility can be inferred since there is no contrary evidence. There was no vehicle ahead of the Wagon R in the said lane.

19. At this stage it would be apposite to discuss the judgment relied upon by Sri Aditya Singh Parihar, learned counsel for

the insurance company in **Nishan Singh and others Vs Oriental Insurance Company Ltd. and others. Nishan Singh (supra)** is distinguishable on facts and not applicable to this case. Firstly, in **Nishan Singh (supra)** the vehicles were tailing each other. In this case there was no traffic ahead in the lane in which the WagonR was moving. Secondly the width of the road in Nishan Singh (supra) was about 14 ft. The Yamuna Expressway is much broader.

20. Safe driving norms define the duty to care of a driver. Two of the safety precautions which must be observed by a driver are: a minimum distance between two moving vehicles should be maintained and maximum speed limit has to be strictly adhered to. The permissible speed limits and terms of other safety precautions and compliance thereof will be determined upon enquiry in the facts and circumstances of a case. The germane considerations in such enquiry include the breadth and condition of the road, volume of traffic, visibility conditions.

21. The Yamuna Expressway is a well constructed highway of large breadth with several lanes. Multiple lane highways like Yamuna Expressway have been created for speedier connectivity with road conditions which facilitate faster movement of vehicles. Lane driving norms ease traffic flow and are designed to prevent accidents. The permissible speed limits on these highways are higher than other roads.

22. In these facts and circumstances, particularly absence of traffic in the lane, and good road and visibility conditions, speed of 80 km. per hour on the Yamuna Expressway was not excessive. The offending truck was moving in another lane. The truck driver suddenly swerved into the lane of the WagonR at a very fast speed and abruptly halted. He did not alert the driver of the WagonR before changing lanes. The offending driver failed to observe traffic rules and take reasonable care. The driver of the Wagon-R had no time and opportunity to stop his car or take safety measures to prevent the accident.

23. From facts and evidences in the record and appraised in the preceding discussion, these facts are proved by the evidential standard of preponderance of probability. The negligence was entirely on part of the offending truck driver and he was fully responsible for the accident. Negligence on part of the WagonR driver is not proved. The learned tribunal erred in facts and law by imposing contributory negligence liability of 30% on the driver of the WagonR. The finding is reversed. The insurance company is liable to pay the full compensation.

IV C. Issue of dependancy of the claimants on the deceased:

24. The claimants have specifically stated their dependancy on the deceased with all material facts in their pleadings. These facts have not been specifically refuted by the insurance company. The bald and general denial by the insurance company is not worthy of acceptance. Infact, the insurance company did not examine the P.W. 1 on the issue of dependancy in the witness box.

25. The claimants were dependant on the deceased and are entitled to compensation on account of her death.

IV D. Issue of computation of the compensation under various heads:

a. Salary of the deceased

26. The deceased was an Assistant Teacher in a government primary school. She was drawing a salary of Rs. 34,500/- per month. House Rent Allowance as per her service entitlement was a component of her salary. The tribunal has unlawfully deducted the House Rent Allowance amount from the salary of the deceased. House Rent Allowance has to be treated as part of salary of the deceased while computing the compensation.

b. Deduction towards personal expenses:

27. The deceased had four dependants. The deduction of 1/3rd made towards personal expenses made by the learned tribunal was excessive. The amount which is liable to be deduction towards personal expenses of the deceased is 1/4th.

28. The discussion has the advantage of authorities in point. While deciding the issue of deduction of personal expenses, the Supreme Court in **Sarla Verma (Smt) and others Vs Delhi Transport Company and another** held:

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362] , the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."

29. **Sarla Verma (supra)** was later followed with approval in **National Insurance Company Limited Vs. Pranay Sethi and others** (See Pr. 37).

C. Issue of multiplier

30. There is merit in the submission of Sri Aditya Singh Parihar learned counsel that an incorrect multiplier of 16 has been used by the learned tribunal. The learned counsels for other parties fairly concede point. The age of the victim was 38 years. The applicable multiplier applicable as per the holdings in **Sarla Verma (supra)** and **Pranay Sethi (supra)** is 15.

31. The compensation has to be recalculated by applying multiplier of 15.

d. Calculation of Conventional Heads:

32. The amount determined under conventional heads in the impugned award is at variance with **Pranay Sethi (supra).** The claimants are entitled to the sum fixed in **Pranay Sethi (supra)** which holds as under:

"54. .....The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the

thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- funeral expenses should be Rs. 15,000/-, Rs. 40,000/- And Rs. 15,000/- respectively."

e. Interest

33. Interest of 7% and the manner of payment decided by the learned tribunal is just and lawful and does not call for interference.

IV E. Determination of Compensation to which claimants- respondents are entitled:

34. In wake of the preceding discussion, the amount of compensation to which the claimants are entitled, is tabulated hereunder:

i. Date of Accident - 22/23.04.2014

ii. Name of Deceased - Smt. Pratibha Dwivedi

iii. Age of the deceased - 38 years

iv. Occupation of the Deceased - Assistant Teacher

v. Income of the deceased - 34,500.00

vi. Name, Age and Relationship of Claimants with the deceased:

Sr. No.	Name	Age	Relation
1.	Sunil Kumar Dwivedi	43	Husband
2.	Km. Janhvi Dwivedi	14	Daughter
3.	Vijyant Dwivedi	10	Son
4.	Smt. Munni Devi	60	Mother-in-law
5.	Ramsumer Dwivedi	65	Father-in-law

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1.	Monthly Income (A)	34,500/-
2.	Annual Income (B) (A x 12 = B)	4,14000/-
3.	Future Prospects (C)	50% of 4,14000/- = 2,07,000/-
4.	Annual Income + Future Prospects (B+C=D)	4,14000.00 + 2,07,000/- = 6, 21,000
5.	Deduction towards personal expenses (E) (¼ of D)	¼ of 6,21,000/- = 1,55,250/-
6.	Annual Loss of Dependency (F) (D-E = F)	6,21,000- 1,55,250/- = 4,65,750/-
7.	Multiplier (G)	15
8.	Total loss of dependancy (F x G)	4,65,750 x 15 = 69,86,250/-
9.	Conventional Heads: (a) Loss of consortium (b) Loss of Estate (c) Funeral Expenses	70,000/-
10.	Total compensation	70,56,250/-
11.	Interest	7%

VI. Conclusions & Directions:

35. The amount of compensation to which the deceased has been found entitled

shall be deposited by the Insurance Company within three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimants without delay. The amount already disbursed to the claimants (if any) shall be duly adjusted.

36. The amount deposited by appellant Rajesh, in FAFO No. 2507 of 2016, who is the owner of the vehicle before this court shall be refunded to him. The security deposited by the said appellant in the wake of the order passed by this Court shall be discharged.

37. These appeals are finally decided as above.

(2022) 12 ILRA 741
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE SURENDRA SINGH-I, J.

Jail Appeal No. 325 of 2018

Suresh @ Lakshmi ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri C.L. Chaudhary, Amicus

Counsel for the Opposite Party:
Sri Amit Sinha, A.G.A.

Criminal Law – Criminal Procedure Code, Section - 313 - Indian Penal Code, 1860 - Sections 201, 302 & 404 - Jail Appeal – challenging the order of Conviction – offence of murder - one eye witnesses - last seen has not been proved - convicted only on the basis of circumstantial evidences - which are not good enough - as per the law laid down by the Hon'ble Apex court the prosecution has utterly failed to established its case beyond all the reasonable doubts and the chain of events - appeal succeeds and is allowed. (Para –10, 11, 18, 20)

Appeal Allowed. (E-11)

List of Cases cited:

1. Sattatiya @ Satish Rajanna Kartalla Vs St. of Mah. (2008(3) SCC 210),

2. S. Govindraraju Vs St. of Karn. (2013 (15) SCC 315),

3. Devi Lal Vs St. of Raj. (Criminal Appeal No. 148/2010 decided on Dt. 08.01.2019),

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

5. Raja alias Rajinder Vs St. of Har. (2015(11) SCC 43),

6. Ram Niwas Vs St. of Har. (2022 Law Suit (SC) 942).

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This jail appeal arises out of impugned judgment and order dated 27.03.2017 passed by Additional Sessions Judge/Court No. 1, Pilibhit in Sessions Trial No. 341 of 2014 arising out of Crime No. 473 of 2014 convicting the accused appellant under Section 302 of I.P.C. and sentencing him to undergo imprisonment for life with a fine of Rs. 20,000/-, in default thereof, to further undergo six months additional imprisonment; under Section 201 of I.P.C. to undergo five years imprisonment with a fine of Rs. 5000/-, in default thereof, to undergo two months additional imprisonment, with a direction that all the sentences shall run concurrently.

2. As per prosecution case, on 15.06.2014, one unknown dead body was

found in a sugar-cane field and later, on the basis of clothes, the same was identified to be that of the deceased Ram Kishore. Further case of the prosecution is that on 13.06.2014, the deceased informed his family members that he would be returning on 13.06.2014. He further informed that he is in the company of the appellant. FIR was registered against the appellant under Sections 302 and 201 of IPC.

3. Inquest on the dead body of the deceased was conducted, vide Ex. Ka-7/3 on 15.06.2014 and the body was sent for postmortem, which was conducted vide Ex.Ka.-5 on 15.06.2014 by Dr. Rajesh Kumar (PW-4) and the cause of death was strangulation as a result of anti mortem injuries. The following injuries have been found on the body of the deceased:

"1. A ligature mark with ligature on all around neck horizontally in two round, Ligature 42 cm long 4 cm width,

Ligature tied on neck 4 cm below each side horizontally from right & left ear, 4 cm below from chin in 5 cm width.

2. Contusion on chest upto nipple of both sides starting from upper back of neck and shoulder."

4. After investigation charge-sheet, Ex.Ka.-20 was filed and the appellant was tried for the offences under Sections 302, 201 & 404 of IPC.

5. So as to hold the accused appellant guilty, prosecution has examined 9 prosecution witnesses. The statement of the accused appellant was recorded under Section 313 Cr.P.C. in which, he pleaded his innocence and false implication.

6. By the impugned judgment, the Trial Judge has convicted the appellant as mentioned in paragraph no. 1 of this judgement, however, has acquitted him under Section 404 of I.P.C. Hence, this appeal.

7. Learned counsel for the appellant submits:

(i) that there is no eye witness account of the incident and the appellant has been convicted solely on the basis of weak circumstantial evidence.

(ii) that even the dead body of the deceased has not been properly identified and the same has been identified only on the basis of his clothes.

(iii) that one bag and slipper of the deceased are alleged to have been seized at the instance of the appellant and even wife of the deceased, Ram Pyari (PW-3) has not supported the prosecution case, so far as it relates to the seizure.

(iv) that the appellant is in jail since 22.06.2014.

8. On the other hand, supporting the impugned judgment, it has been argued by the State counsel that conviction of the appellant is strictly in accordance with law and there is no infirmity in the same.

9. We have heard learned counsel for the parties and perused the record.

10. From the evidence as adduced by the prosecution, it is apparent that but for the so-called evidence of last seen, there is no other evidence against the appellant. Even the evidence of last seen has not been proved by the prosecution as required under the law.

11. Circumstantial evidence available on record is not good enough to hold the conviction of the accused-appellants. Law

in respect of **circumstantial evidence** is very clear.

12. In **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra**, the Supreme Court, while dealing with circumstantial evidence, observed as under:

"11. In *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as under:

"10. ..... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

12. In *Padala Veera Reddy v. State of AP* [(1989) Supp (2) SCC 706], this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

13. In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

13. In **S. Govindaraju v State of Karnataka**, the Apex Court, while dealing

with circumstantial evidence, observed as under:

"29. It is obligatory on the part of the accused while being examined under Section 313 of Cr PC to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence in order to decide whether or not the chain of circumstances is complete. When the attention of the accused is drawn to circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. (Vide: Munish Mabar v. State of Haryana, AIR 2013 SC 912).

31. The prosecution successfully proved its case and, therefore, provisions of Section 113 of the Evidence Act, 1872 come into play. The appellant/accused did not make any attempt, whatsoever, to rebut the said presumption contained therein. More so, Shanthi, deceased died in the house of the appellant. He did not disclose as where he had been at the time of incident. In such a fact situation, the provisions of Section 106 of the Evidence Act may also be made applicable as the appellant/accused had special knowledge regarding such facts, though he failed to furnish any explanation thus, the court could draw an adverse inference against him."

14. Recently, in **Devi Lal vs. State of Rajasthan** the Supreme Court, while dealing with circumstantial evidence, observed as under:

14. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra 1984 (4) SCC 116.* The relevant excerpts from para 153 of the decision is assuredly apposite:

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji *Sahabrao Bobade & Anr. Vs. State of Maharashtra [(1973) 2 SCC 793* where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human

probability the act must have been done by the accused."

15. It has further been considered by Apex Court in ***Sujit Biswas Vs. State of Assam 2013(12) SCC 406 and Raja alias Rajinder Vs. State of Haryana 2015(11) SCC 43*** that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused."

16. In the case of **Ram Niwas Vs. State of Haryana; 2022 Law Suit (SC) 942**, the Supreme Court has laid down the following principles/conditions with regard to the offence, which is said to be covered under circumstantial evidence.

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047].

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

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

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

17. Supreme Court has further held that:

"19. This Court has held that there has to be a chain of evidence so complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show

that in all human probability the act must have been done by the accused. It has been held that the circumstances should be of a conclusive nature and tendency. This Court has held that the circumstances should exclude every possible hypothesis except the one to be proved. It has been held that the accused "must be' and not merely "may be' guilty before a Court can convict.

20. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt."

18. Applying the above principles as laid down by the Supreme Court, we find that the prosecution has utterly failed to establish its case beyond all reasonable doubts and the chain of events, which can be said to exclusively lead to the one and only one conclusion i.e. the guilt of the accused, is not complete.

19. Taking the cumulative effect of the evidence, we are of the view that the Trial Court has erred in law in convicting the appellant. He is entitled to get the benefit of doubt.

20. Accordingly, the jail appeal succeeds and is allowed.

21. Appellant Suresh alias Laxmi is in jail, he be set free forthwith, if not required in any other case.

22. As Sri C.L. Chaudhary, learned Amicus has assisted the Court in this case, State Government is directed to pay a sum of Rs. 10,000/- to him towards his remuneration.

(2022) 12 ILRA 746
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2022

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE MAYANK KUMAR JAIN, J.

Criminal Appeal No. 1007 of 1984

Bhagwat & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri B.P. Singh, Sri Ashok Kumar Singh, Sri Bhagwat Prasad, Sri Chandrakesh Mishra, Sri Daya Shanker Mishra, Sri Narendra Deo Rai

Counsel for the Respondent:
A.G.A.

Criminal Law – Criminal Procedure Code, 1973 - Section – 313 - Indian Penal Code, 1860 - Sections 34 & 302: - Criminal Appeal – against order of Conviction & Sentence - Life imprisonment - Evaluation of Evidence - offence of murder - FIR - informant alleged that in the midnight when he along with his son sleeping in the Verandah adjacent to his *Baithak* accused persons along with 10-15 persons came suddenly attacked and killed his son with a bomb - court finds that, the testimony of the complainant creates serious doubt about prosecution version as to why the assailants remain inactive and did not turn back to him and on the other hand no any injuries was caused to others - evidence on record belies the theory of the prosecution and create reasonable doubt over the occurrence as St.d by the prosecution - no articles were seized or produced in the court - out of 10 to 15 assailants only the accused-appellant are identified by informant and no one else - Material contradictions in the evidence of the witnesses of the fact render the theory of the prosecution to be doubtful - identification of the

appellant is not established - evidence of witnesses of fact as a whole does not have any right of truth - held, trial court has not appreciated the evidence available on record in a rightful manner and hence wrongly convicted the appellant - hence, the appeal is accordingly allowed. (Para - 35, 37, 68, 70, 71, 72)

Appeal is Allowed. (E-11)

List of Cases cited:

1. Durbal Vs St. of U.P. (2011) 2 SCC 676

2. Krishnegowda Vs St. of Karn., (2017) 13 SCC 98

3. St. Vs Bhagwat & ors., Sessions Trial No. 72 of 1980

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. This criminal appeal has been preferred by the appellants against the judgment and order of sentence dated 30.03.1984 passed by Sri Khem Singh, the then 6th Additional Sessions Judge, Azamgarh in Sessions Trial No. 72 of 1980 (State Vs. Bhagwat and Ors.) arising out of Case Crime No. 910/79 under Sections 302/34 IPC, Police Station Kotwali District Azamgarh whereby appellants-accused Bhagwat, Sahab, Lalloo, and Kamta were convicted under Section 302 read with Section 34 of IPC and sentenced to undergo life imprisonment.

2. Facts giving rise to the prosecution case are that Phool Chand submitted a written report **(Ex- Ka 1)** to Inspector Kotwali, District Azamgarh on 28.10.1979, wherein it was stated that he along with his son Kunwar Bharat was sleeping in the Verandah adjacent to his *"Baithak'* on 27.10.1979. At around 12:00 midnight, 10 to 15 persons came suddenly from the western lane flashing their torches. He heard the sounds "*Yahi-Yahi*". He identified the accused Bhagwat, Sahab, Lallu, and Kamta among them. Apprehending danger, he ran towards his house. His son rushed towards his other house situated on the eastern side of his *Baithak*. Later, he also rushed toward the direction where his son had gone. He had a "*danda*' in his hand He shouted while approaching his son. He heard three sounds and later found that his son had died. His wife and sister-in-law ("*Bhabhi*') had already come out. When he reached, he found that his wife was crying and saying that Bhagwat had killed her son with a bomb. At that time, his *bhabhi* Chandradeiya, his wife Jagpatiya, and Hardev were present on the spot.

3. On the basis of the aforesaid written report **(Ex Ka - 1),** the first information report **(Ex Ka 3)** was registered with Police Station Kotwali, Azamgarh as Case Crime No. 910 of 1979 naming the appellants as accused persons. The investigation was entrusted to Sub Inspector Bal Karan Singh, who started the investigation and prepared the inquest report **(Ex C-1)** of the dead body of the deceased Kunwar Bharat and sent it for post-mortem along with relevant documents. He recorded the statements of the witnesses and prepared the site plan **(Ex. C-6)** and other documents. The accused-appellants were arrested during the investigation. After the conclusion of the investigation, a charge sheet came to be filed against appellants under Section 302 /34 of IPC.

4. Thereafter, the case was committed to the Court of Session where it was registered as Session Trial No. 72 of 1980. Charges under Section 302/34 IPC were framed against the accused-appellants. The accused-appellants pleaded not guilty and claimed to be tried.

5. To bring home the charges against the accused-appellants, the prosecution produced four witnesses of fact - PW-1 Hardev, PW-2 Phool Chand (the complainant), PW-3 Chandradeiya, PW-4 Jagpatiya (wife of the complainant), and three formal witnesses - PW-5 Dr. R.R. Rai, who conducted the post-mortem examination of deceased Kunwar Bharat, PW-6 Ram Achhaibar Dubey, HCP, and PW-7 S.I. Bal Karan Singh, the Investigating Officer.

6. After the close of prosecution evidence, statements of the appellants-accused were recorded under Section 313 of Cr.P.C., in which they denied the commission of the crime and their presence at the house of the complainant at the time of the incident. They have also denied committing the murder of Kunwar Bharat. They alleged that the Investigating Officer filed a false charge sheet against them. They had been implicated due to village enmity and hence the witnesses deposed against them.

7. Hearing both the parties and after vetting the evidence and facts and circumstances of the case, the trial court recorded conviction and passed the sentence against the appellants as aforesaid.

8. Being aggrieved by the impugned judgment and order of sentence the accused-appellants have preferred the present criminal appeal.

9. We have heard Sri Daya Shankar Mishra, learned Senior Advocate assisted by Sri Chandrakesh Mishra, learned counsel for the appellants and Sri M.P.S. Gaur, Sri Alok Kumar Tripathi and Sri Om Prakash, learned AGA for the State and perused the record. We have also reappreciated the evidence available on record.

10. On the basis of the evidence available on record, under the facts and circumstances of the case, it has to be determined as to whether on the intervening night of 27/28.10.1979 at around 12:30 am, the accused-appellants committed the murder of the son of the complainant Kunwar Bharat in furtherance of common intention.

11. Learned counsel for the appellants argued that the complainant Phool Chand is not the eyewitness of the occurrence and he had not seen any of the appellants committing the murder of his son. The witness Hardev, who is said to be present at the time of occurrence, has not supported the prosecution story during his deposition. There are material improvements in the evidence of the complainant and against the facts mentioned in the First information report. There are material contradictions and discrepancies in the oral evidence of PW-2 Phool Chand, PW-3 Chandradeiya and PW-4 Jagpatiya. The medical evidence also does not corroborate the prosecution story. The FIR is also silent about so many facts narrated by the witnesses in their evidence. It is alleged by the prosecution that the deceased was sleeping in the Verandah, but none of the appellants, as alleged, approached him or caused any damage to him. If there would have been an intention to commit the murder of Kunwar Bharat, some immediate injury would have been caused to him at that time. As per the prosecution story, at the time of throwing the bomb, other persons were also standing there but none of them had suffered any kind of injury. No motive has been assigned to the appellants to commit the murder of Kunwar Bharat. The manner of

assault as deposed by the witnesses of fact does not prove the prosecution story. The evidence of witnesses of fact is not reliable and it is full of material contradictions with each other.

12. To buttress his argument, learned counsel for the appellants argued that PW-3 Chandradeiya stated that she did not suffer any injury while she followed the appellants and at the time of occurrence she was standing close to Kunwar Bharat. No bloodstained clothes were handed over to the Investigating Officer even though she had stated that bloodstains occurred on her clothes during the incident. It is further submitted that PW-1, the complainant alleged that 10-15 persons came to the house flashing lights of the torches but he named only the appellants as accused and other persons were not named for the reason best known to the complainant. None of the appellants suffered any kind of injury while it is a case of the prosecution that the bomb was thrown upon the deceased from close proximity. No motive was available to the appellants to commit the murder of Kunwar Bharat since there was no enmity with him. The appellants have falsely been implicated. There was no source of light at the time of occurrence and it is not possible to identify the appellants, in the light of the torch by the witnesses. The torches were not taken into possession by the investigating officer during the investigation. The trial Court has not rightfully appreciated the evidence and has ignored important aspects of the case. The Investigating Officer has been examined as a Court witness which was beyond the jurisdiction of the trial Court. The prosecution has utterly failed to prove the charge against the appellants. The appellants are liable to be acquitted and the appeal deserves to be allowed.

13. Per contra, learned AGA argued that the first information report of the matter was promptly registered at 02.10 am while the incident took place at around 12:30 am. The appellants were identified by the witnesses in the light of the torches which they were having at the time of occurrence. The witnesses of fact have corroborated the prosecution version and if there are minor contradictions or discrepancies which do not adversely affect the case of the prosecution, they are to be ignored. The medical evidence is consistent with the prosecution story. Kunwar Bharat, a boy of 13 years of age was brutally murdered by the appellants by throwing a bomb at him. The presence of the appellants on the spot is proved by the witnesses of fact. The investigation of the case was fairly conducted by the Investigating Officer and based on evidence collected during the investigation, a charge sheet was filed against the appellants. The appellants have rightly been convicted and sentenced by the trial Court. The judgement of the trial Court was passed after appreciating the evidence available on record rightfully. The prosecution has succeeded to bring home the charge against the appellants. Thus, the appeal is liable to be dismissed.

14. PW-1 Hardev is the witness of the FIR and is said to be present at the place of occurrence. He stated in his evidence that on the day of the occurrence at around 12-12.30 am he was at his residence. Upon hearing the sound of a bomb explosion, he reached "Siwan". He reached the place of occurrence where a dead body was lying. No one was present there. A dead body was lying there which he could not recognize. Hours later he came to know that the body was of Kunwar Bharat, son of Phool Chand. He did not see anyone attacking

him with a bomb. He arrived at the place of occurrence after the incident.

15. PW-2 Phool Chand is the complainant and father of the deceased Kunwar Bharat. He stated in his evidence that his son Kunwar Bharat, aged 13 years, was murdered at around 12-12:30 midnight. He was sleeping in the Verandah of his *''Baithak'* along with his son Kunwar Bharat. On hearing the barking of a dog he woke up and also awakened his "*Bhabhi* Chandradeiya and asked her why the dog was barking. She came out and told him that some persons were approaching flashing the torchlight. 10 to 15 people came there. Out of them he identified Bhagwat, Sahab, Kamta and Lalloo. He hid inside the house and then climbed up on the roof of his house. His son ran towards his "Kachcha' house. Bhagwat chased his son, caught hold of him and took him through the lane to the eastern side. The complainant came down from the roof and went to his house but no one was there. Then he rushed to his "*Rahat*' on the eastern side. He heard the sound of 2-3 bomb explosions. Beerbal, Hardev, Chandradeiya and his wife Jagpatiya met him. He was informed by his wife and Chandradeiya that Bhagwat had killed his son by throwing a bomb over his head and then ran away. He went close to his son who was lying on road, south to "*Rahat*". Due to the explosion, his head was severed and he died. He identified the accused in the light of the torch which was in their hands. Before this incident, the accused Bhagwat wanted to carve out a water drain through his "*Chak*', which the complainant had resisted. For this, Bhagwat had filed a civil suit and hence, Bhagwat was inimical to him. Report of this occurrence was dictated by him to Udaybhan Singh and after hearing the same, putting his thumb impression he handed it over to the police station. He has proved the written report as Ex. Ka-1. He also stated that Bhagwat lodged a false report about the dacoity at his house naming the complainant. But after the investigation, the final report was submitted on that matter.

16. PW-3 Chandradeiya stated in her examination-in-chief that on the day of the occurrence she was sleeping in her house. Phool Chand and Kunwar Bharat were sleeping in the same house on a common cot. Phool Chand woke her up and asked her to check as to why the dogs were barking on the roof. She went to the lane in the Verandah and saw 10 to 15 persons carrying torches approaching. They were armed with "*Lathi*', "*Goli*' and "*Bhala*'. They came in front of their Verandah. She informed Phool Chand who then climbed up the roof of the house. Assailants flashed the torchlight on the cot of Phool Chand. Due to this, Kunwar Bharat rushed towards his mother's "Kuchcha' house. Assailants chased Kunwar Bharat. She also went after them crying. Kunwar Bharat knocked on the door of his mother. The moment his mother opened the door, Bhagwat, Sahab, Lalloo and Kamta caught hold of Kunwar Bharat and dragged him towards "*Rahat*'. She along with the mother of Kunwar Bharat ran after them. She saw that three bombs exploded at the door of the Bhagwat. Bhagwat attacked Kunwar Bharat with a bomb towards the south of "*Rahat*'. All the assailants ran away towards the western side. She identified the accused in the light of the torch. Kunwar Bharat died after sustaining injuries from the bomb.

17. PW-4 Jagpatiya stated in her examination-in-chief that on the day of the occurrence she was sleeping in her "*Kachcha*' house. Her son Kunwar Bharat

was sleeping with his father in the "*Pakka*' house. Chandradeiya was also sleeping there. At midnight Kunwar Bharat came to her crying and started banging on the door. As soon as she opened the door accused Sahab, Bhagwat, Lalloo and Kamta came there Bhagwat and Sahab caught hold of Kunwar Bharat, and Kamta and Lalloo pushed him towards "*Rahat*'. They were in all 10 to 15 people. Lalloo, Kamta and one unknown person were having torches. Chandradeiya also came there. She along with Chandradeiya went after Kunwar Bharat and Bhagwat. These people took Kunwar Bharat to the southern side of "*Rahat*' Bhagwat attacked Kunwar Bharat with a bomb. His head was severed and he died. She wept and cried. Phool Chand, Birbal and Hardev came in this order. All the assailants ran towards the western side. When these 10-15 people were taking away Kunwar Bharat, she heard three bomb explosions at the door of Bhagwat.

18. PW-5 Dr. R.R. Rai stated in his evidence that he conducted the post-mortem on the body of deceased Kunwar Bharat on 28.10.1979 at 3:15 pm. The age of the deceased was 13 years. The following injuries were found:-

Anti-mortem Injuries

1. Badly lacerated wound on head and face in the area of 20 cm x 17 cm, must of skull missing, most of skull badly fractured and most of bone pieces missing. Membrane of brain matter missing. Most of brain matter missing in to pieces. Both eye ball with eye brows and eye lids and nose and upper or lower lip with surrounding facial muscles with skin missing with facial bone with upper jaw missing. Lower jaw badly fractured into pieces. Tongue lacerated in whole, whole face except right ear badly lacerated parts missing. The lacerated wound of head and face looking in one.

2. Multiple abrasion in a area of 30 cm x 15 cm on front of both shoulder upper part and front sides of neck. Yellow powder seen in places.

This witness has proved the post-mortem report as **Ex Ka-2.**

19. PW-6 H.C. 105 Achhaivar Dubey stated in his evidence that on 28.10.1979 he was posted at Police Station Kotwali Azamgarh as head Moharir. On the basis of the written report **(Ex Ka-1)**, he prepared the first information report in his writing and signature. The first information report is proved as **Ex Ka-3**. Registration of the case was entered in Rapat at 2.20 am. The witness has proved the entry of G.D. as **Ex Ka-4.**

20. C.W.-1 S.I. Balkaran Singh is the Investigating Officer of this case. He stated in his examination-in-chief that in October 1979 he was posted as S.I. in Kotwali Azamgarh. The case was registered in his presence and the investigation was entrusted to him. He reached the place of occurrence on 28.10.1979 and the inquest proceedings were conducted. This witness has proved the inquest report as **Ex C-1**. Documents such as the photo of the dead body, *"Khaka Naash*" report to C.M.O., and other documents were proved by this witness as **Ex C-2** to **Ex-4**. The dead body of the deceased was sent for post-mortem. The evidence of the witnesses was recorded. He collected plain soil and blood-stained soil from the place of occurrence. He prepared the recovery memo which he proved as **Ex C-5**. During the investigation, he prepared the site plan of the place of occurrence which he proved as **Ex C-6**. After concluding the investigation, he

submitted the charge sheet against all the accused which is proved by him as **Ex C-7**.

21. Now we proceed to re appreciate the documentary and oral evidence produced before the trial court.

22. In the present appeal, the question which needs to be determined is whether, on the intervening night of 27/28.10.1979, the appellants committed the murder of Kunwar Bharat, by throwing a bomb at him.

23. It is to be noted that in a criminal trial, the burden of proof lies upon the prosecution to prove the charge beyond reasonable doubt.

24. As per the case of the prosecution, as described in the first information report, the complainant Phool Chand was sleeping along with his son Kunwar Bharat in the Verandah adjacent to his *"Baithak'*. From the western lane, 10-15 persons came flashing the torchlights and they were shouting "*Yahi-Yahi*". The complainant identified the appellants-accused Bhagwat, Sahab, Lalloo and Kamta. Out of fear, the complainant ran towards his "Kothari' while his son rushed towards the house of the complainant which was situated on the eastern side of the *"Baithak'*. The complainant raised the alarm and rushed towards the direction where his son had run away. He heard the sounds of three bomb explosions and found his son had died. When he reached the spot, his wife **(PW 4)** was crying saying that appellant Bhagwat attacked his son with a bomb. The Sister-in-law of the informant, Chandradeiya **(PW-3)** and Hardev **(PW 1)** were also present there.

25. PW-2 Phool Chand in his examination in chief has made material improvements vis-à-vis the first information report. In his examination-in-chief, he stated that he woke up around 12-12:30 midnight to the sound of the barking of a dog. He asked his sister-in-law (*bhabhi*), PW-3, why the dog was barking. She came out and informed him that some persons are approaching flashing the torchlight. 10-15 persons came there and amongst them, he identified the appellants because they flashed the torch light on his cot. Bhagwat caught hold of his son and took him away to the eastern side. The complainant came down from the roof of his house and reached "*Rahat*' where he heard 2-3 bomb explosions. His wife and *Bhabhi* told him that Bhagwat attacked the head of his son Kunwar Bharat and went away. He found his son dead.

26. The facts that the informant woke up to the sound of barking of the dog; he identified the appellants in the light of the torch; Bhagwat caught his son Kunwar Bharat; he heard the sound of 2-3 bomb explosions when he was rushing to his son; all amount to improvements in his evidence since these facts find no mention in the first information report **(Ex Ka 1).**

27. In his cross-examination the complainant stated that he was standing in the Verandah when Chandradeya came to him and he then ran to his house but he also stated that when 10-15 persons came there he was sleeping with Kunwar Bharat. These statements are self-contradictory.

28. He further stated that he confronted these 10-15 people, standing at a distance of 4-6 steps from him and at this time, Kunwar Bharat was sleeping nearby on the cot. These people were not carrying any bombs or guns, but they had "*lathi*', "*ballam*', "*gandasi*', "*bhala*'. The

complainant had also not mentioned these facts in his first information report. Moreover, later during the cross-examination, he stated that the assailants were not having "*Gandasa*' instead they had only "*lathi*' and "*ballam*'. He also stated that he did not see from the front whether the assailants were armed.

29. He stated that he had mentioned in his report that Bhagwat caught hold of his son after chasing him but this fact also does not find any place in the FIR.

30. PW-2 also stated in his cross-examination that he mentioned the barking of a dog in his report (Ex Ka-1). He also narrated that he asked his *Bhabhi* why the dog was barking but with regard to this fact also, the FIR is silent.

31. All of the above show that PW-2 has made material improvements during his statement and the entire deposition.

32. In his evidence, PW-2 stated that there was an earlier dispute between Bhagwat (one of the accused) and him concerning a drain of tubewell. Bhagwat wanted to carve out a drain through his "*Chak*' which the complainant had resisted. As a result, Bhagwat filed a civil suit against the complainant. The complainant had preferred an appeal against the judgement relating to this matter, before the High Court. The complainant believes and had assigned this dispute as the motive behind the commission of this crime by the appellant-accused. Further, in his cross-examination, he stated that one out of the said 10-15 people shouted "*yahi hai*" and that these words were about him. He did not know why the assialants had come to his house. He told the Investigating Officer that the accused came along with other people to kill him. His son Kunwar Bharat was killed by these assailants since there was a dispute related to a drain. This evidence goes to show that the assailants came to target the complainant and not his son Kunwar Bharat.

33. The complainant stated that he had to face ten persons whom he did not recognize. Out of 10 to 15 persons, nobody rushed to the complainant or said anything to him. He was not attacked by any of them and nobody entered the Verandah or the room. He passed through these 10-15 persons within the close proximity of 2-1 steps. Even then, no one out of them rushed towards him to attack him.

34. If this evidence of the complainant is relied upon, it would appear that the assailants did not come there to attack him. The complainant in his evidence stated that when he was rushing toward his "Kaccha" House from Pucca house, he was actually behind the assailants within a distance of 10-15 steps. Even at that time, these assailants did not turn back to attack him.

35. Based on this evidence, it is unbelievable that on one hand, the complainant submits that the assailants had come to injure or attack him but on the other hand no injury was caused to him even when the assailants had enough opportunity to do so in the close proximity with him. The testimony of the complainant creates serious doubt about prosecution version as to why the assailants remained inactive and did not attack the complainant when they had sufficient opportunity to kill him since according to the complainant assailants came to target him.

36. So far as the question of the killing of Kunwar Bharat by appellants is

concerned, PW2 stated that when his *bhabhi* Chandradeiya went from his house Kunwar Bharat was sleeping on the cot. The assailants did not make any effort to catch Kunwar Bharat and they did not even approach him. When Kunwar Bharat rushed from his "*Pakka*" house to "Kachha" house he passed through the same lane where the assailants were standing. PW-2 did not see assailants heading toward Kunwar Bharat or attacking him.

37. This evidence of the complainant belies the theory of the prosecution and creates reasonable doubt over the occurrence as stated by the prosecution.

38. PW-3 Chandradeiya stated that she heard the sound of three bomb explosions at the door of Bhagwat, the appellant. In her cross-examination, she said that when the informant came down from his roof she was with Kunwar Bharat at "*Rahat*'. Assailants did not make any effort to enter into the Verandah or "*Pakka*' house of the informant. None of them either tried to catch her or Kunwar Bharat. When the informant was sleeping, none of the assailants headed towards him or Kunwar Bharat for attacking them, instead these 10-15 persons were standing at their place.

39. On the basis of the aforesaid evidence it appears to be quite unnatural as to why the assailants did not react and catch this witness or Kunwar Bharat at that time. This shows that the accused had no intention to kill Kunwar Bharat. This witness has also stated about the unnatural conduct of the accused that when she was heading towards the "*Kachcha*' house, none of the assailants approached her. Kunwar Bharat stood for a while close to his cot. She stated that when the assailants flashed the light of the torch at Kunwar Bharat at that time the informant was on his roof. She saw Kunwar Bharat near the door of the "*Kachcha*' house and at that time assailants were at a distance of 2-3 hands from Kunwar Bharat and she was towards the eastern side at a distance of 2-4 hands. When she and the wife of the informant were crying none of the assailants attempted to attack them. The assailants did not make any effort to catch them from the"*Kachcha*' house to "*Rahat*'. When she reached the well she did not see Phool Chand.

40. PW-4 Jagpatiya, wife of the complainant and mother of the deceased, stated in her cross-examination that when she opened the door of her house, the assailants were 3-4 steps away from Kunwar Bharat and he was not surrounded. Neither she nor Chandradeiya was surrounded by the assailants. They were also not threatened by them even though they did not speak to them. None of the assailants tried to kill Kunwar Bharat at her house or on the way to "*Rahat*'. She along with Kunwar Bharat and the assailants stayed at "*Rahat*' for about ten minutes.

41. This evidence of PW-4- Jagpatiya also raises serious doubt about the commission of the crime by the accused persons as said earlier. The assailants did not kill Kunwar Bharat at the place where he was sleeping, or when he passed through the assailants while he was approaching the house of his mother. They also did not try to kill him at the house of his mother (PW-4). They did not make any effort to kill him on the way up to "*Rahat*' and they stood there for about ten minutes.

42. This conduct of the assailants clearly indicates that the assailants had no

intention to kill Kunwar Bharat. Moreover, the assailants did not make any endeavor to catch or attack the complainant, PW3 Chandradeiya or PW4 Jagpatiya.

43. The Hon'ble Apex Court in the case of **Durbal v. State of U.P., (2011) 2 SCC 676** observed that :-

"17. The whole prosecution case is that on account of the dispute over fishery rights, the accused bore a grudge against Kaldhari (PW 1) and even threatened him with dire consequences. Whether there was any dispute over the fishery rights itself is highly doubtful. The only person apart from PW 1 who speaks about the dispute is Magan (PW 4) who was examined by the police after more than two months of the occurrence. It is true, motive for committing the crime pales into insignificance in a case where the prosecution story rests upon the evidence of eyewitnesses. But, for the purposes of evaluating and appreciating the evidence, the sequence of events cannot be ignored.

18. Be that as it may, there was no enmity whatsoever between the deceased and the accused. When the suggested enmity, if at all, was between the accused and Kaldhari (PW 1), there does not appear to be any reason as to why the accused should attack the deceased and leave Kaldhari unscratched. Admittedly, there was not even an attempt by the accused to attack Kaldhari. This story somehow appears unbelievable and difficult to accept. At any rate, there is no evidence adduced by the prosecution in this regard."

44. In view of the observation made by the Hon'ble Apex Court in the case in hand also, on the basis of the prosecution evidence, it is clear that the complainant alleged that the appellants had enmity with him with regard to carving out some drain from his "*Chak*' which the complainant had resisted. Further the complainant had stated that the recital of the word "*yahi-yahi*" was in reference to him. Therefore, the appellant had no enmity with Kunwar Bharat, the deceased. There does not appear any reason as to why the accused-appellant would attack Kunwar Bharat and leave the complainant and other witnesses of fact unscratched. Pertinent to mention here that there was not even an attempt by the accused-appellant to attack the complainant Phool Chand. Therefore, the case of prosecution appears to be unbelievable and difficult to accept.

45. In her deposition, PW-3 Chandradeiya stated that when 3-4 bombs exploded at the door of the accused Bhagwat she was near the well along with Kunwar Bharat. All the assailants were 2-3 steps away from them. Both of them stood there for two minutes. She and Kunwar Bharat went towards the southern *''Rasta'* from the well and remained there for around one hour.

46. PW-3-Chandradeiya in her deposition stated that when accused Bhagwat threw a bomb upon Kunwar Bharat, she was standing at a distance of 3-4 hands from him. Kunwar Bharat was standing beside her. She did not sustain any injury. 10-15 persons were also standing at a distance of 3-4 hands from Kunwar Bharat.

47. It is highly improbable that when PW-3 was standing within close proximity of the deceased Kunwar Bharat and 10-15 persons were also standing within close proximity of Kunwar Bharat, none of them

sustained any injury while it is alleged that a powerful bomb was thrown on the face of the Kunwar Bharat.

48. PW-4 Jagpatiya also stated in her cross-examination that Kunwar Bharat was attacked from a distance of 3-4 steps. She did not sustain any injury and did not receive any bloodstains on her clothes.

49. The aforesaid evidence of PW-3 Chandradeiya and PW-4 Jagpatiya also creates serious doubt about the prosecution story. These two witnesses stated that both of them and the assailants were standing very close to Kunwar Bharat but neither these witnesses nor any of the assailants sustain any injury. PW-5 Dr. R.R. Rai has stated in his evidence that the intensity of the bomb was very severe. It is highly improbable that the persons standing in close proximity to Kunwar Bharat did not sustain any injury while it was a powerful bomb. This improbability creates serious suspicion about the prosecution version.

50. PW-4 Jagpatiya is an important witness in this case. She has alleged to have witnessed the incident. PW-4 in her examination in chief stated that when her son Kunwar Bharat came to her at midnight on the day of the occurrence and when she tried to open the door, the accused Sahab and Bhagwat caught hold of her son Kunwar Bharat and the accused Kamta and Lalloo pushed him and took him away. Assailants were 10-15 in number.

51. This fact has been narrated first time by this witness in the Court. and not mentioned in the first information report either by the informant or by any other witnesses such as PW-3 Chandradeiya. This witness has also stated in her examination in chief that when she was crying after the occurrence, her husband Phool Chand arrived at the spot and thereafter Beerbal and Hardev came there. This evidence proves that the informant is not the eyewitness of the incident. Further, this witness has also stated that she heard the sound of three bomb explosions at the door of accused Bhagwat when the assailants were dragging Kunwar Bharat.

52. PW-2 Phool Chand in the first information report mentioned that out of fear when the assailants came, he rushed towards "Kothari' but in his evidence, he stated that he hid inside the house and thereafter he climbed up the roof of the house. The complainant, PW1 Phool Chand, in his cross-examination stated that at the time of lodging the FIR, he went to the police station alone and nobody was accompanying him. However, CW-1 Bal Karan Singh, the Investigating Officer stated in his evidence that Ram Janam Singh and Harish Chandra R/O Devkhari came along with the complainant to the Police Station. These variations in the statements made by the informant amount to a material contradiction in the version of the complainant.

53. PW 3 Chandradeiya stated that the assailants chased Kunwar Bharat, but PW 2 Phool Chand did not mention this in his evidence while it is said that both the witness were present at the "Pukka' house when the assailants came.

54. PW-4-Jagpatiya first time had narrated in her statement to the Investigating Officer that Bhagwat was carrying a bag while PW-7 Balkaran Singh, Investigating Officer specifically denied that PW 4 stated that Bhagwat was carrying a bag. It is pertinent to mention here that none of the prosecution witnesses such as

PW-2 Phool Chand and PW-3-Chandradeiya and PW-4-Jagpatiya stated in their evidence that the assailants were carrying a bomb in their hands. Therefore, the evidence that Bhagwat was carrying a bag at the time of occurrence amounts to an improvement and embellishment in the evidence of the prosecution witness.

55. PW-3-Chandradeiya has also stated in her evidence that when she informed about the assailants he climbed on the roof of "Kothari'. PW-3 in her evidence stated that all four accused caught hold of Kunwar Bharat and took him away near the "*Rahat*'. This evidence is not corroborated with the evidence of PW-2 (informant) while PW-4 Jagpatiya as referred to above, stated that Bhagwat and Sahab caught Kunwar Bharat and Kamta and Lallu pushed Kunwar Bharat towards the "*Rahat*'. This is the material contradiction in the evidence of the fact. PW-3- Chandradeiya in her cross-examination stated that when the assailants flashed the light of the torch on the cot of Kunwar Bharat at that time informant was on the roof. This evidence is also not corroborated by the evidence of PW-2 Phool Chand.

56. There are material contradictions between the testimonies of PW-2-Phool Chand, PW-3-Chandradeiya and PW-4-Jagpatiya and these material contradictions adversely affect the prosecution story.

57. The Hon'ble Supreme Court in **Krishnegowda v. State of Karnataka, (2017) 13 SCC 98** observed that material contradiction in the testimony of prosecution witness creates serious doubt in the mind of the court about the truthfulness of the witnesses and hence it cannot be held that the prosecution has proved the guilt beyond reasonable doubt and the accused are entitled for benefit of doubt in such case. The Hon'ble Court held:-

"...26. Having gone through the evidence of the prosecution witnesses and the findings recorded by the High Court we feel that the High Court has failed to understand the fact that the guilt of the accused has to be proved beyond reasonable doubt and this is a classic case where at each and every stage of the trial, there were lapses on the part of the investigating agency and the evidence of the witnesses is not trustworthy which can never be a basis for conviction. The basic principle of criminal jurisprudence is that the accused is presumed to be innocent until his guilt is proved beyond reasonable doubt.

27. Generally in the criminal cases, discrepancies in the evidence of witness is bound to happen because there would be considerable gap between the date of incident and the time of deposing evidence before the court, but if these contradictions create such serious doubt in the mind of the court about the truthfulness of the witnesses and it appears to the court that there is clear improvement, then it is not safe to rely on such evidence.

The minor variations and contradictions in the evidence of the eyewitnesses will not tilt the benefit of doubt in favour of the accused but when the contradictions in the evidence of the prosecution witnesses proves to be fatal to the prosecution case then those contradictions go to the root of the matter and in such cases the accused gets the benefit of doubt."

58. In the instant case, the evidence of PW-2 the complainant, PW-3

Chandradeiya and PW-4 Jagpatiya have material contradictions with each other and they have made certain improvements in their evidence. Therefore, the evidence of these witnesses does not inspire confidence and hence is not trustworthy. Moreover, the eye witness PW-1 Hardev, named in the FIR has also not supported the prosecution version. In such case, the benefit of the doubt shall be extended to the accused-appellants.

59. PW-3 Chandradeiya in her statement stated that when she was approaching the "*Kachcha*' house from the "*Pakka*' house she did not raise any alarm to call her neighbours Rajendra, Mohan, Baldev and Chhedi. Phool Chand shouted for help from other people but nobody came forward. This fact also indicates that as per the prosecution witnesses when the assailants were taking Kunwar Bharat away with him they did not raise any alarm or they did not even try to obtain any assistance from the neighbours. This fact casts a shadow of doubt upon the prosecution story.

60. PW-3 also stated that when she hugged Kunwar Bharat after the incident, her clothes were stained with the blood of Kunwar Bharat and she continued to wear those bloodstained clothes but she did not give those clothes to the investigating officer.

61. PW-7 S.I. Totaram who conducted the investigation of this matter has denied that Phool Chand gave him the statement that the accused were carrying torch light in their hands. According to him, PW-2 did not give any kind of statement that he chased the assailants. PW-3 Chandradeiya did not give any statement that she along with the wife of the informant made any noise. They heard the sound of a bomb blast. The witnesses who said that a certain statement was given by them to Investigating Officer, have been denied by PW-7.

62. PW-1 Hardev is the witness of the first information report. It is stated by PW-2-Phool Chand and PW-4-Jagpatiya that Hardev came to the place of occurrence but this witness was examined as PW-1 and he denied the prosecution story in his cross-examination and also denied his presence at the time of occurrence. He stated that was at his house. He did not identify the dead body and hours later he came to know that the dead body is of Kunwar Bharat. He did not witness any of the accused attacking Kunwar Bharat. In his cross-examination made on behalf of the defence he stated that the bomb was fired at the residence of the accused and he went there. Many persons from the village were also approaching them. The assailants ran away after seeing the mob. When the mob was chasing the assailants it was (Mob) hrowing the bomb and accidentally Kunwar Bharat suffered fatal injuries.

63. So far as the availability of a source of light at the place of occurrence at the time of the incident is concerned, based on which, the informant and PW-3 Chandradeiya identified the appellants, PW-1 Phool Chand narrated in his first information report (Ex Ka-1) that he saw appellants when they flashed the torchlight. In his deposition before the court, he stated that appellants threw the light from the torch on his cot and so he identified them. In his cross-examination, he stated that all 10-15 persons were not having torches with them but only 2-3 out of them were having them. All the four accused had not covered their faces. The accused were moving their

torch and during this movement, the flashlight also fell on their faces. He told the Investigating Officer that the accused were moving their torches. He cannot say why this statement was not recorded by the Investigating Officer. He did not have any torch with him since it was dark during the night and thus he could not see where Kunwar Bharat was moving. The accused were not flashing their torches continuously.

64. PW-3 Chandradeiya stated in her examination-in-chief that the assailants were having torches in their hands but in her cross-examination, she stated that 10-15 people did not throw torchlight upon her. These people instead threw light on the cot on which Kunwar Bharat was sleeping. 2-3 assailants were lighting torches on the way from "Kuccha' House to the "*Rahat*'.

65. When we peruse the site plan (Ex C-6), we find that no source of light is mentioned or shown by the investigating officer from the "Pucca' house to "Kaccha' House of the complainant. CW-1 Sub Inspector Bal Karan Singh, the Investigating Officer has stated that the distance between the eastern house (shown as C) and the place where Kunwar Bharat was attaked with a bomb (shown as E) was 90 steps while the place where the accused took Kunwar Bharat with them (shown as D) was at a distance of about 80 steps. However, no source of light is shown at these places or anywhere in between them.

66. CW-1 Sub Inspector Bal Karan Singh had also denied that the complainant gave any statement that the assailants flashed their torches in such a manner that the light from these torches fell on the faces of the accused. Further, he said that the complainant did not give any statement that the assailants were lighting their torches in a circulatory manner. It is clear tha since the investigating officer denied that such a statement was given by the complainant to him, the identification of the accused/ appellant by the complainant and PW-3 Chandrdeiya is doubtful. Moreover, it is important to mention here that neither such torches were recovered during the investigation nor these torches were produced in the court during the trial.

67. No source of light other than the torchlights that the assailants were having had been asserted by the prosecution. This being the incident of midnight, the source of light has prime importance. The prosecution has failed to establish in which light the appellants were identified by the complainant and PW-3 Chandradeiya. The prosecution also failed to establish the source of light under which PW3 and PW-4 Jagpatiya witnessed Bhagwat attacking Kunwar Bharat with a bomb at the "*Rahat*'. This also creates a serious doubt that PW-3 and PW-4 were the eye-witnesses of the incident.

68. It is also to be noted that it is alleged that 10-15 assailants came to the house of the informant but out of them he identified only the accused appelant and no one else. Even during the investigation the identity of assailants other than the accused assailants was not revealed.

69. Given the above facts, we observe that there was not sufficient source of light during the entire sequence of events right from the house of the complainant where he was sleeping when the accused-appellant came to the place of occurrence where Kunwar Bharat was alleged to be killed by Bhagwat by throwing a bomb at his face. On account of this, the prosecution

has utterly failed to establish that the accused-appellants were identified by the informant and PW-3 Chandradeiya and also that PW-3 and PW-4 Jagapatiya are the eyewitnesses in the absence of a light source at the place of occurrence.

70. On the basis of the above discussion and appreciation of documentary and oral evidence available on record, we conclude that the prosecution has failed to bring home the charge u/s 302/34 IPC against the appellants. Material contradictions in the evidence of the witnesses of the fact render the theory of the prosecution to be doubtful. Accused appllants had no motive to kill Kunwar Bharat. The identification of the appellant is not established by cogent evidence. The witnesses have made material improvements and embellishments in their testimonies. The evidence of witnesses of fact PW-2 Phool Chand, PW-3 Chandradeiya, and PW-4 Jagpatiya on reading as a whole does not inspire confidence and does not have any ring of truth. Appreciation of oral evidence of witnesses of fact raises doubt about the commission of the crime by the appellants. The Learned Trial Court has not appreciated the evidence available on record in a rightful manner and hence wrongly convicted the appellants.

71. The appellants are entitled to the benefit of the doubt since the prosecution has failed to prove charges against the appellants beyond the reasonable doubt. Thus the appeal is liable to be allowed.

ORDER

72. The criminal appeal is accordingly allowed. The Judgement of conviction and order of sentence passed by the learned trial court is hereby set aside. Appellants are hereby acquitted from the charges.

73. The Appellants are on bail. They need not to surrender. Their personal bonds and surety bonds are cancelled.

74. Let the certified copy of this order be transmitted to the trial court for compliance.

75. The lower Court record be also transmitted to the court concerned.

(2022) 12 ILRA 760
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2022

BEFORE

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

Criminal Appeal No. 2895 of 2015

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

Counsel for the Appellant:
Sri S. Lal, Abhilasha Singh, Sri Ashutosh Yadav, Sri Sheshadri Trivedi

Counsel for the Respondent:
Govt. Advocate, Sri Dheeraj Singh Bohra

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313, - Indian Penal Code, 1860 - Sections 71, 302, 304-B, 304 part – I, 304 part – II & 498-A, - Dowry Prohibition Act, 1961- Sections 2, 3 & 4 - Indian Evidence Act, 1872 - Section 106 & 113(b) - Criminal Appeal – Conviction & Sentence - Life imprisonment in both U/s 304-B & 302 IPC with fine – Evaluation of Evidence - offence of dowry death - FIR - informant alleged that his daughter was married

with accused three year ago and her husband along with his family members killed his daughter due to non-fluffing their demand of additional dowry - Parameters and contours of the offence of 'Dowry Death' and 'Murder' - court finds that, trial court committed error - when trial court in holding the appellant guilty for offence of 'dowry death' than no required to enter in to the arena of offence of 'murder' - held offence of 'dowry death' is proved - consequently, conviction u/s 302 IPC is set-aside. (Para - 24, 26, 29)

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 - Sections 71, 302, 304-B, 304 part – I , 304 part – II & 498-A, - Dowry Prohibition Act, 1961 - Section - 2, 3 & 4 - Indian Evidence Act, 1872 - Sections 106 & 113(b) - Criminal Appeal – Conviction & Sentence - Life imprisonment in both U/s 304-B & 302 IPC with fine – Principle of natural justice - *maxim audi alterm partem* - object behind section 313 is to enable the accused to explain any circumstances appearing against him - it makes obligatory provision on the court to afford the opportunity to the accused for explaining the said incriminating circumstances - hence, examination of accused u/s 313 Cr.P.C. is of utmost importance and fair opportunity should be awarded to the accused. (Para - 28)

(C) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313, - Indian Penal Code, 1860 - Sections - 71, 302 , 304-B, 304 part - I, 304 part – II & 498-A, - Dowry Prohibition Act, 1961 - Sections 2, 3 & 4 - Indian Evidence Act, 1872 - Section - 106 & 113(b) - Criminal Appeal – Conviction & Sentence - Life imprisonment in both U/s 304-B & 302 IPC with fine – Quantum of Punishment - Punishment for offence dowry death does not provide the imposition of fine, it provides only imprisonment which shall not be less than 7 years but may extended to life imprisonment - trial court committed grave error by imposing the fine - Imposition of proper punishment & undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system - accused appellant is convicted for the offence punishable under section 304 - B of IPC - criminal appeal partly allowed - order accordingly. (Para - 31, 32, 34, 35, 36)

Appeal Partly allowed. (E-11)

List of Cases cited:

1. Dharmendra Rajbhar Vs St. of U.P., 2021 LawSuit (All) 27

2. R. Rachaiah Vs Home Secretary, Bangalore, 2016 2 Crimes (SC) 264

3. Jasvinder Saini Vs State (Govt. of NCT of Delhi), 2013 4 Crimes (SC) 346

4. Sanjay Kumar Jain Vs St. of Delhi, 2010 0 Supreme (SC) 1226

5. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

6. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

7. Jameel Vs St. of UP [(2010) 12 SCC 532]

8. Guru Basavraj Vs St. of Karn., [(2012) 8 SCC 734]

9. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323]

10. St. of Punj. Vs Bawa Singh, [(2015) 3 SCC 441]

11. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

(Delivered by Hon'ble Ajai Tyagi, J.)

1. The appeal has been preferred by the appellant-Manoj Sharma against the judgment and order dated 30.06.2015, passed by Additional Sessions Judge, Hapur in Session Trail No. 1534 of 2012 (State of UP vs. Manoj Sharma and others), arising out of Case Crime No. 157 of 2012, under Sections 498-A, 302, 304-B I.P.C. and Section 3/4 of D.P. Act, Police Station Hapur Dehat, District Hapur whereby the appellant is convicted and sentenced for the

offence under Sections 302 & 304-B I.P.C. for life imprisonment with a fine and in default of payment of fine.

2. Brief facts of the case giving rise to this appeal are that a written report was submitted by informant-Mohan Sharma at police station Hapur Dehat, District Hapur with the averments that marriage of his daughter Anshu Sharma was solemnized with the accused-Manoj Sharma on 01.03.2009 in Hapur. After the marriage, husband, father-in-law, mother-in-law, brother-in-law and sister-in-law of deceased Anshu Sharma have started the demand of additional dowry and they used to demand of one Alto car and Rs.2 lacs in cash as demand of additional dowry. The financial position of informant was not such as to meet out the aforesaid demand, therefore, all the aforesaid persons started cruelty and torturing to his daughter. On 20.03.2012 at about 02:46 PM, his daughter made a phone call to the informant and told that due to non fulfilment of demand of additional dowry, her husband and his family members beating her.

3. It is also averred in the written report that informant and his wife went to the matrimonial home of their daughter, where they saw that dead body of their daughter was lying in the courtyard of the house and there were injuries mark on her body. On the basis of the aforesaid written report, a case crime no.157 of 2012 was registered at police station Hapur Dehat under Sections 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act. Investigating Officer took up the investigation, he visited the spot and prepared the site plan. Inquest proceedings were started and inquest report was prepared. Dead body of the deceased was sent for post-mortem where the doctor conducted the post-mortem on her body and prepared the post-mortem report.

4. During the course of investigation, Investigating Officer has recorded the statement of witnesses under Section 161 Cr.P.C. After completion of investigation, a charge sheet was submitted against the accused persons namely, Rajkumar, Smt. Priyanka, Km. Pooja, Manoj Sharma, Ashok Kumar and Smt. Anita.

5. Learned trial court took the cognizance on charge sheet. The matter being exclusively triable by the court of sessions, which was committed to the court of sessions where learned Trial Judge framed the charges against the accused persons under Sections 498-A, 304-B, 302/34 of I.P.C. and Section 3/4 of Dowry Prohibition Act. During the couse of trial, accused-Ashok Kumar has passed away and rest of the accused perosns were put on trial. Accused-appellant denied the charges and claimed to be tried.

6. To bring home the charges, the prosecution examined following witnesses:

1.	Mohan Sharma	P.W.-1
2.	Manju Sharma	P.W.-2
3.	Pawan Kumar Yadav	P.W.-3
4.	Dr. Sanjay Kumar	P.W.-4
5.	Subhash Chandra	P.W.-5
6.	Mahendra Singh	P.W.-6
7.	Rajpal Singh	P.W.-7
8.	Ashok Kumar	P.W.-8

7. In support of oral evidence, prosecution submitted following documentary evidence, which was proved by leading oral evidence:-

1.	FIR	Ex.ka-4

2.	Written report	Ex.ka-1
3.	Post-mortem report	Ex.ka-3
4.	Panchayatnama	Ex.ka-7
5.	Charge sheet	Ex.ka-6 & 2
6.	Site plan with index	Ex.ka-8

8. After completion of prosecution evidence, the statement of accused was recorded under Section 313 of Criminal Procedure Code (Cr.P.C.) and after completion of prosecution evidence, in which they told that false evidence has been let against them and it was stated by accused-appellant that at the time of occurrence, he was not present in the house and had gone to attend his duty. After hearing the arguments of both the sides, learned trial court acquitted all the accused persons except accused-appellant Manoj Sharma. Accused-appellant, Manoj Sharma was convicted and sentenced under Section 304B, 302 I.P.C. and Section 4 of Dowry Prohibition Act.

9. Heard Mr. Sheshadri Trivedi, learned counsel for the appellant and learned counsel for the State. Record has been perused.

10. Learned counsel for the accused-appellant has submitted that appellant has been falsely implicated by the informant because there was no demand of additional dowry on the part of the appellant or any of his family members. Learned trial court has acquitted all other accused persons except the appellant, which itself proves that the entire prosecution story on which the prosecution case was based proved false.

11. It is also submitted by learned counsel for the appellant that as per the First Information Report, the deceased made a phone call to her father/informant by which she informed that she was being beaten by the accused persons and specific mobile number is mentioned in the F.I.R. but there is no call detail report is on record, which could prove the aforesaid fact. In fact, the deceased had committed suicide because she was under depression for not having any child. There is no eye witness of the occurrence.

12. It is next submitted that as per the prosecution story, the occurrence had taken place in the early hours of the morning but there is no evidence on record, which could fix the time of death. In fact, the appellant had gone to his duty at 09:00 AM and after that the suicide was committed by the deceased for the reason stated above, therefore, at the time of the said occurrence, the appellant was not present at the house. Learned trial court has convicted the appellant by shifting the burden of proof on him under Section 106 of Indian Evidence Act.

13. Since the accused-appellant was not present in the house at the time of occurrence, therefore, no burden of proof under Section 106 of Indian Evidence Act could be shifted on the shoulders to prove his innocence. Learned counsel for the accused-appellant has relied on the judgment of this Court in the case of ***Dharmendra Rajbhar Vs. State of U.P., 2021 LawSuit (All) 27*** and the judgments of Hon'ble Apex Court in the case of ***R. Rachaiah Vs. Home Secretary, Bangalore, 2016 2 Crimes(SC), 264, Jasvinder Saini Vs. State (Govt. of NCT of Delhi), 2013 4 Crimes(SC) 346 and Sanjay Kumar Jain Vs. State of Delhi, 2010 0 Supreme(SC) 1226.***

14. It is further submitted by learned counsel for the accused-appellant that in

this case charges have wrongly been framed by the learned trial court. It has framed the charges for the offence under Section 304-B & 302 I.P.C. separately while the charge under Section 302 I.P.C. should have been framed as alternative charge and at the time of awarding the punishment, learned trial court has awarded the punishment in both the offences.

15. Submission of learned counsel is that no person can be awarded sentence twice for one offence. Counsel for the accused-appellant has attracted the attention of this Court to the provision of Section 71 of I.P.C., which speaks as under :-

71. Limit of punishment of offence made up of several offences.-- *Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his of-fences, unless it be so expressly provided. 1[Where anything is an offence falling within two or more sepa-rate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.] Illustrations*

(a) A gives Z fifty strokes with a stick. Here A may have commit-ted the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intention-ally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

16. It is next submitted that there is no evidence on record with regard to the offence under Section 302 I.P.C. This is not proved on record that accused-appellant has committed the murder of the deceased and the learned trial court has convicted the accused-appellant for the offence under Section 302 I.P.C. on the basis of circumstantial evidence while the motive is not proved nor any circumstance is brought on record by which it could be assessed that offence is committed by the accused-appellant. For facing conviction on circumstantial evidence, the circumstances should be fully proved.

17. In this case, no chain of circumstances is complete in such a manner that could lead to the conclusion that accused-appellant was the only one who had committed the crime and none else. No question is put to the accused-appellant at the time of recording his statement under Section 313 Cr.P.C., therefore, the accused-appellant is highly prejudiced. The impugned judgment and order is bad in the eye of law and is liable to be set aside.

18. Per contra, learned A.G.A. has submitted that it is clearly stated in the F.I.R. that appellant along with his family members continuously demanded the Alto Car and Rs.2 lacs in cash as additional dowry. The death of the deceased had taken place in her matrimonial home and witnesses of fact i.e. P.W.-1 & P.W.-2 have supported the prosecution case. Moreover,

Dr. Sanjay Kumar, P.W.-4 has opined that cause of the death was asphyxia due to throttling, therefore, it is proved beyond doubt that the death of the deceased was not the result of suicide but she was murdered by the accused-appellant due to non fulfilment of demand of additional dowry.

19. It is further submitted by learned A.G.A. that all the witnesses of fact have supported the prosecution case and, therefore, there is no illegality or impropriety in the impugned judgment and order, which calls for any interference by this Court.

20. Prosecution has made foundation of this case as a case of dowry death. It is averred in F.I.R. that marriage of the deceased was solemnized with accused-appellant on 01.03.2009 and the death of the deceased was occurred on 20.03.2012, therefore, undisputedly, the death of the deceased had taken place within seven years of her marriage. Allegations of demand of additional dowry are made in F.I.R. and just before the death, the deceased made a phone call to her father stating the act of torturing by the accused-appellant and his family members. So, in this way, the prosecution has founded its case as a dowry death case.

21. Prosecution has produced two witnesses of fact i.e. P.W.-1 & P.W.-2, father and mother of the deceased respectively. Both the witnesses have supported the prosecution version and during their cross-examination, no such evidence has emerged which could help the appellant or which could shatter the prosecution case. The evidence of P.W.-4, Dr. Sanjay Kumar goes to show that there were ante mortem injuries in post-mortem report, which reads as under:-

(i) Abrasion 3 cm X 1 cm on the side of upper neck, 6 cm below and behind the chin.

(ii) Contusion 2 cm X 2 cm on the upper part of neck, 6 cm below and behind the chin on right side of neck.

(iii) Abrasion 1 cm X 1 cm on the back of the wrist.

22. The doctor has opined the cause of death was throttling and no contrary evidence to the aforesaid medical evidence is found on the record. Section 304-B I.P.C. defines dowry death, as under:-

[304B. Dowry death.--

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or har-assment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprison-ment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

23. Learned trial court has also taken into consideration the ingredients of the offence under Section 304-B I.P.C. and reached to the conclusion that death of the deceased had taken place within seven years of her marriage, which was the death, otherwise, than under normal circumstances. It is also proved that soon before her death, she was subjected to cruelty by accused-appellant in connection with demand of additional dowry.

24. Learned trial court has also considered that aforesaid ingredients are available and proved in this case. These ingredients have not been rebutted by the accused-appellant, therefore, we concur with the findings of learned trial court in holding the appellant guilty for the offence under Section 304-B I.P.C. but when the offence under Section 304-B I.P.C. has been proved by prosecution beyond reasonable doubt then the learned trial court was not required to enter the arena of the offence under Section 302 I.P.C.

25. After holding the appellant's guilty under Section 304-B I.P.C., the learned trial court went a step further for taking the recourse of the provision of Section 106 of Indian Evidence Act and the burden was to be on the shoulders of the accused-appellant to prove his innocence in the light of the fact that death of the deceased had taken place in her matrimonial home where she used to reside with her husband/appellant. Learned trial court convicted the accused-appellant under Section 302 I.P.C. also on the basis of circumstantial evidence, which was not required when he had already been convicted for the offence of "dowry death".

26. The parameters and contours of the offence of "dowry death" and "murder" are entirly different. The offence of dowry death is proved by first proving ingredients as mentioned in Section 304-B I.P.C. and raising the presumption under Section 113-B of Indian Evidence Act, while in case of murder, no presumption can be raised and prosecution is required to prove the offence under Section 302 I.P.C. beyond reasonable doubt but the learned trial court has mixed one offence with two separate punishments. If the offence with regard to murder is considered separately then also it is not proved because learned trial court has taken it as a case of circumstantial evidence. In a matter of circumstantial evidence, the chain of circumstances must be complet, in such a manner, that it could reach only to one conclusion that it is the accused who has committed the offence and no one else. Circumstances should be fully proved and must be conclusive in nature, which is not in our case.

27. We are in full agreement with the submission of learned counsel for the accused-appellant that no question with regard to offence of murder was put to the appellant in his statement recorded under Section 313 Cr.P.C. Section 313 Cr.P.C. reads as under:-

313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

28. The object behind Section 313 Cr.P.C. is to enable the accused to explain any circumstance appearing against him in the evidence and its object is based on *the maxim audi alterm partem,* which is one of the maxim principles of natural justice. It has always been recorded as interfered to rely upon any incriminating evidence without affording the opportunity to the accused for explaining the said incriminating circumstances. The provisions of Section 313 Cr.P.C., therefore, makes it obligatory on the Court to question the accused on the evidence and circumstance appearing against him so as to apprise him on the exact case, which he is required to meet. In a case of circumstantial evidence, the same is essential to decide whether or not, the chain of circumstances is complete. Therefore, the examination of accused under Section 313 Cr.P.C. is of utmost importance and fair opportunity should be awarded to the accused so that no prejudice is caused to him.

29. We are of the considered view that learned trial court has committed grave error in holding the accused-appellant guilty for both the offences under Section 304-B and 302 I.P.C. distinctly and simultaneously. Consequently, we deem it appropriate to set aside the conviction of the accused-appellant under Section 302 I.P.C. but in the facts and circumstances of this case, the offence under Section 304-B I.P.C. is proved against the accused-appellant beyond any reasonable doubt, therefore, we concur with the findings of learned trial court as far as the conviction of accused-appellant is concerned for the offence under Section 304-B I.P.C.

30. Now it comes to the part of sentencing. The impugned judgment and order goes to show that for the offence under Section 304-B I.P.C. also, the appellant has sentenced for life imprisonment and fine to the tune of Rs.1 lacs. Sub section 2 of Section 304-B I.P.C. provides the punishment for the offence of dowry death, which states as under:-

304-B (2) *Whoever commits dowry death shall be punished with imprison-ment for a term which shall not be less than seven years but which may extend to imprisonment for life.]*

31. The punishment for the offence of dowry death does not provide the imposition of fine, it provides only imprisonment which shall not be less than seven years but which may extend to life imprisonment. Learned trial court has committed grave error by imposing the fine. Life imprisonment is awarded for the offence under Section 304-B I.P.C. Principles of proper sentencing should be kept in mind by the court while awarding the punishment.

32. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the

court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

33. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

34. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

35. As per the jail report of the accused-appellant, his incarceration period is more than 12 years as of now with remission and actual undergone period is more than 10 years, therefore, we feel that in the light of the facts and circumstances of this case, the punishment of life imprisonment for the offence under Section 304-B I.P.C. is too severe and harsh.

36. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity

of offence. Hon'ble *Apex Court*, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

37. Learned AGA also admitted the fact that appellant is languishing in jail for the last more than 12 years. Since, the appellant has already served 12 years in jail, ends of justice will be met if sentence is reduced to the period already undergone.

38. Hence, the sentence awarded to the accused-appellant by the learned trial-court is modified as period already undergone and the fine awarded for Rs.1 lacs is set aside. Conviction and sentence for the offence under Section 302 I.P.C. is hereby set aside.

39. Accordingly, the appeal is partly **allowed** with the modification of the sentence, as above. The accused-appellant shall be released forthwith, if not wanted in any other case.

40. Let a copy of this judgment along with the trial court record be sent to the court below and jail authorities concerned for compliance.

(2022) 12 ILRA 769
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.12.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 5669 of 2018
With
Criminal Appeal No. 6271 of 2018

Nasir @ Guddu ...Appellant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Shamsuddin Ahmad, Sri Brijesh Kumar Pandey, Sri Saghir Ahmad, Sr. Advocate

Counsel for the Opposite Party:
G.A.

(A) Criminal Law – Criminal Procedure Code, 1973 – Sections 161, 313 & 437(A) - Indian Penal Code, 1860 - Section – 34, 120-B, 302, 307 & 452 - India Evidence Act, 1872 - Section - 134 - Criminal Appeals – challenging the order of Conviction & Sentence - Life imprisonment in U/s 302/34, 10 years of RI U/s 307/24 & 2 years of RI U/s 452/34 of IPC with fines – Evaluation of Evidence - offence of Murder - FIR - informant alleged that accused appellants come in green t-shirt and with intension to kill fired upon him by country-made due to which he sustained gunshot injuries resulted companion of informant was died during treatment - in the St.ment U/s 313 accused appellants denied their involvement - accused appellant Ravindra has made it clear that the informant due to harbour resentment a false accusation has been made against him - it is note that PW-1 & PW2 has turned hostile and did not support the prosecution case in their testimonies - In FIR alleged that murder has been committed with a country made pistol but, from investigation & Post mortem report it reflect that a rifle was used - court finds that, there are contradiction with regards to fire arm used as well as direction gunshot - which creates doubt in the prosecution story - further conduct & testimony of PW-8 (wife of deceased) also create grave doubt in prosecution story against Ravindra beyond doubtful - resulting, impinged orders of conviction & sentence is liable to be quashed for appellant Ravindra - direction issued for releasing him accordingly. (Para – 16, 17, 18, 19)

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 313 & 437(A) - Indian Penal Code, 1860 - Sections 34, 302, 307 & 452 - India Evidence Act, 1872

- Section 134 - Criminal Appeals – challenging the order of Conviction & Sentence - Life imprisonment in U/s 302/34, 10 years of RI U/s 307/24 & 2 years of RI U/s 452/34 of IPC with fines – Appreciation of Evidence of witnesses - offence of Murder - FIR - informant alleged that accused appellants come in green t-shirt and with intension to kill fired upon him by country-made due to which he sustained gunshot injuries resulted companion of informant was died during treatment - PW-8 is solitary eye witness who is examination-in-chief as well as in her cross examination fully support the prosecution case against Nasir @ Guddu and her St.ment fully corroborates with the autopsy report and site plan as well as with other documentary evidence available on record - it is settled law that court can and may act on the testimony of a single witness provided he/she is reliable - further, it is also a settled law that it is the quality that matters and not the quantity of witness - moreover PW-8 clearly assigned the role of firing only upon the accused-appellant Nasir @ Guddu - Court finds that, finding of court below with regards to the accused -appellant Nasir @ Guddu is correct and the guilt of Nasir @ Guddu has been proved beyond reasonable doubt by the prosecution - consequently, Appeal filed by Nasir @ Guddu is accordingly dismissed. (Para – 42, 43, 44, 47, 50)

List of Cases cited:

1. Pandurang Vs St. of Hyderabad, AIR 1955 SC 216

2. Suresh & anr. Vs St. of U.P.h, (2001) 3 SCC 673

3. Balbir Singh Vs St. of M.P., (2019) 15 SCC 599

4. Vadivelu Thevar& anr. Vs St. of Madras, AIR 1957 SC 614

5. Prithipal Singh & ors.Vs St. of Punj.& anr., (2012) 1 SCC 10

6. Gulam Sarbar Vs St. of Bihar (Now Jharkhand), (2014) 3 SCC 401

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. These two appeals have been preferred against a common judgment and order dated 18th September, 2018 passed by the Additional District & Sessions Judge, Court No.2, Ghaziabad in Sessions Trial No. 787 of 2007 (State Vs. Ravindra & Nasir @ Guddu), arising out of Case Crime No. 514 of 2006, under Sections 452/34, 307/34, 302/34 and 120-B/34 I.P.C., Police Station-Vijaynagar, District-Ghaziabad, whereby both the appellants have been convicted and sentenced to two years rigorous imprisonment each under Section 452/34 I.P.C. with a fine of Rs. 1,000/- each and in default thereof, they have to further undergo one month additional imprisonment; ten years rigours imprisonment each under Section 307/34 I.P.C. with fine of Rs. 10,000/- each and in default thereof, they have to further undergo six months additional imprisonment each; and life imprisonment under Section 302/34 IPC, with fine of Rs. 10,000/- each and in default thereof, they have to further undergo six months additional imprisonment. Both the appeals are thus being decided by means of this common judgment and order.

2. We have heard Mr. Saghir Ahmad, learned Senior Counsel assisted by Mr. B.K. Pandey, learned counsel for the accused appellant Nasir @ Guddu and Mr. Vijay Kumar Srivatava, learned counsel for the accused appellant- Ravindra and Mr. Arunendray Singh, learned A.G.A.. for the State and also perused the entire materials available on record.

3. The prosecution story is that on the basis of written report of the informant-P.W.-1 Sanjay dated 27th August, 2006

(Exhibit-Ka/1) scribed by Balveer Singh, a first information report (Exhibit-Ka/7) has been lodged on 27th August, 2006 at 2330 hrs. against the accused-appellant Ravindra and one unknown person alleging therein that Guddu used to live in the house of informant Sanjay on rent. On August 27, 2006, at around 10:00 p.m. (night), while the informant/P.W.1 was having his dinner in Guddu's room along with Guddu and his wife, Ravindra and one other person wearing a green shirt, came and Ravindra called Guddu and the informant to come out on which they came out. Ravindra said that he after dropping his companion, would come again within two minutes. After dropping his companion, Ravindra came again and called Guddu to come out from his room. The first informant however called Guddu to come back in the room. The companion of Ravindra immediately came on the door of the room of Guddu and with a intention to kill Guddu, fired upon him by country-made pistol (Tamancha), which was in his hand, due to which Guddu sustained three gun shots. When the informant tried to save Guddu, that unknown person i.e. companion of Ravindra with intention to kill fired upon him due to which he also sustained gun shot injuries. The people of locality had taken Guddu to MMG hospital while the first informant/P.W.-1 got himself treated at Sanjeevani hospital and then came to lodge the report.

4. After lodging of the first information report, the Investigating Officer/P.W.-12 inspected the spot and prepared the site plan (Exhibit-ka/5). He also collected the blood stained clothes and pillow cover and prepared the recovery memo of the same. He also took blood stained piece of floor (marble). He also took an empty cartridge. The Investigating Officer has also recorded the statement of the informants, scriber of the written report and other witnesses. The injured Guddu, who was admitted in G.T.B. Hospital Shahdara, Delhi on 27th August, 2006 was declared dead by the Doctor vide death report dated 28th August, 2006 (Exhibit-Ka/10). The dead body of the deceased was sealed and sent for post-mortem under the supervision of Assistant Sub-Inspector Hukum Singh/P.W.-7 after doing inquest of the body of the deceased at G.T.B. Hospital.

5. The autopsy of the deceased was conducted on the same day i.e. 28th August, 2006 at 03.00 p.m. by Dr. Barkha Gupta (P.W.-5). In the opinion of P.W.-5, the cause of death of deceased was haemorrhage shock due to Ante-mortem injury of internal abdominal organs. P.W.-5 has further opined that the injuries were antemortem and caused by projectile of a rifled firearm ammunition and injury no. 1 is sufficient to cause death in ordinary course of nature. The P.W.-5 has found following external ante-mortem injuries on the body of the deceased, which are as under:

"1. Firearm entry wound 0.5 cm x 0.5 cm surrounded abrasion collar 0.1 cm in thickness all around except on upper part where it is 0.2 cm, situated on midline at epigastria region 19.0 cm below external notch and 21.0 cm above umbilicus. On exploration track of the wound is going backward and downward and to the left entering into abdominal cavity after piercing the peritoneum going through and through from left lobe of liver than going through and through from stomach and injuring the intestine in the path of track than entering into the muscles of the anterior wall of abdomen and coming out

by making an exit wound 0.5 cm x 0.5 cm with everted margins and fat protruding out situated 23.0 cm to left from midline and 3.0 cm above left anterior superior iliac spine. 1500 ml of liquid and clotted blood present in abdominal cavity.

2. Firearm entry wound 0.5 cm x 0.5 cm situated on the right shoulder top with inverted margins. 9.0 cm inside the shoulder tip and 7.0 cm outer to the right from the root of the neck. On exploration the track of the wound going medially downward in the soft tissues of the back of the chest and bullet was found lodged between vertebrae T2 and T3. Lead bullet 1.3cm in length and 0.8 cm in diameter."

6. Medico Legal Case Report (Exhibit-Ka/15) qua the death report/certificate of the deceased has also been given by Dr. Anil Yadav (P.W.-11) on 28th August, 2006 and he has opined as follows:

"1. Penetration injury below the costal angle (0.5 cm in diameter) and at the left iliac fossa (0.5cm in diameter)

Imp- Gunshot injury could not be ruled out."

7. The informant/P.W.1 has also been medically examined externally by Dr. Anil Prakash (P.W.-9) at District (M.M.G.) Hospital, Ghaziabad and he has found following injuries on the body of the informant:

"1. Linear abrasion 8cm x 1cm due to GSW (Gun Shot Wound) on right side of chest 4.5 cm below right nipple at 7 o'clock position. Red colored medicine is present on this abrasion. Slight blackening in area of 9 cm x 1.5 cm around this wound.

2. Wound of entry of GSW (Gun Shot Wound) on front and inner aspect of upper part of left knee, its size 1 cm x 1 cm x 1.5 cm. Adv. X-ray

3. Abrasion 1cm x 1 cm on outer aspect of middle of left knee, 3cm below and outer to injury no. 2."

P.W.-9 has opined that Injury no. 1 and 3 found on the body of informant/P.W.-1 are in simple nature. Injury no. 2 is KUO (Kept Under Observation). Injury no. 1 and 2 are caused by firearm injury. Injury no. 3 is caused by hard blunt object."

8. The X-ray of left knee joint of the informant/P.W.1 has been conducted by Dr. Rajndra Prasad (P.W.-10) and as per the X-ray report, he has opined that a radio opaque of metallic density is found in the left knee joint of the informant.

9. The investigation proceeded and after completion of statutory investigation in terms of Chapter XII Cr.P.C., the Investigating Officer submitted the charge-sheet (Exhibit-Ka/6) dated 8th November, 2006 against the accused-appellants. The Magistrate concerned took cognizance of the offence on the charge-sheet and as the case was triable by the court of sessions, committed the case to the court of Sessions resultantly, the same was registered as Sessions Trial No. 787 of 2007 (State Vs. Ravindra & Nasir @ Guddu), arising out of Case Crime No. 514 of 2006, under Sections 452/34, 307/34, 302/34 and 120-B/34 I.P.C., Police Station-Vijaynagar, District-Ghaziabad.

10. On 27th August, 2007, the learned Trial Court framed following charges against the accused-appellants for the offence under Sections 452/34, 307/34, 302/34 and 120-B/34 I.P.C.:

'मैं, दीपक कुमार श्रीवास्तव, अपर सत्र न्यायाधीश, कोर्ट सं० 8, गाजियाबाद आप रविन्द्र,

नासिर उर्फ गुड्डू व हबीब उर्फ भोला को निम्न आरोप से आरोपित करता हूः-

प्रथम- यह कि दि०27.8.06 को समय करीब रात्रि के 10 बजे के बाद स्थान मौ० माता कालौनी में परिवादी के मकान स्थित थाना विजय नगर गाजियाबाद में आपने एक राय होकर गुड्डू के ऊपर जान से मारने की नीयत से तमंचे से फायर कर गंभीर रूप से घायल कर दिया जिससे उसकी मृत्यु हो गयी। इस प्रकार आपने धारा 302/34 भा०द०सं० के अंतर्गत दण्डनीय अपराध कारित किया जो कि इस न्यायालय के प्रसंज्ञान में है।

दिवतीय- यह कि उक्त दिनांक, समय व स्थान पर आपने जब मृतक गुड्डू पर जान से मारने की नीयत से फायर किये तब परिवादी गुड्डू को बचाने के लिये उठा तो आपने परिवादी पर जान से मारने की नियत से उस पर फायर किये और यदि इन फायर के परिणामस्वरूप उसकी मृत्यु हो जाती तो आप परिवादी संजय की हत्या के दोषी होते और इस प्रकार आपने धारा 307/34 भा०द०सं० के अंतर्गत दंडनीय अपराध कारित किया जो कि इस न्यायालय के प्रसंज्ञान में है।

तृतीय- यह कि उक्त दिनांक, स्थान व समय पर आपने गुड्डू को जान से मारने की नियत से परिवादी के घर में अनाधिकृत प्रवेश कर गृह अतिचार किया और इस प्रकार आपने धारा 452/34 भा०द०सं० के अंतर्गत दंडनीय अपराध कारित किया जो कि इस न्यायालय के प्रसंज्ञान में है।

चतुर्थ- यह कि आपका मृतक गुड्डू से रूपयों के लेन देन पर विवाद था और मृतक गुड्डू उधार के रूपये नहीं लौटा रहा था इसी वजह से आपने दि० 27.8.06 को रात्रि 10 बजे से पूर्व किसी समय गुड्डू की हत्या करने का षडयंत्र रचा और षडयंत्र के अनुपालन में आपने उसकी हत्या कर दी और इस प्रकार आपने धारा 120बी/34 भा०द०सं० के अंतर्गत दंडनीय अपराध कारित किया जो कि इस न्यायालय के प्रसंज्ञान में है।

एततदवारा निर्देश दिया जाता है कि उक्त आरोप का विचारण इस न्यायालय दवारा किया जाये।"

11. In order to prove its case, the prosecution relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:-

"i). Written report dated 27th August, 2006 submitted by the informant-P. W.1, which has been scribed by one Balvir Singh, which has been marked as Exhibit-Ka/1;

ii). The first information report dated 27th August, 2006 has been marked as Exhibit- Ka/7;

iii). Recovery memo of blood stained clothes and pillow cover dated 28th August, 2006 has been marked as Exhibit-ka/2;

iv). Recovery memo of blood stained and plain marble of floor dated 28th August, 2006 has been marked as Exhibit-ka/3;

v). Recovery memo of empty cartridge dated 28th August, 2006 has been marked as Exhibit-ka/4;

vi). Injury report and X-ray report of the informant/P.W.-1 dated 28th August, 2006 and 4th September, 2006 respectively have been marked as Exhibit-Ka/14;

vii). Death report of the deceased given by the Doctor of G.T.B. Hospital dated 28th August, 2006 has been marked as Exhibit-ka/10;

viii). The post-mortem/autopsy report of the deceased dated 28th August, 2006 has been marked as Exhibit-Ka-9;

ix). Site plan with index prepared by the Investigation Officer dated 28th August, 2006 has been marked as Exhibit-ka/5;

x). Medical paper regarding death of the deceased issued by P.W.-11 dated 28th August, 2006 has been marked as Exhibit-ka/16;

xi). Medico Legal Case Report of the informant/P.W.1 has been marked as Exhibit-ka/15; and

xii). Charge-sheet dated 8th November, 2006 has been marked as Exhibit- Ka/6."

12. The prosecution also examined total nine witnesses in the following manner:-

"i). P.W.-1/Informant, namely, Sanjay, who is said to be an injured eye witness;

ii). P.W.-2, namely, Chhota brother of the deceased ;

iii) P.W.-3, namely, Sub-Inspector Lokendra Pal Singh, who has recorded the statements of the witnesses under Section 161 Cr.P.C.;

iv) P.W.-4, namely, Constable-506 Kiran Pal Singh, who has prepared the chik first information report and has also proved the same before the Court below;

v). P.W.-5, namely, Dr. Barkha Gupta, who has conducted the autopsy of the deceased and prepared the post-mortem report;

vi). P.W.-6, namely, Rinku Bhati, who knew the accused-appellant Ravindra Jatav;

vii). P.W.-7, namely, Assistant Sub-Inspector Hukum Singh, who has done the inquest of the body of the deceased and made a request to the Hospital for post-mortem of the deceased;

viii). P.W.-8, namely, Smt. Babita, wife of the deceased Guddu, who is said to be an eye-witness;

ix). P.W.-9, namely, Dr. Anil Prakash who has medically examined the injuries of the injured Sanjay i.e. informant/P.W.-1;

x). P.W.-10, namely, Dr. Rajendra Prasad, who has done the X-ray of left knee of the injured/informant/P.W.1;

xi) P.W.-11, namely, Dr. Anil Yadav, who has given the Medico Legal Case report about the death of the deceased; and

xii) P.W.-12,namely, Sub-Inspector Hargovind Singh, who has conducted the investigation of the case;

13. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellants for confronting with the same under Section 313 Cr.PC. In their statements recorded U/s 313 Cr.P.C. the accused appellants denied their involvement in the commissioning of the offence 452/34, 307/34, 302/34 and 120-B/34 I.P.C. The accused-appellant Ravindra has made it clear that the informant/P.W.-1 Sanjay used to park his auto in front of his house, which caused his father to repeatedly ask the informant to move the auto and he also file a complaint with the police at the Vijay Nagar police station. The informant/P.W.-1 used to harbour resentment due to the aforementioned complaint, and as a result, a false accusation has been made against him on the basis of suspicion. Ravindra, the accused-appellant, also claimed that he had been wrongfully accused of being involved in the incident. The deceased had a criminal mindset himself. The defence side has only produced one witness, D.W.-1 Akhand Singh, to prove the alibi of accused Ravindra.

14. The accused-appellant Naasir @ Guddu under Section 313 Cr.P.C. has stated that Guddu and his wife were criminals and they suspected that he is an informer of them and because of the said reason, they harbored a grudge against him and a complaint has also been made in that regard. He has further stated that he has been falsely implicated in the case. The deceased himself was a criminal.

15. The trial court after relying upon the evidence adduced by the prosecution

and recording its finding that there is no significant contradiction between the statements of the witness and the medical evidence, nor is there any inconsistency in the statements of the witness, has come to the conclusion that the prosecution has been able to prove beyond reasonable doubt that the accused Ravindra and Nasir alias Guddu entered into the room of the deceased on 27.08.06 at about 10.00 p.m. with the common intention, in which the deceased was tenant. It has also been recorded that with the intention of killing the informant Sanjay and the deceased Guddu, accused-appellants fired and injured them, as a result Guddu died. Therefore, the accused Ravindra and Nasir alias Guddu are liable to be convicted under the charges of Section 452/34, 307/34, 302/34 IPC. The trial court has further recorded that so far as the question of allegation under Section 120B I.P.C. is concerned, the prosecution has failed to prove the same beyond reasonable doubt. Therefore, the accused Ravindra and Nasir alias Guddu deserve to be acquitted of the offence u/s 120B I.P.C. It is against this judgment and order of conviction passed by the trial court that the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellant is too severe.

16. Assailing the impugned judgment and order of conviction Mr. Saghir Ahmad, learned Senior Counsel assisted by Mr. B.K. Pandey, learned counsel for the accused appellant Nasir @ Guddu and Mr. Vijay Kumar Srivatava, learned counsel for the accused appellant- Ravindra submits that the first informant/P.W.-1 Sanjay has not recognized the assailants/the accused appellants. P.W.1 has turned hostile and did not support the prosecution case. Further submission is that PW-2 Chhota is the brother of the deceased but he has also not supported the prosecution case and has turned hostile. He said that he did not know about the murder of his brother deceased-Guddu. Next submission is that the murder has been committed by a rifle, as is evident from the post-mortem report, which has been marked as Exhibit ka-9, but as per the first information report, the deceased Guddu was killed by a country-made pistol (Tamancha). From the aforesaid, it is clear that there is a contradiction with regard to fire arm used in the murder of the deceased, which makes the prosecution case doubtful.

17. Learned counsel for the accused-appellants has also asserted that the deceased sustained a gunshot wound on his right side of the body. If the case of the prosecution is accepted that the accused fired on the deceased from the front side, then he would have sustained a gunshot wound on his front side rather than on his right side, which also creates doubt in the prosecution story.

18. It is further argued that as per the prosecution version, when the incident took place, wife of the deceased i.e. P.W.-8 was present at the place of occurrence, when as a matter of fact, when her husband i.e. injured (since deceased) sustained gun shots, she went to call his brother-in-law, namely, Chhota (brother of the deceased). The said conduct of P.W.-8 seems to be unnatural as if a husband due to gun shot injuries, is on the verge of his death, his wife's major concern will be to save the life of her husband by taking him to the nearby hospital with the help of nearby available people rather than leaving him and proceeding to call her brother-in-law, who was residing at a distance of one kilometer

away from the place of occurrence. Such acts of P.W.-8 creates grave doubt regarding the prosecution story.

19. Learned counsel for the appellant has next contended that it has come on evidence that when the incident occurred, there was no source of light at the place of occurrence, therefore, it is not ascertained as to how the assailants have been identified by the prosecution witnesses in the absence of light. Since the prosecution case is completely silent on this aspect and is not supported by any evidence, the accused-appellants are not guilty of the offence under Section 452/34, 307/34, 302/34 I.P.C beyond reasonable doubt.

On the cumulative strength of the aforesaid submissions, learned counsel for the appellants submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

20. On the other hand, Sri Arunendra Singh, learned A.G.A. for the State while supporting the prosecution version submits that although P.W.-1, P.W.-2, P.W.-6 have turned hostile but they admitted that incident occurred in which the deceased died due to gun shot injuries. They have also proved the Exhibit Ka-2, Exhibit Ka-3 and Exhibit Ka-4 and PW-8/wife of the deceased Smt. Babita has fully supported the prosecution version and she is an eyewitness of the entire incident and has clearly disclosed about the commissioning the offence of murder, therefore, the trial court has not committed any error in convicting and sentencing the accused appellants to undergo life imprisonment with fine.

On the basis of the aforesaid submissions learned A.G.A. submits that as this is a case of direct evidence and impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such both the appeals filed by the accused-appellants, who committed heinous crime by murdering the deceased Guddu are liable to be dismissed.

21. We have considered the submissions made by the learned counsel for the parties and have gone through the records of present appeals specially the judgment and order of conviction and evidence adduced before the Trial Court.

22. The question to be addressed and determined in these appeals is whether the accusation of guilt arrived at by the Trial Court and the sentence awarded is legal and sustainable and suffers from no infirmity and perversity.

23. The facts as have been noticed above clearly shows that the incident took place on 27th August, 2006 at 10:00 p.m and the first information report qua the said incident has been lodged on the same day i.e. 27th August, 2006 at 11.30 p.m. (2330 hrs.). According to the prosecution the first information report is well within time and prompt.

24. As per the first information report, the incident took place on 27th August, 2006 at about 10:00 p.m. alleging therein that Guddu used to live in house of Sanjay on rent, when he (Sanjay) was eating food in the room of Guddu along with him and his wife, the accused-appellant Ravindra and one other person who was wearing green shirt came. The accused-appellant Ravindra called Guddu, when Guddu and informant came out, the accused-appellant Ravindra said that after dropping his companion he would come back once

again, then the informant and Guddu returned to room. After dropping his companion, Ravindra came again and called Guddu to come out from his room. The first informant called Guddu to come in the room, the companion of Ravindra immediately came on the door of the room of Guddu and with intention to kill Guddu, fired thrice upon him by country-made pistol (Tamancha). When the informant tried to save Guddu that the said companion had also fired upon him due to which he also sustained gun shot injuries. The people of the locality and wife of Guddu took him to the hospital. The occurrence of this incident has been supported by P.W.-1 informant Sanjay in his examination-in-chief, but he has denied that the present accused persons have killed the deceased. This witness has also stated that two unknown persons came to the place of occurrence, one of them wore green shirt. The unknown person wearing green shirt had killed the deceased. The said statement has also been supported by the wife of the deceased I.e. P.W.-8 in her examination-in-chief and in the cross-examination. PW-8 has stated in her examination-in-chief that after selling the house, her husband (Guddu) and her Devar Chhota (brother-in-law) i.e. P.W.-2 used to live in Vijay Nagar on rent. After selling the said house, from the money of his share, which was received by the brother-in-law of P.W.-8, Chhota P.W.-2 purchased another house in Mata Colony. Rs. 1,50,000/- whichever was left to him P.W.-2 lended to Habib. When the husband of P.W.-8 demanded the money from Habib, which was lended by P.W.-2 i.e. the brother-in-law of P.W.8, some altercation took place between them and thereafter they stopped talking to each other. P.W.-8 has further stated that 20 to 25 days before the incident, when Habib, Nasir and Babban were consuming alcohol and abusing each other, there was also some altercation between Habib, Nasir, Babban, Lala and Mullad due to which Lala and Mullad attacked Habib, Nasir and Babban by knife and sword, as a result whereof Habib and Nasir sustained injuries. From that time, on the suspicion that the said attack has been made by Lala and Mullad on the instigation of the husband of P.W.-8 i.e. deceased Guddu, these persons started having a grudge against her husband. Due to the aforesaid grudge, Habib and Nasir threatened the husband of P.W.-8 i.e. deceased saying "कि इसे ऐसा मजा चखाएगें कि याद रखोगे" but P.W.-8 and her husband ignored the same. On the date of incident, when the first informant/P.W.1 Sanjay, who is landlord and her husband Guddu were sitting on a cot in her room and she was sitting on the floor and serving meal, there was electricity at that time. The neighbour i.e. accused-appellant Ravindra came there and he called her husband Guddu and landlord Sanjay to come out from the room and when they went outside the room, began talking to each other at the door. The accused-appellant Ravindra said that after dropping his companion, he would come back, then the informant and Guddu returned to room. After sometime the neighbour i.e. accused-appellant Ravindra came to the room of P.W.-8 once again and called the deceased Guddu to talk with him for two minutes. On calling of accused-appellant Ravindra, the husband of P.W.-8 i.e. deceased went out from the room. When the deceased and the accused-appellant talked to each other, P.W.-1 i.e. first informant Sanjay called Guddu to come and eat food, which was served by P.W.-8, then the deceased Guddu came and started eating food. It is that the companion of accused-appellant Ravindra i.e. accused-appellant Nasir @ Guddu, who wore green

shirt, came once again and with intention to kill, he fired indiscriminately upon her husband Guddu and P.W.1 Sanjay, while Guddu and P.W.1 were sitting on the cot. The husband of P.W.-8 Guddu sustained three gun shot injuries, whereas the informant/P.W.-1 Sanjay also sustained two gun shot injuries. P.W.-8 has further stated that the said incident was seen by her with her own eyes. In the cross-examination also this witness has supported the prosecution version.

25. In the site plan, mark "→" shows for arrival and escaping routes of accused after firing, whereas the point "(C)" shows the place from where the accused called the deceased Guddu and informant/P.W.-2 to come out from the room. Point "(B)" shows the place from where the accused fired, whereas point "(A)" shows the place where the first informant/P.W.1 and the deceased Guddu were sitting on a cot and sustained gun shot injuries. On the place between point "(A)" and point "(B)" blood stained clothes, dried blood and empty cartridge were lying. From the site plan it is apparent that on the date of incident, Sanjay and deceased Guddu were sitting on cot i.e. at point-"(A)" in the room of Guddu, whereas assailant was standing on the point "(B)", which is the entrance point of the room. When assailant will stand on the point-"(B)" then he has to move from left side to fire at point-"(A)". PW-8 has also stated in her cross-examination that one assailant, who was standing at the entrance of the room i.e. point "(B)", shot fire by swinging his arm. The cot on which the deceased Guddu was sitting was on the opposite side (left side) of the entrance i.e. point "(A)". At the time of incident the deceased Guddu was eating food. P.W.-8 has also stated in her cross-examination that at the time of incident electricity was there. She has admitted that Investigating Officer has recorded her statement, within two or three days of the incident. She has next stated that assailant was wearing green shirt and she has recognized him. From the aforesaid facts, it is apparently clear that the statement of P.W.-8 fully corroborates the site plan prepared by the Investigating Officer with regard to the place and manner of incident.

26. P.W.-2 Chhota has not supported the prosecution story and he has been declared hostile. PW-3, Sub-Inspector Lokendra Pratap Singh is the Investigating Officer, who has proved the Exhibit Ka-5 and other prosecution papers. He has also admitted in his cross-examination that P.W.-8 i.e. Babita wife of deceased had told him that the assailant wore green shirt. It was also told by her that other person i.e. accused-appellant Ravindra had not fired on deceased. He further stated that P.W.-8 had also told him that the accused-appellant Nasir @ Guddu had fired thrice on the deceased.

27. P.W.-4 Constable-506 Kiran Pal Singh is the writer of chik first information report, who has proved Exhibit ka-7 and Exhibit ka-8. P.W.-5 Dr. Barkha Gupta is the autopsy surgeon and at the time of post mortem, she has opined that the cause of death was haemorrhage shock due to ante-mortem injury of internal abdominal organs. The injuries are ante-mortem and caused by projectile of a rifle fire arm ammunition.

28. Witness Rinku Bhati has been adduced as P.W.-6 but he too has turned hostile. Hukum Singh Assistant Sub-Inspector has been adduced as P.W.-7, who has prepared the inquest report and supported the prosecution version and has

proved Exhibit Ka-10, Exhibit Ka-11 and Exhibit Ka-12.

29. P.W.-9 Dr. Anil Prakash has examined injuries of the first informant/P.W.1 Sanjay and has opined that injury no. 1 and 3 found on the body of informant/P.W.-1 were simple in nature. Injury no. 2 is KUO (Kept Under Observation). Injury no. 1 and 2 were caused by firearm. Injury no. 3 was caused by hard blunt object.

30. P.W.-10, Dr. Rajendra Prasad has also examined the informant/P.W.-1 and has opined that a radio opaque of metallic density is found in the left knee joint of the informant. He has proved the X-rays (no. 3769 and 3770) material exhibits- 1 and 2 which have been done in the case of injured/first informant/ P.W.1. He found in X-ray report a radio opaque of metallic density which was caused by fire arm.

31. P.W.-11, Dr. Anil Yadav has also been adduced by prosecution who has proved Exhibit Ka-16 and other relevant papers. P.W.-12, Inspector Sri Hargovind Singh has also been examined and has proved Exhibit ka-5 and other relevant papers and objects.

32. From the perusal of the aforesaid statements of the prosecution witnesses, the prosecution has established its case beyond reasonable doubt. Defence has also adduced Akhand Veer Singh as defence witness-1. The defence witness (DW-1) has also admitted in his examination-in-chief that on 27.08.2006 he heard about occurrence of incident.

33. In the case in hand PW-8/wife of the deceased has seen the occurrence and has fully supported the prosecution story. She has recognized the accused assailant Nasir @ Guddu who wore green shirt at the time of incident which has been supported by PW-1 Sanjay/informant also in his statement before the Court. Hence there is no doubt that this offence has been committed by accused appellant Nasir @ Guddu with rifle or country-made pistol (Tamancha).

34. Learned Senior Counsel for the accused appellant has argued that the injury caused to deceased was by a rifle (fire arm) which is also opined by doctor in post mortem report. The rifle and country-made pistol (Tamancha) both adopts 315 bore cartridge, hence the argument that injured/deceased sustained injuries with rifle only and not country made pistol (tamancha), has no legs to stand.

35. The argument of learned counsel for the appellant with regard to the wound on the right side of the deceased does not creates doubt in the prosecution story because as per the site plan, deceased Guddu and Sanjay were sitting on cot i.e. at point "(A)", which is left side from the point "(B)" i.e. the place of entrance. On fire from the point "(B)" to point "(A)" the injury will most probably be caused on the right side of the body of the deceased. Hence considering these circumstances, this argument is also liable to be rejected.

36. Learned counsel for the appellant has also argued about the conduct of PW-8. He stated that when her husband got injured it was her duty to take care of him but instead she went to call her brother-in-law i.e. P.W.2 Chhota, whose house was situated 1 k.m. away from the place of occurrence as per the statement of P.W.-8. To ascertain the exact distance between the house P.W.2 to place of incident i.e. house

of P.W.8, it is important for us to refer the statement of P.W.2. He has stated in his examination-in-chief that his house is situated 250 meter away from the place of incident in the same locality meaning thereby the house of P.W.-2 i.e. Dewar (brother-in-law) of P.W.8 was nearby the house of deceased. P.W.8. i.e. wife of the deceased is a women and when her husband got injured she must have got perturbed and it must have been difficult for her to decide at that point of time and was in dire need of help. P.W.-2 Chhota being in her vicinity as closest kith and kin, she went to call him for his help. This conduct of P.W.-8 very much natural. It cannot be said that such conduct of P.W.8 was unnatural and creates doubt in prosecution story.

37. Having analysed the prosecution evidence placed on record, we find that there is no specific allegation attributed to the accused-appellant Ravindra of having either fired gun shot on the deceased or in any manner committed the offence itself. Although the accused-appellant initially came with the main accused i.e. the accused-appellant Nasir @ Guddu to call the deceased Guddu and again asked the deceased to come out of the room but he was not present on the spot at the time of actual commissioning of the offence nor has been participated in it. It appears that the accused-appellant Ravindra was only mediating between two parties i.e. the deceased Guddu and the accused-appellant Nasir @ Guddu for some amicable resolution of differences between the parties and lastly the offence itself was committed by the main accused-appellant Nasir @ Guddu wearing green shirt. The aforesaid facts have also been supported by Akhand Veer Singh, who has been adduced as defence witness i.e. D.W.-1. In his statement, D.W.-1 has stated that on 27th August, 2006 at 9.15 p.m. (night), when he was purchasing some goods from the grocery shop of one Khemraj, the accused-appellant Ravindra was also purchasing some goods. D.W. 1 has also stated that at the shop of Khemraj they stayed for about 15 to 20 minutes. When the accused-appellant Ravindra and D.W.-1 were purchasing goods, they heard sound of firing. On hearing the same, D.W.-1 rushed to the room of deceased Guddu and saw that first informant/P.W.1 and the deceased were shot by a firearm.

38. From the aforesaid facts, it appears that there was some dispute between the deceased Guddu and Nasir @ Guddu. Ravindra was simply mediating to resolve the dispute arose between both of the them. Neither the accused-appellant Ravindra had ever instigated to kill Guddu nor there was premeditation of mind between accused-appellants, namely, Nasir and Ravindra. There was also no common intention of the accused-appellant Ravindra in the commissioning of offence of murder of the deceased Guddu. The aforesaid facts have not been proved from any evidence available on record. Therefore, no case under Section 34 I.P.C. is made out against the accused-appellant Ravindra, as is clear from Section 34 I.P.C., which reads as follows:

"34. Acts done by several persons in furtherance of common intention.--*When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

39. It would also be worthwhile to reproduce relevant judgment of the Apex Court to come to the aforesaid conclusion:

1). In the case of **Pandurang vs. State of Hyderabad** reported in AIR 1955 SC 216 has held that a person cannot be

held vicariously accountable for the actions of another if their purpose to commit the crime was not common. It is not a common intention if their conduct is independent of the act of another. It will be known for the same persons. Paragraph-33 of the said judgment reads as follows:

"Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King-Emperor(1). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King-Emperior and Mahbub Shah v. King-Emperor(1). As their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

(2) In the case of **Suresh and Another v. State of Uttar Pradesh**, reported in **(2001) 3 SCC 673**, on the question of common intention, the Apex Court has observed:

"40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in SatrughanPatar v. Emperor held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied."

3). In the case of **Balbir Singh Vs. State of Madhya Pradesh** reported in **(2019) 15 SCC 599**, the Apex Court has observed as follows:

"33. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that: (i) there was common intention on the part of several persons to commit a particular crime, and (ii) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 IPC is simultaneous conscious mind of persons participating in

the criminal action to bring about a particular result. Minds regarding sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. 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.

34. Observing that the inference of common intention is to be drawn from the conduct of the accused, in Ramesh Singh alias Phooti Vs. State of A.P. (2004) 11 SCC 305, the Supreme Court held as under:-

"12. ..... As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducingSection34 IPC, the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra (1970) 1 SCC 696)"

40. Charge was also framed under Section 120B/34 I.P.C. against the accused-appellants Ravindra and Nasir @ Guddu but this charge has not been found proved by the Court below against them. In the written report of the first informant/P.W.1 on the basis of which the first information report has been lodged, the statement of P.W.-8, solitary eye witness as also in the other evidence available on record, it is apparent that specific allegation for committing the murder of the deceased has been attributed to the accused-appellant Nasir @ Guddu and not by accused-appellant Ravindra. Therefore, no case for the offence punishable under Sections 452/34, 307/34, 302/34 are made out against the accused-appellant Ravindra.

41. In view of the above discussions we find that Trial Court was not justified in returning the finding of guilt against the accused-appellant Ravindra on the basis of

evidence led by the prosecution. The finding of Court below that the guilt of the accused-appellant Ravindra has been proved beyond reasonable doubt is thus rendered unsustainable. We hold that the prosecution has failed to prove the guilt of the accused appellant-Ravindra beyond reasonable doubt.

42. So far as the conviction of the accused appellant Nasir @ Guddu is concerned, this Court may record that there is a direct evidence against the accused-appellant Nasir @ Guddu for commissioning of the offence of murder of the deceased Guddu. The accused-appellant Nasir @ Guddu has motive and intention to commit the offence of murder of the deceased. In his statement recorded under Section 313 Cr.P.C., the accused-appellant Nasir @ Guddu has stated that the deceased and P.W.-8 were criminals and they suspected that he is an informer of them and because of the said reason, they harbored a grudge against him and a complaint has also been made in that regard. In her statement, P.W.-8 has stated that due to suspicion that attack on the accused-appellant Nasir and his two friends has been made by Lala and Mullad on the instigation of the husband of P.W.-8 i.e. deceased, accused-appellant Nasir and his friend Habib threatened the husband of P.W.-8 i.e. deceased to face dire consequences. It is no doubt true that P.W.-1/first informant, P.W.-2 i.e. brother of the deceased and P.W.6 who have been adduced as prosecution witnesses have turned hostile but they have admitted that the incident occurred in which the deceased sustained gun shot injuries and died. Even otherwise, there is a direct evidence of P.W.-8, who in her examination-in-chief as well as in her cross-examination fully supports the prosecution case and her statement fully corroborates with the autopsy report of the deceased and the site plan as also other documentary evidence available on record. As a general rule, the Court can and may act on the testimony of a single witness provided he/she is wholly reliable. It is settled law that it is the quality that matters and not the quantity of witness.

43. The issue, which is up for consideration before us at this stage is whether the person wearing green shirt, who fired thrice upon the deceased due to which he was done to death, is the accused-appellant Nasir @ Guddu or not. We may record that although the first informant/P.W.-1 and P.W.-2 have turned hostile but in their depositions they have clearly stated that the person who fired on the deceased was wearing green shirt. P.W.-8 in her statement has also specifically stated that the person, who fired on the deceased was wearing green shirt. The identify of the person wearing green shirt has also been disclosed by P.W.-8 as the accused-appellant Nasir @ Guddu.

44. P.W.-3 Sub-Inspector Lokendra Singh in his cross-examination has clearly stated that during the recording of the statement under Section 161 Cr.P.C. P.W.-8 has clearly assigned the role of firing upon the deceased to the accused-appellant Nasir @ Guddu. She has also stated that the accused was wearing green shirt. P.W.-8 moreover has not assigned the role of firing to any other person, namely, accused-appellant Ravindra.

45. Following the case of **Vadivelu Thevar & Another vs. State of Madras;** AIR 1957 SC 614, the Apex Court in the

case of **Prithipal Singh & Others Vs. State of Punjab & Another** reported in (2012) 1 SCC 10, has observed as follows:

"45. This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence."

(Emphasis added)

46. Again in the case of **Gulam Sarbar Vs. State of Bihar (Now Jharkhand)** reported in *(2014) 3 SCC 401*, the Apex Court has observed as follows:

"19. ***In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted.*** *The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in Probate cases, where the law requires the examination of at least one attesting witness****, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence."***

(Emphasis added)

47. In view of the aforesaid facts and laws laid down by the Apex Court, we find that the finding of the Court below with regard to Nasir @ Guddu is correct and the guilt of the accused Nasir @ Guddu appellant has been proved beyond reasonable doubt by the prosecution, which is sustainable.

48. Consequently, in view of the deliberation held above this appeal succeeds and is allowed with regard to accused appellant- Ravindra.

49. The judgment and order of conviction against the accused-appellant Ravindra dated 18th September, 2018 passed by the Additional District & Sessions Judge, Court No.2, Ghaziabad in Sessions Trial No. 787 of 2007 (State Vs. Ravindra & Nasir @ Guddu), arising out of Case Crime No. 514 of 2006, under Sections 452/34, 307/34, 302/34 and 120-B/34 I.P.C., Police Station-Vijaynagar,

District-Ghaziabad by the Court below cannot be legally sustained and is hereby set aside.

50. The appeal filed by the accused appellant Nasir @ Guddu is accordingly dismissed. .

51. The accused-appellant Ravindra, who is in jail since 15th September, 2018, shall be released on compliance of Section 437-A Cr.P.C. unless he wanted in any other case.

52. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Ghaziabad henceforth, who shall transmit the same to the Jail Superintendent concerned in terms of this judgment.

(2022) 12 ILRA 785
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 112 of 2012

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

Counsel for the Appellant:
Sri Intekhab Alam Khan, Mrs. Gunjan Sharma, Sri Pankaj Srivastava, Sri Shyam Kr. Srivastava

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 53 (A), 313 & 437(A) - Indian Penal Code, 1860 - Sections 201, 302 & 376 - Criminal Appeal – against conviction & Sentence – offence of rape and murder - Trial court convicted the appellant on the basis of circumstantial evidences - In defence plea taken that, prosecution story is based on guess work and strong suspicion only on the basis of testimony of PW-2 whose testimony is full of suspicion - Evaluation of evidences - court held that, where case is based upon circumstantial evidences, those circumstances sought to be proved against the appellant beyond reasonable doubt, together with a chain to be completed as to point out that in all human probability such crime was committed by the accused no anyone else - court finds that, in the testimonies of witnesses no any specific deposition are found against appellant, no any allegation about appellant in FIR, no any blood or semen stained were found on the seized articles, even I.O. has not efforts to do the DNA profile or taken blood samples of the appellant for examination with sample recovered from knickers of the deceased which creates serious doubt - case is full of strong suspicion and nothing else - probably, to solve a heinous crime, investigating agencies, under immense pressure implicated the appellant to be a soft target - prosecution fails to prove the charges against the appellant beyond the reasonable doubt - hence, appeal is allowed - direction issued for liberty forthwith accordingly. (Para – 16, 18, 19)

Appeal is allowed. (E-11)

List of Cases cited:

1. Bablu Vs St. of Raj., (2006) 13 SCC 116

2. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

3. Sharad Birdhichand Sarda Vs St. of Mah., (1984) 4 SCC 116

4. Shivaji Sahabrao Bobade & anr. Vs St. of Mah., (1973) 2 SCC 793

5. Vijay Shankar Vs St. of Har., (2015) 12 SCC 644

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. This appeal is against the judgment and order of the learned Sessions Judge, Ramabai Nagar dated 16.11.2011 whereby the appellant has been convicted under Sections 302, 376 and 201 I.P.C. and sentenced as follows : (i) imprisonment for life as well as fine of Rs.20,000/- under Section 302 I.P.C.; (ii) imprisonment for life as well as fine of Rs.20,000/- under Section 376 I.P.C. and (iii) seven years RI as well as fine of Rs.5,000/- under Section 201 I.P.C. All sentences to run concurrently.

2. Considering the nature of the offence, we deem it appropriate to mask the identity of the victim and her family therefore, wherever required they have been assigned a pseudonym or are described by their witness number.

INTRODUCTORY FACTS

3. On 10.03.2010 at 7.20 a.m. a written report (Exb. Ka-1), scribed by VKR (not examined), signed by PW-1, the father of the victim, was submitted at police station Shivrajpur, district Kanpur Nagar giving rise to Case Crime No.84 of 2010 in respect of which, chik FIR (Ex. Ka-3) and GD entry (Ex. Ka-4) was made by PW-5. In the written report it was alleged that at 7.30 p.m. on 09.03.2010 the victim, who is aged seven years, was noticed by RK (not examined) and informant's brother (PW-2) in the company of the accused-appellant going towards the brick kiln; the victim did not return; a search for the victim was made in the night but the victim could not be found; and next day morning (i.e. 10.03.2010), at about 6.00 a.m., body of the victim has been found at the brick kiln. By expressing suspicion that the accused-appellant committed rape and murder of the victim the FIR was lodged. Pursuant to the report, at about 11.00 a.m., on 10.03.2010, inquest was conducted of which inquest report (Exb. Ka-9) was prepared by PW-7 and the body was sent for autopsy. The autopsy was conducted on 10.03.2010 itself. The autopsy report prepared by PW-3 describes the body and the injuries, etc noticed as follows:

(a) **Age :** about seven years.
(b) **Time since death :** one day.
(c) **External examination** :-

Average built; eyes closed; tongue protruded; face, lips and nails cyanosed. R.M. present in both extremities. P.M. staining on whole back, buttock and thigh; mud present in head, hair, face and scalp.

(d) Ante Mortem injuries :-

(i) Multiple abraded contusion in 11 cm x 3 cm area on front of neck and right lateral and left lateral part of neck 4 cm below chin. Ecchymosis TN present. Base of abrasion is brownish. Fracture of hyoid bone is present;

(ii) Vagina lacerated. Edges are swollen and bleeds to touch. Two fingers are easily introduced, blood oozing from vagina, clotted blood present inside cavity.

(e) Cause of death :

Asphyxia as a result of ante mortem throttling.

4. On 11.03.2010, vide CD Parcha no.2, the appellant was arrested by PW-7 and on the basis of his confessional statement and pointing out following articles were recovered from his house : (i) a bed spread (Bichhona) which was spread over a wooden plank kept in the room; (ii) a quilt /woollen loyi having blood spots; (iii) a Dhoti alleged to have been used to wipe off semen stains; and (iv) underwear, which he was wearing, alleged to be having

blood and semen stains. A seizure memo (Exb.Ka-7) was prepared to reflect seizure of said articles. It be noted that the two witnesses of the seizure who had signed on that seizure memo were not examined during the course of trial.

5. During the course of investigation, statement of the informant (PW-1) was recorded on 10.03.2010 and, later, on 26.03.2010 his clarificatory statement was recorded. In between, on 12.03.2010 statement of PW-6 was recorded who disclosed about a confession being made to him by co-accused Awadhesh @ Ankaj, who died in an accident on 14.03.2010 of which entry was made on 15.03.2010 vide CD Parcha no.4. The statement of PW-2 was recorded on 27.03.2010 and on 08.04.2010 statement of RK (not examined) was recorded. On 12.04.2010, statement of inquest witnesses was recorded. On 29.04.2010 statement of PW-4 (mother of the victim) was recorded and the seized articles were sent for forensic examination. Thereafter, charge-sheet was submitted. On the basis of charge-sheet, on 26.08.2010, the trial court framed charge of offences punishable under Sections 376, 302 and 201 I.P.C. against the accused-appellant. The appellant denied the charges and claimed trial.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined as many as seven witnesses. PW-1, PW-2, PW-4 and PW-6 are witnesses of facts; PW-3 conducted autopsy of the cadaver; and PW-5 was the person who made GD entry of the written report and prepared chik FIR. PW-7 is the Investigating Officer. A forensic report (Ex. Ka-17) in respect of the clothes etc of the deceased and articles seized vide Ex. Ka-7 was also obtained and produced. As per the forensic report (Exb. Ka-17), human blood was found on the knickers and the vaginal slide of the deceased-victim; no blood was found on the skirt, shirt, jersey and T-shirt of the victim; and human sperm was found only on the knickers of the victim. But no sperm was found on the skirt, shirt, jersey, T-shirt and vaginal slide of the victim. It be also noted that neither blood nor semen/ sperm could be noticed on the articles seized vide Ex. Ka-7 i.e. (i) bed spread (Bichhona) allegedly recovered from the room of the accused; (ii) quilt /woollen loyi allegedly recovered from the room of the accused; (iii) Dhoti alleged to have been used by the accused to wipe off semen stains and recovered from his room; and (iv) underwear, which he was wearing when arrested. What is important is that there was no DNA profiling of the blood/sperm found as to match it with the accused-appellant.

7. We shall now proceed to notice, in brief, the oral testimony of the prosecution witnesses.

7 (i) **PW-1** - He is the informant and father of the victim. In his statement-in-chief, he stated that at the time of the incident the victim was aged about seven years; that the victim, on 09.03.2010, at about 7.30 p.m., was playing near the temple, she used to often go to the temple to get Prasad; at the temple, father of the accused-appellant used to do Puja and distribute Prasad but, on account of injury, appellant's father had not been doing Puja for last few days therefore, in his place, the appellant used to sit there and distribute Prasad; that when the victim did not return home from the temple, a search for her was made by him and his family members in

the evening itself, at about 9.00 p.m.; during search, PW-1's brother, namely PW-2, and RK informed PW-1 that about an hour ago, they saw the accused-appellant taking the victim to his house; upon getting the above information PW-1 went to the house of the appellant who was found in a drunken state; when the appellant was asked about the victim, the appellant informed them that the victim did come but has gone back; thereafter, hectic search for the victim was made whole night and next day morning, the body was found at M.S. Brick kiln with blood stains on clothes. The written report was shown and read out to PW-1, he admitted that it was scribed by VKR upon which he had put his signature after understanding its contents which were read over to him by the scribe. PW-1 stated that it was this very report which he got scribed from VKR and lodged at the police station. The said report was marked as Exb. Ka-1. He also stated that after the report was lodged, the Investigating Officer had come to the spot and had prepared inquest report. He confirmed that the Investigating Officer had recorded his statement.

During cross-examination, PW-1 admitted that at the time of the incident he was at his stall from where he vends eggs etc.; his daughter (victim) had gone with other children to the temple where she was playing with 6 -7 children. He stated that the house of the accused-appellant is about 30 meters away from the temple and in between the temple and the house of the accused there are houses both sides. He stated that there is no fixed time for distribution of Prasad in the temple. Ordinarily, evening prayers are offered in the temple at about 9.00 p.m. and Prasad is distributed after Aarti. He admitted that Prasad was being distributed by uncle of the appellant, who is the Pujari of the temple and does Puja there. PW-1 stated that on the date of the incident, at about 8.00 pm he received information that the victim is missing; as soon as he got the information, he left his stall and went in search of the victim; that search continued up to 2 to 2-1/2 hours post midnight. He stated that during the course of search PW-2 and RK had informed him that the victim was seen with the appellant. He admitted that he gave an oral report to the police at about 11.00 pm that the victim is missing. He stated that when he went to the police station to give information about his daughter having gone missing, he did not inform the police that the victim was seen / noticed with the accused-appellant, as he had no evidence. He admitted that he himself did not notice the victim being taken away by any one. He admitted that Pujaris at the temple have dispute with each other and that he has relationship with all the Pujaris there. He admitted that the elder Pujari was appellant's father who was no longer there and now the appellant's uncle is the Pujari of temple. He stated that he has no knowledge about any dispute between the appellant's father and uncle or other Pujaris in respect of the temple. He denied the suggestion that he has falsely implicated the appellant on account of the said dispute between Pujaris.

7. (ii) **PW-2** - He is the brother of PW-1. PW-2 stated that he works as a hawker and has a ground nut vending stall. He stated that the body of the deceased was found on 10.03.2010 at 10.00 a.m. at MS Brick kiln. In respect of the incident he stated that, on 09.03.2010, while he was vending from his stall, at about 7.30 p.m., he saw the accused-appellant taking the victim to his house. He stated that this was also witnessed by RK. PW-2 stated that this information was given by him to his brother PW-1. PW-2 also stated that he and

his brother went to the house of the appellant to enquire about the victim at about 9.00 p.m., who told them that the victim after having Prasad had left. PW-2 stated that the reputation of the appellant is not good. He used to tease girls.

During cross-examination PW-2 stated that the house of the appellant is about 25-30 meters away from the temple; that he knows the appellant for last 10-15 years; that PW-2's house is in front of the temple, about 10-15 meters away; that at the time of the incident there was only one Pujari at the temple, named X. X used to do Puja and distribute Prasad. The appellant was also Pujari there. He stated that at the time of the incident, the appellant was not the Pujari but he used to wander there and that prior to X, the father of the appellant was the Pujari but, on account of injury, X started doing Puja since 2-2 1/2 months before the incident. PW-2 stated that in the temple Aarti is done two times; one in the morning at about 5.00 a.m. and the other in the evening at 8.30 p.m. He stated that at the time of Aarti, he did not use to visit the temple and he also did not visit the temple on the date of the incident while there was Aarti. He stated that the morning Aarti was done by X and the evening Aarti was also done by X. He saw X doing evening Aarti from the door of his house. He stated that Prasad was being distributed after Aarti. After the evening Aarti, when Prasad is distributed, a lot of people gather to collect the Prasad. He stated that on the date of the incident, evening Aarti was completed by 9.00 p.m. and thereafter Prasad was distributed. He stated that at the time of the Aarti, on that day, X was there. On further cross-examination, PW-2 stated that on the date of the incident he had put his stall; to put his stall he left his house at about 9.00 a.m. in the morning and was there up to 8.30 p.m.; that ordinarily his stall continues up to 9.00 p.m. but, on the date of the incident as he received information about his niece missing, he returned earlier. He stated that RK used to visit the shop of his uncle, which was at roadside; on the date of the incident, RK visited his uncle's shop. PW-2 further stated he and his brother (PW-1) jointly went to the house of the appellant in search of the victim and they noticed the appellant in a drunken state. PW-2 stated that he also went with his brother to give the missing report and along with them, the wife of PW-1 was there. In respect of the time when they visited the police station, he stated that the time must be around 9.00 p.m. On further cross-examination, he stated that after the body of the deceased-victim was found in the morning at about 7.00 a.m., they had gone to inform the police. He denied the suggestion that he did not see the accused-appellant in the company of the victim and that RK was not with him. He also denied the suggestion that he has good relations with the uncle of the appellant, who is currently Pujari of the temple and, therefore, at his behest, he has falsely implicated the appellant.

7. (iii) **PW-3** He is the autopsy surgeon who proved the autopsy report and the contents thereof, which we have already noticed above.

7. (iv) **PW-4** The mother of the victim-deceased. PW-4 stated that on the date of the incident, the victim was playing outside the temple at about 7.00 p.m. and near the temple she saw the appellant. She stated that after the victim could not be found a search for her was made and they had also gone to inform the police at around 11.00 p.m. in the night. She gave the description of the clothes which the

deceased was wearing on the date of the incident.

During cross-examination, PW-4 stated that she did not see the victim going with the appellant but she saw the appellant standing near her at the temple. She clarified that the time when her daughter had gone to play near the temple, no Prasad was being distributed. She denied the suggestion that she has no knowledge of the incident and that she has not witnessed anything. She also denied the suggestion that she is making the statement on the suggestions made to her by her husband and Devar.

7. (v) **PW-5** The police constable, who made GD entry of the written report vide Report No.15 at 7.20 a.m. of which copy was produced and marked as Exb. Ka-4. He also proved the preparation of chik FIR which was marked as Exb.Ka-3. During cross-examination, he stated that in his presence the Investigating Officer had not recorded statement of any witness. He denied the suggestion that the GD entry was not made at the time it is purported to be.

7. (vi) **PW-6** He stated that on 10.03.2010 at about 11.00 a.m. Pankaj @ Awadhesh called him on telephone and stated that he and the appellant have jointly committed the crime and had thrown the body at M.S. brick kiln.

Note : As this witness has not given any direct testimony against the appellant and the co-accused, whose confession he has deposed about, was not put to trial, we do not propose to notice his statement made during the cross-examination.

7. (vii) **PW-7** The Investigating Officer (I.O.). He proved the various stages of investigation including preparation of site plan (Ex. Ka-5) from where the body was recovered and the site plan (Ex. Ka- 8) from where items were recovered vide Ex. Ka-7. PW-7 stated that from the skirt of the victim some Churan (powder) and two rupee coin was recovered of which he prepared a memo which was marked Exb. Ka-6. He stated that on 11.03.2010 he arrested the accused, recorded his statement and recovered articles of which he prepared seizure memo Exb. Ka-7 (noticed above). He also produced the recovered articles which were marked material exhibits. He stated that on the date of registration of the FIR he recorded the statement of the informant and on 12.03.2010 he received information from PW-6 regarding extra judicial confession made by co-accused Awadhesh who, later, met with an accident and died. He stated that he recorded a clarificatory statement of the informant on 26.03.2010. Thereafter, on 27.3.2010, he recorded the statement of PW-2 and on 08.04.2010 recorded the statement of RK. On 12.04.2010, he recorded the statement of inquest witnesses and sent the seized articles for forensic examination on 29.04.2010. He produced the forensic report which was marked Exb. Ka-15. He proved the charge-sheet which was marked as Exb. Ka-16.

During cross-examination, PW-7 disclosed that the accused was arrested at 15.35 hours on 11.03.2010. He stated that during the course of investigation no witness disclosed that the accused-appellant had given Churan to the deceased. He stated that the witnesses had disclosed that the deceased was last seen alive in the company of accused-appellant at about 7.30 p.m. He stated that this information was given to him by PW-2 and RK and nobody else. On further cross-

examination, PW-7 admitted that he could not learn about any criminal antecedents of the accused. He denied the suggestion that there was no recovery from the house of the appellant and that the seizure memo is nothing but fabricated. He also stated that PW-6 had not informed him that he saw the co-accused but he only told him that he heard about the crime on telephone. PW-7 denied that he prepared a false charge-sheet and the investigation was bogus.

Statement under section 313 CrPC

8. After the entire prosecution evidence was recorded, the incriminating circumstances that appeared against the appellant in the prosecution evidence were put to him for recording his statement under section 313 CrPC. The appellant denied the incriminating circumstances and claimed that he has been falsely implicated because of a dispute with his uncle in respect of the temple and that the informant, PW-6 and the other person who is shown to be the witnesses of recovery, are all close associates of his uncle with whom he has dispute relating to the temple. However, no evidence was led in defence.

FINDINGS OF THE TRIAL COURT

9. The trial court on the basis of evidence led during the course of trial held the following circumstances proved : (i) the victim on 09.03.2010 at 7.00 p.m. went to play near the temple; (ii) the accused was seen taking away the victim at 7.30 p.m. on 09.03.2010 by PW-2; (iii) that when PW-2 and PW-1 had gone to the house of the appellant they noticed him in a drunken state and he also admitted that the deceased had come to his house and after taking Prasad she left; (iv) when the body of the deceased was recovered, from her skirt Prasad/Churan was recovered; (v) that the deceased was last seen alive with the accused and was never seen alive thereafter; (vi) the deceased resides alone; (vii) that on 10.03.2010 at around 11.00 p.m. co-accused Pankaj @ Awdhesh informed PW-6 about the commission of crime by him and the appellant; (viii) that the house of the accused is near the place from where the body of the deceased was recovered; and (ix) that there is no obvious motive to falsely implicate the accused. Finding the aforesaid circumstances as forming a chain so complete that it conclusively pointed towards the guilt of the appellant, convicted the appellant as above.

10. We have heard Smt. Gunjan Sharma for the appellant and Sri J.K. Upadhyaya, learned AGA for the State.

SUBMISSIONS ON BEHALF OF THE APPELLANT

11. Learned counsel for the appellant submitted that this is a case where there is hardly any evidence against the appellant. The only evidence against the appellant is given by PW-2 with regard to victim last seen alive in the company of the appellant. The testimony of PW-2 is not at all reliable for the following reasons : (i) if PW-2 had noticed that the appellant was taking the deceased to his house and this information was given by PW-2 to PW-1 (informant) at 9.00 p.m. on the same day (09.03.2010), as is alleged, then there was no occasion for the informant not to make a disclosure about this fact to the police when admittedly PW-1 and PW-2 had both gone to the police station to give a missing report; further, in the FIR it would not have been stated that PW-2 and RK had noticed

the appellant taking the deceased towards the brick kiln. This discrepancy suggests that the prosecution story is based on guess work and strong suspicion only; (ii) the testimony of PW-2 is also unreliable for the simple reason that his presence becomes doubtful inasmuch as during cross examination he stated that on the date of the incident he left the house to put up his stall at 9.00 a.m. in the morning and was there at the stall till 8.30 p.m. and returned only when he received information that his niece had gone missing. If that was so, then where was the occasion for him to have noticed the deceased in the company of the appellant at 7.30 p.m. In these circumstances, the entire prosecution case is based on wholly unreliable evidence. In addition to above, learned counsel for the appellant submitted that the forensic evidence does not corroborate the recovery of blood stained and semen stained articles from the house of the accused. This also creates suspicion with regard to the bona fides of the investigation. Further, the statement of PW-2 was not promptly recorded but was recorded after two weeks. All of this would suggest that the prosecution story was developed only on guess work. Hence, the prosecution has miserably failed to prove their case against the appellant.

12. Learned counsel for the appellant further contended that this is a case which was instituted after amendment in the Code of Criminal Procedure whereby Section 53-A was inserted in the Code, yet no effort was made to have DNA profile of the blood and semen found on the knickers of the deceased as to connect it with the appellant. All these circumstances would suggest that the appellant has been falsely implicated only on account of strong suspicion or perhaps because of temple dispute. It was urged that the learned trial court has accepted the prosecution evidence as gospel truth and has not tested the same against the weight of probabilities.

SUBMISSIONS ON BEHALF OF THE STATE

13. Per contra, Sri J.K. Upadhyaya, learned AGA, submitted that there is no strong enmity disclosed between the prosecution witnesses and the appellant therefore, there is no good reason to assume that the prosecution witnesses would falsely implicate the accused-appellant. Admittedly, the house of the appellant was located at a short distance from the temple and the MS brick kiln, from where the body of the deceased was recovered, was in close vicinity thereto. It is not in dispute that there existed a temple in front of the house of the victim and that the victim in lure of Prasad visited the temple therefore, it is quite probable that she visited the temple and went with the appellant as is the evidence. In such circumstances, the testimony of PW-2 cannot be doubted and PW-4, the mother of the victim, has also given testimony that when the victim had gone to play near the temple she noticed the appellant standing there. He, therefore, submits that the learned trial court has rightly recorded conviction and the appeal is liable to be dismissed.

ANALYSIS

14. Having noticed the rival submissions and the evidence led by the prosecution what is clear is that this is a case based on circumstantial evidence. There is no direct eye-witness account of the incident. As to when on the basis of evidence circumstantial in nature, conviction can be recorded, the law is well settled, which is,

that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence (vide **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644; Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116; Bablu V. State of Rajasthan, (2006) 13 SCC 116**) Further in the much celebrated judgment of the Supreme Court in **Sharad Birdhichand Sarda's case**, it has been clarified that the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established.

15. In addition to above, we must bear in mind that the most fundamental principle of criminal jurisprudence is that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions (vide **Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793)**. These settled legal principles have again been reiterated in a three-judge Bench decision of the S**upreme Court in Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

16. In light of the law noticed above, what we have to examine is whether the circumstances sought to be proved against the appellant have been proved beyond reasonable doubt and whether those circumstances put together constitute a chain so complete as to point out out that in all human probability it is the appellant and no one else who committed the crime.

17. In the instant case, the prosecution places strong reliance on the following circumstances : that the appellant was relative of the Pujari of the temple which was in front of the house of the victim

where the victim used to visit for Prasad as also to play; that on the date of the incident the victim had gone to play at the temple by or about 7.00 p.m. where the appellant was present; thereafter, PW-2 noticed the appellant taking the victim towards his house; and, whereafter, the victim was not seen alive.

18. In so far as the presence of the appellant at the temple when the victim went there to play is concerned, that evidence has come from the mother of the victim who has been examined as PW-4. During her cross examination, PW-4 has specifically stated that she did not notice the appellant taking the victim. She only noticed the presence of the appellant near the temple. Admittedly, the temple was a public temple accessible to all. In such circumstances, the presence of any person near the temple by itself is not an incriminating circumstance which may require an explanation. More over, from the testimony of PW-2 it appears that at the time of the incident the Pujari of the temple was the uncle of the appellant because the father of the appellant who was earlier doing Puja had suffered injury therefore, he was unable to do Puja at the temple. Another interesting feature that has come in the testimony of PW-2 is that the Prasad is distributed after morning and evening Aarti. No doubt, PW-1 states that Prasad is distributed at all times but the statement of PW-2 is specific that Prasad is distributed either in the morning or in the evening. PW-2 also specifically stated that morning Aarti takes place at 5.00 a.m. and the evening Aarti takes place at 8.30 or 9.00 p.m. Interestingly, the time when PW-4 saw the accused at the temple is 7.00 p.m. by which time, Arti was not done. Whereas, PW-2 saw the appellant taking the victim at about 7.30 p.m. Since there is no direct evidence about distribution of Prasad or as to who gave the Prasad, recovery of Churan from her skirt cannot be attributed to the appellant. As to what weight is to be attached to the aforesaid statements of PW-2 and PW-4 needs to be examined. In so far as PW-4's statement is concerned, she did not state that she saw the appellant taking the victim. She only stated that she saw the appellant standing at the temple. In so far as PW-2 is concerned, his testimony is specific that the appellant was seen taking the victim at 7.30 p.m. But, during cross examination, PW-2 stated that on the date of the incident he had left his house in the morning at around 9.00 a.m. and returned in the evening at 8.30 p.m. when he was informed that his niece had gone missing. The statement given in his cross examination seriously dents the credibility of the statement of PW-2 that he saw the appellant taking the victim at 7.30 p.m. more so, when there is no clear description of the place from where he spotted the appellant taking the victim. Notably, the Investigating Officer did not indicate in the site plan the place from where the witnesses spotted the appellant taking the deceased. Another interesting feature of the case is that the FIR has been lodged on the next day i.e. on 10.03.2010. PW-1, PW-2 and PW-4 are all consistent that they had visited the police station in the night of 09.03.2010 at 11.00 p.m. to inform the police about the victim being missing. What is important here is that in the FIR which was lodged on the next day, there is no disclosure with regard to their effort of making a missing report previous evening. Further, there is no disclosure in the FIR of they having visited the house of the appellant upon getting information that the appellant was noticed taking away the victim to his house. What is most important is that in the FIR the information given to

the informant by PW-2 is quoted in a manner as if PW-1 was informed that the appellant was seen taking the victim towards the brick kiln from where her body was recovered. Importantly, in the deposition made during trial, the information alleged to have been given by PW-2 to PW-1 is with regard to the appellant taking the victim to his house. Interestingly, the articles seized from the house of the appellant were not found stained with blood or semen. Further, the I.O. made no effort to DNA profile the blood sample of the appellant with the blood and semen found on the knickers of the deceased. All of this creates a serious doubt in our mind with regard to the credibility of the investigation, which assumes importance in a matter based on evidence circumstantial in nature. It appears to us that the case was built on strong suspicion and nothing else, probably, to solve out a heinous crime because it is quite natural that when heinous crime is noticed or reported there is immense pressure on the Investigating agencies to solve it out as quickly as possible. The appellant appeared to be a soft target, being son of the Pujari at the temple where the deceased used to go. But, it is well settled that how so ever strong suspicion might be it does not take the place of proof. In our view, therefore, neither the prosecution has been abe to prove the incriminating circumstances against the appellant beyond the pale of doubt nor those circumstances constituted a chain so complete as to indicate that in all human probability it was the appellant and no one else who committed the crime.

19. In view of the discussion above, we are of the opinion that the appellant is entitled to be acquitted of all the charges for which he has been tried and convicted. The appeal is, therefore, **allowed.** The judgment and order of conviction passed by the trial court is hereby set aside. The appellant is acquitted of all the charges for which he has been tried. The appellant is reported to be in jail. He shall be set at liberty forthwith unless warranted in any other case subject to compliance of provisions of Section 437-A CrPC.

(2022) 12 ILRA 795
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 753 of 1990

Raj Kumar & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Raj Singh, Sri Surendra Nath Yadav

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

Criminal Law – Criminal Procedure Code, 1973 - Sections – 313 & 360 - Indian Penal Code, 1860 - Sections – 323/34, 324/34, 307, 452 & 506 – Probation of offenders Act, 1958 – Section - 4 - Criminal Appeal – against conviction & sentence - offence of threat with dire consequences and assault upon the informant's son - Evaluation of Evidences - defence taken that, no any eye witnesses, no any evidence of common intention and father of accused had already lodged an FIR against the informant therefore in rebuttal this case was lodged against them - but, from perusal of FIR filed by accused appellants, court finds that, name of informant is absent in the list of accused - and further, documents which are filed by accused-appellants in defence have not been proven by any witnesses - appellants fails to rebut the prosecution case - on the other

hand, prosecution has proved the charges u/s 324/34 & 323/34 IPC against the appellants - court finds that, no illegality, irregularity or impropriety nor any jurisdictional error in the impugned order of court below - thus, conviction is upheld - However, appellants are entitled to get the benefit of section 4 of Act, 1958 - directions issued with regards to find and compensation accordingly. (Para – 14, 25, 26, 35, 36, 37)

Appeal is partly allowed. (E-11)

List of Cases cited:

1. Jagat Pal Singh & ors. Vs St. of Har., AIR 2000 SC 3622

2. St. Vs Raj Kumar & anr., Sessions Trial No. 368 of 1988

3. Subhash Chand & ors. Vs St. of U.P. 2015 Law Suit (All) 1343

4. St. of Mah. Vs Jagmohan Singh Kuldip Singh Anand & ors., (2004) 7 SCC 659

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Surendra Nath Yadav, learned counsel for the appellants and Sri Sunil Kumar Tripathi, learned A.G.A. for the State.

2. This criminal appeal has been filed against the judgement and order dated 14.03.1990 passed by Ist Additional Sessions Judge, Bulandshahr, in Sessions Trial No. 368 of 1988, State Vs. Raj Kumar and another arising out of Case Crime No. 19 of 1983, under Sections 323 & 307 I.P.C., Police Station- Jahangirpur, District- Bulandshahr.

3. By the impugned order, the trial court has convicted the appellants, Raj Kumar and Bhoora alias Omi u/s 324/34 and 323/34 I.P.C. with a fine of Rs.2,000/- and Rs.1,000/- each respectively with default clause. They are further sentenced to imprisonment till the rising of the court under the said count.

4. According to the prosecution case about 4-5 days prior to the occurrence in question i.e. 17.02.1983 at about 10 a.m., the accused-appellants, Raj Kumar and Bhoora were opening fire at their tubewell. Prasadi and his son, Mahavir, who were residents of village- Bhoot Garhi, P.S.- Jahangirpur, District- Bulandshahr, were going to their own tubewell. They objected to the accused whereupon the accused threatened them with dire consequences, if they disclosed the above incident of firing to anybody else. The informant and his son did not convey this information to any of the villagers but the accused suspected the informant and his son. On 17.02.1983 at about 10 a.m., the accused, Bhoora and Raj Kumar with one other person were running with lathis and gandasa. On the main front of the house of Om Prakash. All the three assailants attacked Mahavir with lathi and gandasa with the intention to kill him. Accused Bhoora attacked Mahavir on his head with the gandasa as a result of which Mahavir fell down. The witnesses Bhoja, PW2 Vikram Singh and other villagers assembled on the spot to save Mahavir. The accused ran away towards village- Pahasu. The informant's wife and other villagers took injured Mahavir to District Hospital, Khurja. Bhoja went to Jahangirpur and informed the informant, Pershadi about this incident. Pershadi then went to Khurja and saw his injured son who was admitted in the hospital. The injured went thereafter to P.S.- Jahangirpur and lodged the written report (Ext.Ka.1).

5. On the basis of written report (Ext.Ka.1), a chik FIR (Ext.Ka.4) was prepared by PW5 Constable Omprakash

Tyagi. On the basis of chik report, he made the G.D. entry (Ext.Ka.5). The investigation of the case was taken by PW6 Babu Ram Sharma. He recorded the statement of Pershadi, Mahavir and Vikram, made a local inspection at the spot and prepared the site plan (Ext.Ka.6). On 25.02.1983, he took in his possession the blood-stained clothes of injured Mahavir and prepared the recovery memo (Ext.Ka.7) to that effect. After completing the investigation, he submitted charge-sheet (Ext.Ka.8) against accused Bhoora on 19.03.1983 u/s 323, 307 I.P.C. On 21.07.1983, another S.I. Mojjam Singh submitted another charge-sheet (Ext.Ka.9) against accused Raj Kumar u/s 323, 307 I.P.C.

6. Both the accused were committed to the Court of Sessions by order dated 03.08.1986 passed by learned Chief Judicial Magistrate, Bulandshahr. On 18.01.1989, the court framed charge u/s 323/34 and 307/34 I.P.C. against accused-appellants, Raj Kumar and Bhoora @ Omi. The appellants pleaded not guilty and claimed to be tried for the charge.

7. To prove the charge, the court examined PW1 Mahavir, PW2 Vikram and PW3 Pershadi as witnesses of fact whereas PW4 Ravi Kumar Sharma, PW5 H.C. Om Prakash Tyagi and PW6 S.I. Babu Ram Sharma, were examined as formal witnesses.

8. PW3 informant Pershadi proved the written report (Ext.Ka.1). He also proved the blood-stained clothes of injured Mahavir as material Exts.1, 2 and 3. He stated in his evidence that above material exhibits were packed and sealed before him by the Investigating Officer and the Investigating Officer prepared the memo regarding taking them in his possession.

9. PW1 Mahavir and PW2 Vikram deposed about the occurrence. PW4 Dr. Ravi Kumar Sharma, the then Medical Officer in Government Hospital, Khurja, on 17.02.1983 at 11.50 p.m. proved the injury report of injured Mahavir (Ext.Ka.3). He noted following injuries on the person of injured Mahavir :-

(i) Incised wound 4 cm x 1 cm x bone deep on the back of left side head 6 cm above and behind left ear, margins clean cut. Both ends tapering, fresh bleeding present.

(ii) Abrasion 3 cm x 1½ cm on the back of right elbow

(iii) Abrasion ½ cm x ½ cm on the back and base of right ring finger.

(iv) Red contusion 3 cm x 2 cm on the top of left shoulder.

In the opinion of the PW4 Dr. Ravi Kumar Sharma, injury no. 1 was caused by some sharp-edged weapon and was kept under observation. X-ray of the skull was advised. The remaining injuries were caused by some hard blunt object and are simple in nature. Duration of the injuries is fresh.

10. PW5 H.C. Om Prakash Tyagi proved the chik first information report and G.D. relating to institution of criminal case.

11. The Investigating Officer, PW6 S.I. Babu Ram Sharma has proved the site plan and two charge-sheets submitted against accused, Raj Kumar and Bhoora.

12. On 06.02.1990, the court recorded the statement of the accused-appellants, Raj Kumar and Bhoora u/s 313 Cr.P.C. They have denied the prosecution case and have stated that the prosecution witnesses have given false evidence against them due to enmity. They have also stated that the Investigating Officer has wrongly filed charge-sheets against them.

13. The accused-appellants has stated in their additional statement that on the date of incident, the informant Pershadi had done *marpeet* with his father and maternal uncle regarding which first information report was lodged against him. Therefore, he filed wrong written report against the accused. The accused have filed documentary evidence in defense. They have filed paper no. 59/A which is the certificate issued by Janta Inter College, Bhatauna, to the effect that accused-appellant, Raj Kumar had passed Class-VIth in 1979-80 and his conduct has been good. Paper No. 60A/1 is the certified copy of the chik FIR lodged by Prahlad Singh against Devi, Harvir, Giriya, Hari, Shanker and Dariyav. Paper no. 60A/2 is the certified copy of the written report of Prahlad. Paper no. 61/A is the certified copy of the medical report of Prahlad. The defence has filed a copy of the FIR lodged by Prahlad but it does not mention the name of Mahavir.

14. It has been argued on behalf of the appellants that FIR has been lodged after a gap of 8½ hours after much delay. It has been argued that informant Pershadi is not an eye witness and he was not present at the place of occurrence. It has also been stated that only one accused, Bhoora used sharp-edged weapon balkati (gandasa) for causing injury to Mahavir. The other accused was having a lathi in his hand. There is no evidence of common intention. Accused-appellant, Raj Kumar cannot be held guilty for offence u/s 324 r/w 34 I.P.C. It has also been argued that on the date of occurrence of the alleged incident, the informant Pershadi has caused injury to father of maternal uncle of the

15. Per contra, learned A.G.A. has argued that on the basis of oral and documentary evidence, the prosecution has proved the charge against the accused-appellants beyond all reasonable doubts and they have been rightly convicted u/s 323/34 and 324/34 I.P.C. and sentenced accordingly.

16. Heard learned counsel for both the parties and perused the impugned judgement and order as well as the record of the trial court.

17. The injured PW1 Mahavir has stated in his evidence that one or two days before the incident, he and his father while returning from their **kolhu,** saw accused-appellants and one other person firing at their tubewell. Accused-appellant and the third person threatened them that they will not tell anyone about the incident. Although PW1 Mahavir and his father did not inform anyone about the incident but the accused-appellant had apprehension that they have informed others about the firing incident. Due to that enmity, on the date of occurrence when injured Mahavir and his father Pershadi were standing outside of their house, accused-appellants and one other person attacked. Accused-appellant Raj Kumar was having lathi in his hand and accused-appellant Bhoora was holding *balkati (gandasa)* with which both of them attacked. On their shouting, PW2 Vikram and Bhoja arrived there seeing them on the place of occurrence. PW1

Mahavir has also stated in his evidence that his mother and brother carried him to District Hospital, Khurja, where he was medically examined and given medical treatment. PW1 Mahavir has deposed that on being informed, his father Pershadi reached the hospital. Thereafter, he prepared the written report and lodged the FIR in P.S.- Jahangirpur, District-Bulandshahr.

PW2 Vikram Singh, eye witness of the occurrence, has also stated in his evidence that on the date of occurrence, he saw the appellant, Raj Kumar and Bhoora, attacking injured Mahavir with lathi and balkati (gandasa) respectively. He and Bhoja reached there and saved the injured. On their reaching there, accused-appellants fled from the place of occurrence. PW2 Vikram Singh has also proved in his evidence that injured Mahavir was carried by his mother to District Hospital, Khurja. He was admitted and underwent medical treatment.

18. PW3 Pershadi has deposed in his evidence that he was informed by Bhoja about the incident while he was at his home situated at P.S.- Jahangirpur. He reached the hospital where he found his son, Mahavir admitted in the hospital in an injured state. He inquired from his son about the incident and thereafter, got the written report prepared by some Satyaveer and submitted it at P.S.- Jahangirpur. After the written report (Ext.Ka.1) was submitted, FIR was lodged against appellants, Raj Kumar and Bhoora.

19. PW3 Pershadi has also stated in his evidence that the possession of blood-stained clothes (material Exts.1 to 3) was taken by the Investigating Officer and prepared the memo regarding it.

20. The oral evidence of injured Mahavir is corroborated by the evidence given by the witnessees, PW2 Vikram Singh and PW3 Pershadi. The evidence of aforesaid witnesses PW1, 2 and 3 appears to be true, trustworthy and reliable and even after lengthy cross-examination done by the defence, nothing has been found in their cross-examination so as to make their evidence untrue or unreliable. The oral evidence of PW1, 2 and 3 have been corroborated by the documentary evidence, namely, written report, chik FIR, report regarding G.D. copy, site plan of the place of occurrence and charge-sheets submitted against the accused-appellants, Raj Kumar and Bhoora.

21. The injury no. 1 of PW1 Mahavir is an incised wound on the back of left side on the head. According to the opinion of PW4 Dr. Ravi Kumar Sharma, it has been caused by sharp-edged weapon and x-ray has been advised but in the x-ray report, no fracture was found in the skull bone of the injured. 2-3 days prior to the occurrence, appellant, Raj Kumar and Bhoora, had threatened the injured Mahavir and Pershadi from disclosing to anyone about firing done by them.

22. PW1 Mahavir, PW2 Vikram Singh and PW3 Pershadi have deposed in their evidence that the accused-appellants had apprehension that injured, Mahavir and his father, Pershadi had told about their illegal activities to the villagers. On the day of occurrence, accused-appellants, Raj Kumar and Bhoora, chased them and in pursuance of common intention, caused injury to PW1 Mahavir as mentioned above.

23. Thus, from the evidence produced by the prosecution, motive of the accused-

appellants to commit the offence has been sufficiently proved by the prosecution.

24. PW1 Mahavir, PW2 Vikram Singh and PW3 Pershadi have stated that injured Mahavir's father was not present on the place of occurrence. After the occurrence, the injured was carried to District Hospital, Khurja, where he had undergone medical examination and was referred to medical treatment. On being informed by witness Bhoja, informant Pershadi reached the Khurja hospital and after being informed by his son Mahavir about the occurrence, he went to P.S.-Jahangirpur and lodged the FIR. Thus, the prosecution has sufficiently explained the alleged delay in lodging of the FIR.

25. The documents filed by accused-appellants in defence have not been proved by any witness. Thus, reliance cannot be placed on them.

26. Accused-appellants have proved that accused father had lodged the FIR against the informant therefore in rebuttal, the present case was lodged against them. From the perusal of the FIR filed by accused-appellant, it transpires that in the list of accused, the name of Pershadi is absent. The defence has not made it clear that who are the named accused in the FIR lodged by Prahlad. Thus, the accused-appellants do not get any benefit from the documents filed by them. Thus, the documents filed by the accused-appellants does not rebut the prosecution case.

27. From the appreciation of the evidence on record, this Court has made considered opinion that prosecution has proved the charge u/s 324/34 and 323/34 I.P.C. against the appellants beyond all reasonable doubts.

28. Learned counsel for the appellants has argued that the occurrence took place on 17.02.1983 about 39 years before and on the date of occurrence, accused-appellants were in their teens. They may be granted benefit of the Probation of Offenders Act, 1958.

29. Section 4 of the Probation of Offenders Act, 1958 reads as follows :

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

30. A similar provision finds place in the Code of Criminal Procedure. Section 360 Cr.P.C. provides:

360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub- section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he

may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub- section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

31. These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not been much utilized by the courts. It becomes more relevant and important in our system of

administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused persons. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

32. In the case of **Subhash Chand and others vs. State of U.P., 2015 Lawsuit (Alld) 1343**, this court has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:

"It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellate courts. The Registrar General of this Court is directed to circulate copy of this Judgment to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgment. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

33. In addition to the above judgment of this Court, this Court finds that the Hon'ble Apex Court in the case of **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659**, giving the benefit of Probation of Offenders Act, 1958 to the accused has observed as below:

"The learned counsel appearing for the accused submitted that the incident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The incident is not such as to direct the accused to undergo sentence of

imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

34. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622,** the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

35. In the light of above discussion, I find no illegality, irregularity or impropriety nor any jurisdictional error in the impugned judgment and order of the court below. The conviction recorded by the court below under Sections 324/34 and 323/34 I.P.C. is upheld and is not required to be disturbed.

36. However, instead of sending the appellants to jail, they shall get the benefit of Section 4 of the Probation of Offenders Act, 1958. Consequently, the appellants shall file two sureties to the tune of Rs. 25,000/- coupled with personal bonds and undertaking to the effect that they shall not commit any offence and shall observe good behaviour and shall maintain peace during the period of one year. If there is breach of any of the conditions, they will subject themselves to undergo sentence before the court below. It is also desirable that accused-appellants may be directed to deposit Rs.4,000/- each as cost and compensation in this case within two months. From the aforesaid amount deposited by the accused-appellants, Rs.5,000/- shall be paid to injured Mahavir or in case of his death to his legal representatives. The bonds and sureties aforesaid be filed by the accused persons within two months from the date of the judgment in the court concerned as per law and rules. In case surety bonds and compensation is not deposited, appellants shall be sentenced to simple imprisonment for one year.

37. Accordingly, this appeal is partly allowed regarding sentences of the appellants.

38. Let a certified copy of this order along with record be sent to the court concerned for compliance.

(2022) 12 ILRA 804
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.12.2022

BEFORE

THE HON'BLE MRS SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 1447 of 2013
With
Criminal Appeal No. 2710 of 2013

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

Counsel for the Appellant:
Sri Pramod Kumar Srivastava, Sri Mohd. Samiuzzaman Kha, Sri Nisar Uddin, Sri Moeez Uddin

Counsel for the Opposite Party:
G.A., Sri Rahul Kumar Tripathi

(A) Criminal Law – Criminal Procedure Code, 1973 -Sections 207 & 313 - Indian Penal Code, 1860 -Sections 201, 302 & 364 - India Evidence Act, 1872 - Section - 27 - Criminal Appeal – challenging the order of Conviction & Sentence - U/s 302 for Life imprisonment with fine, U/s 201 for 3 Years RI with fine & U/s 364 for 5 Years RI with fine -

Evaluation of Evidences - allegations that, accused-appellants are kidnapped the deceased & killed him and further burying his dead body behind his house - since prosecution case totally is rests upon the circumstantial evidences, therefore in such a case prosecution is required to prove the each links, which are known as five Golden Principles of circumstantial evidences and as well as no other inference can be drawn from those circumstances - Court finds that, there are lack of motive, enmity & eye witnesses as well as gap of chain of evidences so complete - therefore, prosecution fails to prove its case beyond the reasonable doubt - held, Trial court convicted the appellants by misappreciation of evidences on record - consequently, impugned order of conviction & sentences is set aside - Appeal allowed - directions issued for releasing the appellants from jail accordingly.(Para – 20, 21, 23, 31)

Both appeals are allowed. (E-11)

List of Cases cited:

1. Bodhraj Vs St. of J. & K., (2002) 8 SCC 45

2. St. Vs Kallu Yadav & ors., S.T. No. 152 of 2004

3. Vijay Kumar Vs St. of Raj., 2014 (2) Scale 387

(Delivered by Hon'ble Subash Chandra Sharma, J.)

1. These appeals emanate from the judgment and order dated 13.02.2013 passed by the Additional Sessions Judge, Court No.6 Kaushambi in S.T. No.152 of 2004 (State vs. Kallu Yadav and others) arising out of Crime No.153 of 2004, under Section 364, 302, 201 I.P.C, Police Station Puramufti, District Kaushambi whereby the appellants were convicted and sentenced under Section 302 I.P.C. for life imprisonment with fine of Rs.2000/- ; under Section 201 I.P.C. for a period of 3 years rigorous imprisonment with fine of Rs.1000/- and under section 364 I.P.C for a period of 5 years rigorous imprisonment with fine of Rs. 2000/- by each and in default of payment of fine to further undergo for period of one month simple imprisonment. All the sentences are to run concurrently.

2. The prosecution case in brief is that informant Smt. Sudha Devi wife of Sri Baijnath Yadav was resident of the Village Chhabilwa, Police Station Puramufti, District Allahabad (now Kaushambi). On 17.06.2004, the deceased Phoolchand Yadav, son of the informant, was sitting on the board (*takht*) lying in the varandah at about 12o'clock in the noon. In the meantime, Kallu Yadav known to the deceased came there with smiling face at which the deceased also smiled and both of them went together. The deceased did not return to his house and searches were made but ended unsuccessful, as a result, missing report was filed at the Police Station Puramufti on 26.06.2004 by the informant, which was entered into G.D. as report No.19 dated 26.06.2004. Later on, Kallu Yadav and Makhan Pasi were interrogated by the police in which they disclosed that they had committed the murder of the deceased Phoolchand Yadav and buried his dead body near the puddle behind the house where appellant Kallu Yadav lived. At the instance of both the appellants, the dead body of the deceased was recovered by digging the place where it was buried by them. It was identified by the informant as dead body of her son Kallu Yadav. The case was converted as Crime No.153 of 2004, under Section 364, 302, 201 I.P.C. and investigation was handed over to Sub Inspector D.K. Saini.

3. The inquest of the deceased was conducted by Sub Inspector D.K. Saini and other papers were prepared, the dead body

was sealed and handed over to Constable Kamlakant and Krishnakant to carry it for post-mortem.

4. The post-mortem of the dead body of the deceased Kallu Yadav was conducted on 30.07.2004 at 2:30 P.M. by Dr. R.K. Dubey Orthopaedic Surgeon District Hospital Allahabad who mentioned in the post-mortem report that the dead body was brought by constable Kamlakant and Krishnakant in a sealed bundle sent by the Station House Officer, Police Station Puramufti and also affirmed the fact that seal was found intact and correct.

5. The findings recorded in the post-mortem report of the deceased Phoolchand Yadav are as under :-

Age about 25 years, the whole body was completely distorted and decomposed, mud was present over the body, bones were separated in pieces, decomposed pieces of muscles and ligaments were present, lower limb length 2 feet, 11 inches, the right side skull was fractured in parietal region and a regular piece was absent, the cause of death was found to be coma as a result of antemortem injury.

6. The investigating officer D.K. Saini recorded the statements of witnesses and inspected the place of occurrence, prepared the site plan relating to the place where from the deceased was taken away by the appellant Kallu Yadav and the place wherefrom the dead body was recovered. After recording the statements of the witnesses conversant to the facts of the case he found prima facie case made out under Section 364, 302, 201 I.P.C. against these appellants thereafter, filed charge sheet before the court concerned. The cognizance of the offences was taken by the learned court concerned who provided copies of the prosecution papers to the appellants in compliance of Section 207 Cr.P.C. and committed the case for trial.

7. The learned trial court framed the charges under Section 364, 302, 201 I.P.C. against the appellants on the basis of material on record after giving the opportunity of hearing to them. Charges were read over and explained to which they pleaded not guilty, denied the charges and claimed for trial. Consequently, the case was fixed for prosecution evidence.

8. The prosecution examined PW-1 Smt. Sudha Devi, PW-2 Sukhnandan @ Fajji as witnesses of facts, PW-3 Dr. R.K. Dubey who conducted the post-mortem of the deceased, PW-4 Sub Inspector/H.M. Ram Kumar Yadav who lodged the missing report, PW-5 Sub Inspector D.K. Saini who conducted the investigation of the case and submitted the charge sheet.

9. After conclusion of prosecution evidence, the statements of appellants were recorded under Section 313 Cr.P.C. wherein they negated the statements made by the witnesses before the court and stated that they had been implicated falsely in this case on account of enmity. The opportunity of defence evidence was given to the appellants but they did not adduce any evidence.

10. Learned trial court heard the arguments on behalf of the prosecution as well as the appellants and passed the judgment and order dated 13.02.2013 wherein the court concerned found the

appellants guilty under Sections 364, 302, 201 I.P.C. and sentenced them as aforesaid against which these appeals have been preferred.

11. Learned counsel for the appellants argued that the judgment of the learned trial court is against the evidence available on record and it is bad in the eyes of law and based on the testimony of interested witnesses related to the deceased who were not present at the time of alleged incident. The testimony of the interested witnesses is full of contradictions. No independent witness had been examined to affirm the prosecution case. No motive has been assigned to these appellants to commit murder of the deceased. It has also been argued that no disclosure statement of the appellants was recorded by the I.O. but at the instance of the appellants recovery of dead body and spade was shown by the I.O. which was not made in a proper way but was relied upon by the learned trial court. Even the dead body was not identifiable at the time of recovery and post-mortem. PW-1 and PW-2 were not even present at the time of alleged recovery though their presence had been shown by the Investigating Officer. In this regard, the statements made by PW-1 and PW-2 are contradictory and not reliable. In this way, the prosecution could not prove its case beyond reasonable doubt, therefore, the appellants are entitled for acquittal and the appeals deserve to be allowed.

12. Learned A.G.A. contended that in this case the deceased was taken away by the appellant Kallu Yadav from his house in the presence of his mother PW-1. Later on, his dead body was recovered at the instance of appellants Kallu Yadav and Makhan Pasi. Prior to the incident of murder, deceased was seen by PW-2 while going on bicycle with appellants. Even spade and iron rod used in the commission of murder of the deceased and buried dead body were recovered at the instance of these appellants. In this way, the circumstances proved with evidence clearly indicate that these appellants committed murder of the deceased and concealed his dead body. With the evidence on record the charges against the appellants are proved beyond reasonable doubt. Therefore, the judgment and order passed by learned Sessions Judge is sound and these appeals being devoid of merit are liable to be dismissed.

13. With the submissions as made by the learned counsel for the appellants as well as learned A.G.A., the question before this Court to consider is as to whether the circumstances proved by the prosecution unerringly indicate that these appellants committed murder of the deceased and concealed his dead body in the ground which was recovered at their instance.

14. Before we deal with the contentions raised by the learned counsel for the appellants, it would be convenient to take note of the witness account as adduced by the prosecution.

15. PW-1 Smt. Sudha Devi was the informant who deposed that 6 years prior to the deposition, at about 12 O'clock during the day she was sitting at the board(takht) in varandah of her house with her son Phoolchand aged about 25 years who was unmarried. Kallu Yadav resident of Kajipur who used to come to the village Chhabilwa came to her house and took her son with him. She asked her son Phoolchand as to where was he going, at which he responded that he would come back after a while but he did not return. She made searches but

could not find the whereabouts of his son and then gave an application for missing at the police station Puramufti which she proved as Ex Ka- 1. This witness was subjected to cross-examination which will be discussed in later part of this judgment.

16. PW-2 Sukhnandan @ Fajji brother of the deceased deposed that it was 12 O'clock in the day when his brother was taken by appellant Kallu Yadav from his house. At that time, his mother was also present. Appellant Kallu Yadav took his brother. Makhan was cycling,his brother Phoolchand was sitting on the front side of the bicycle and Kallu Yadav was on the back. All of them met him at about 5 P.M. near Tera mill. He enquired from his brother Phoolchand who replied that he was going to have food at the house of Kallu Yadav and, thereafter, he never returned. Kallu Yadav and Makham Pasi committed murder of his brother Phoolchand and the dead body of his brother was found after one month and ten days, buried ten steps behind the house of Kallu Yadav. This fact was disclosed by Kallu Yadav before the Sub-Inspector. After inquest, the dead body was sent to Allahabad for post-mortem. P.W.2 had identified his signature on the inquest report which was proved as Ex Ka-2. This witness was also cross-examined by the learned counsel for the appellants.

17. PW-3 Dr. R. K. Dubey deposed that, on 30.07.2004, he was posted as Orthopaedic Surgeon in Motilal Nehru Hospital. On that day, he was on the post-mortem duty and conducted post-mortem of the dead body of deceased Phoolchand Yadav which was sent by the Station House Officer, Police Station Puramufti in sealed state. Seal was found to be intact and the body was brought by constable Kamlakant and Krishnakant with relevant papers. The age of the deceased was about 25 years and near about 5 weeks had passed after his death. The whole body of the deceased was decomposed and mud was present all over the body. Bones were separating from one another, muscles and ligaments were decomposed, the length of his feet was 2 feet and foot was 9.5 inch. Right side parietal bone was broken in pieces. The membrane in the head was also decomposed, ribs were separating from the backbone and decomposing, chest wall was also decomposing, lungs had decomposed completely, heart and its membrane was decomposed. Small intestine, large intestine, liver, kidney and spleen were also decomposed. The cause of death of the deceased was coma as a result of ante-mortem injury. One pant, under-wear, vest and shirt were recovered from the dead body and having sealed them it was handed over to the constables. Jaws of the deceased were separated and there were 16 x 16 teeth. He proved the post-mortem report in his hand writing and signature as Ex Ka-3.

18. PW-4 Sub-Inspector Ram Kumar Yadav deposed that on 26.06.2004 he was posted at the Police Station Puramufti as H.M. On that day at 11:30 A.M., Smt. Sudha Devi was present at the police station and handed over a written report under her thumb impression regarding missing of her son Phoolchand on the basis of which he made entry in the G.D. at 11:30 A.M. in his hand writing and signature which he proved as Ex Ka-4.

19. PW-5 Sub-Inspector Dilip Kumar Saini, the Investigating Officer deposed that, on 28.07.2004, he was posted as Station House Officer at Police Station Puramufti. On that day, on the basis of the investigation of the missing report

regarding Phoolchand the Case Crime No.153 of 2004, under Secton 364 I.P.C. was registered which was investigated by him. He copied the contents of the missing report in C.D. On 29.07.2004, he recorded the statements of Smt. Sudha Devi, the informant and Sukhnandan and made spot inspection at the instance of Ram Chandar. He arrested accused persons Kallu Yadav and Makhan Pasi from G.T. Road at about 12:10 P.M. After recording their statements, at their instance the dead body of the deceased was recovered from the village Kajipur and the inquest report was prepared with relevant papers and the dead body was sent for post-mortem. The weapon used in committing murder of the deceased iron rod and spade were also recovered regarding which recovery memo was prepared. On 31.07.2004, post-mortem report was received and copied in the C.D. On 24.08.2004, the statement of witness Harilal and Ashraf were recorded with other witnesses relating to the inquest. After collecting evidence, he submitted the charge sheet against the accused persons. He proved the site plan, recovery memo in his hand writing and signature as Ex Ka-5 to Ex Ka- 14. He also proved the inquest report as Ex Ka- 2 in his hand writing and signature with other papers prepared by him. This witness was also cross examined by the learned counsel for the applicants which will be considered in the later part of this judgment.

20. From the evidence on record, it appears that there is no direct evidence against the appellants to commit murder of the deceased Phoolchand Yadav and burying his dead body behind his house but the whole prosecution case rests upon the circumstantial evidence. In such a case, the prosecution is required to prove the links which unerringly indicate that these were the accused persons who committed the murder and no other inference can be drawn from those circumstances.

21. The most fundamental decision on circumstantial evidence is ***Hanumant Govind Nargundkar vs. State of M.P AIR 1952 SC*** which laid down the five golden principles which constitute the Panchsheel of root of the case based on the circumstantial evidence. (1) circumstances from which the conclusion of guilt is to be drawn should be fully established (2) fact so established should not be explainable on any hypothesis except that accused is guilty (3) facts should be of conclusive nature (4) the fact should exclude every possible hypothesis except the one to be proved (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities it must have been done by the accused. In the case of ***Bodhraj vs. State of Jammu and Kashmir (2002) 8 SCC 45***, it was held by the Supreme Court that conviction can be based on wholly circumstantial evidence but it should be tested on the touchstone of law relating to the circumstantial evidence laid down by the Hon'ble Supreme Court in Hanumant Govind Nargundkar case. Further in the case of ***Vijay Kumar vs. State of Rajsthan 2014 (2) scale 387,*** it was held that in a case based on circumstantial evidence the settled law is that the circumstances from which conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover all the circumstances should be complete and there should be no gap left in the chain of evidence.

22. In the present case, occurrence is said to have taken place on 17.06.2004 at 12 a.m. when appellant Kallu took deceased Phoolchand with him in the presence of his

mother (P.W.1). The deceased did not return regarding which no missing report or F.I.R. was lodged by the informant at the police station concerned but it was given in the police station on 26.06.2004 as Ext. Ka-1 which was entered into G.D. as report No.19 dated 26.06.2004. On 27.06.2004 and after inquiry it was registered as Crime. No. 153 of 04 under section 364 I.P.C. on 28.07.2004 and recovery of dead body was made on 29.07.2004. P.W.1 also stated that after a month, dead body of her son was found, then she went to the police station and lodged F.I.R. The dead body was kept at the police station. P.W.2 also stated that he went to the police station with his mother and 50 other people. On the day, the dead body was recovered he did not lodge the F.I.R, but his mother lodged the report by dictating it to police. P.W.1 also admitted that she gave an application about the dead body after affixing her thumb impression on the day, the dead body was recovered. In this way, it is established that the F.I.R was not lodged promptly. Though it is sought to be proved by the prosecution that the F.I.R was filed with delay of 10 days as per the record, i.e. on 26.06.2004 and 27.06.2004 but the record is inconsistent with the statement of the witnesses P.W.1 and P.W. 2, according to whom the report was given in the police station only after the dead body was recovered on 29.07.2004.

23. In a case based on circumstantial evidence, motive is significant but in the present case there is no motive with the appellants to commit the murder of the deceased. Even P.W.1 stated clearly that there was no dispute between her son and appellants Kallu and Makkhan. So there is lack of motive.

24. The dead body was identified by the informant, mother of the deceased and his brother Sukhnandan. P.W.1 the informant deposed that she went to the police station where Darogaji told her that Kallu and Makkhan had murdered her son. No where she stated that she herself identified the dead body being of her son. P.W.2 Sukhnandan has also not stated in his chief-examination that he had identified the dead body but in his cross examination he stated that the dead body was lying at the police station and it was decomposed but from face it was identifiable. P.W.3 Dr. R.K Dubey stated that the whole dead body of the deceased was distorted and decomposed. In his cross-examination, the doctor further stated that the dead body was not identifiable.

25. P.W.1 informant herself did not identify the dead body but it was told to her by the police that appellants Kallu and Makkhan had committed the murder of his son Phoolchand. It was told when she went to the police station on the day the dead body was recovered but it was not recovered in her presence. She never stated that she had identified the dead body by seeing it or from the clothes of the deceased. She also expressed that the dead body was not recovered in her presence. P.W.2 Sukhnandan stated that the dead body of the deceased was lying at the police station, it was decomposed yet face was identifiable though as per version of the doctor P.W.3, the skin on the face was rotten only bones could be seen and the face was also not identifiable. Thus the dead body was not in identifiable state either by face, body or clothes because clothes were also rotten as per the doctor's account, therefore, the identification of the dead body of Phoolchand has not been established either in view of the statement of P.W.1(mother) or P.W.2 (brother) with the statement of P.W.3.

26. P.W.5, the Investigating officer stated that he arrested the accused persons Kallu and Makkhan Pasi from G.T Road, village Navapur turn at the instance of Ramchandra and Sukhanandan, brother's of the deceased at 12.10 pm on 29.07.2004. P.W.2 Sukhnandan never stated that the appellants were arrested by the police at his instance from GT Road on 29.07.2004 but stated that on the second day of occurrence Kallu met him and was brought to the police station. On the day, the dead body was found he went to the police station with his mother and 50 other people. His mother lodged the report. His thumb impression was got affixed by the police at the police station. He did not make any signature. Kallu was in the lockup then the police told him that Kallu had committed murder of his brother. In this way, arrest of the accused/appellants is also not established having been made from the G.T Road as shown by the Investigating Officer in the presence of P.W.2 or at his instance on 29.07.2004.

27. So far as the disclosure statement of recovery of the dead body and spade etc. are concerned, Ext. Ka. 7 & 8 are the recovery memos of the dead body of deceased Phoolchand, spade and iron rod etc. Ext. Ka. 7 discloses that appellants Kallu and Makkhan confessed that they had committed the murder of the deceased together and burried the dead body in the garden of Ramkhelawan in the village Kazipur which they could recover. Appellants were brought to the aforesaid place in the police jeep with witnesses-Ramchandra and Sukhnandan, where they indicated the place of burial of the dead body, a spade was brought from the neighbourhood and the dead body was excavated by the appellants which was found covered in a cloth. Both the appellants told that the digged dead body was of deceased Phoolchand. Dead body was identified by the eye witnesses of recovery and the recovery memo was prepared and got signed by the accused/ appellants and witnesses. Likewise, spade and an iron rod were also recovered from the room of Gorelal which was told to be in possession of the appellants by them and the aforesaid articles were given by them from beneath the Takht. Recovery memo Ex. Ka.8 was prepared and got signed by the appellants and witnesses Ramchandra and Sukhnandan.

28. During trial, the Investigating Officer was examined as P.W.5 who narrated the incident of recovery as aforesaid but during his cross examination he stated that the dead body was exhumed by the witnesses present, those were Ramchandra, Sukhnandan @ Fajji; Ram Sufal and Kundan. Dead body was kept on the surface after excavation by them. He also stated that he had not mentioned in Ext. Ka.7 as to which appellants made the disclosure statement first and who gave the weapon used in the murder. He also did not mention as to which of the appellant was going ahead, behind or whether they went together.

29. P.W.2 Sukhnandan, the witness of recovery of the dead body and weapons used in the murder, made quite different statement during his examination before the trial court. He stated that he came to the police station with his mother on the day, the dead body was recovered. About 50 other people also went to the police station with him. His mother lodged the report. His thumb impression was taken by the police. He further stated that he never gave his thumb impression or signature to the police prior to that. When the dead body was lying at the police station, he and other persons were

present where their thumb impressions were taken. At the time of the recovery of the dead body, he with his mother went by tempo with other people. People told that the dead body had been recovered, then he went there from home. Police showed him the spade and an iron rod at the police station. When he reached the police station, Kallu was confined in the lockup . Police told him that Kallu had committed murder of his brother, then he came to know that Kallu committed the murder of his brother. Police also told about the recovered articles. The statement of P.W.2 also is in sync. with the statement of P.W.1 informant in this respect when she stated that she went to the police station after recovery of the dead body which was placed at the police station. Darogaji told him that Kallu and Makkhan had committed murder of Phoolchand. In this way, the arrest of appellants from the GT Road, recovery of the dead body of the deceased, the spade and an iron rod, as made by the Investigating Officer does not corroborate with the testimony of P.W.2 Sukhnandan who was alleged to be the witness of recovery. Even the disclosure statement and the recovery whether made either by the appellant Kallu or by Makkhan alone or by both simultaneously, had also not been made clear by the Investigating Officer which fact he admitted during his cross-examination. As a result, the disclosure statement, recovery of the dead body with other articles said to have been used in the commission of the murder can not be said to be established and proved in accordance with the provisions of Section 27 of the Evidence Act.

30. P.W.2 Sukhndandan stated, in his examination in chief, that at about 5 o'clock, all persons met to him at 13 Mile. Makkahn was cycling, Phoolchand was sitting on the front side and Kallu on the hind. He enquired from his brother Phoolchand who said to him that he was going to eat at the house of Kallu Yadav and then he did not come back. The dead body of his brother was found after one month and ten days. This fact of last seen by this witness was not mentioned in the F.I.R. by the informant who was his mother and went to the police station with the witness Sukhnandan(P.W.2.) when the report was given at the police station concerned on 26.6.2004, after ten days of the alleged incident marked as Ext. Ka. 1, and after the recovery of dead body as per the version of P.Ws. 1 and 2 i.e. about one month ten days. In this way, the account of last seen given by P.W. 2 does not inspire confidence and cannot be said to be truthful.

31. Having considered the circumstances of the case as aforesaid, we are of the view that the prosecution could not prove its case beyond reasonable doubt against the appellants. The circumstances said to have been proved do not unerringly indicate the guilt of the appellants, so the appellants cannot be convicted and sentenced for the aforesaid charges. The learned trial court did not make proper appreciation of evidence but convicted the appellants by misappreciation of the evidence on record,which cannot be sustained in the eye of law. Consequently, the judgment and order dated 13.02.2013 is hereby set aside. The appellants are acquitted of all the charges.

32. The appeals are ***allowed.***

33. The appellant Kallu Yadav is in jail. He shall be released from the jail forthwith, if not wanted in any other case.

34. The appellant Makkhan Pasi is on bail. He need not to surrender. His bail

bonds are cancelled and sureties are discharged.

35. The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance.

The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad within one month.

(2022) 12 ILRA 813
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No.2117 of 1988

Tahar Singh & Anr. ...Appellants (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri Haider Zaida, Usha Srivastava, Sri Vinod Kumar Srivastava

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

(A) Criminal Law – Criminal Procedure Code, 1973 -Sections 161 & 313 - Indian Penal Code, 1860 - Sections 34, 302, 307 & 324 - India Evidence Act, 1872 - Section 134 - Criminal Appeal – challenging the order of Conviction & Sentence of Life imprisonment U/section 302/34 IPC - Evaluation of Evidences - Allegations that, accused persons inflicted the injuries upon the deceased with sword & axe respectively due to which deceased was died on spot & they were also assaulted upon the PW-2 with above arms when PW-2 was trying to hold the accused persons - Court finds that, prosecution has proved each and every circumstances leading to the homicidal death of the deceased by cogent and trustworthy evidence beyond reasonable doubt - thus, conviction & sentence of Life imprisonment under section 302/34 IPC is confirmed - directions accordingly.
(Para – 57, 61)

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 - Sections 34, 302, 307 & 324 - India Evidence Act, 1872 - Section 134 - Criminal Appeal – Challenging Conviction & Sentence of - Five year Rigorous imprisonment U/section 307/34 IPC - Evaluation of Evidences & Application of Section 307 - Allegations that, accused persons inflicted the injuries upon PW-2 when they were assaulted to the deceased with sword & axe respectively due to which deceased was died on the spot & PW-2 was injured when he was trying to hold them - It is settled law that, Question of intention to kill or knowledge of death is always a question of fact and not of law - merely causing hurt with intention or knowledge of causing death is sufficient to attract section 307 IPC - from the evidence on record and from the deposition PW-2 court finds that - offence committed by the appellants in respect of injured PW-2 falls in the category of offence under section 324 IPC not under section 307 IPC - thus, appeal is partly allowed - conviction & sentence under section 307/34 of IPC is modified and is converted into section 324/34 of IPC - directions accordingly.
(Para – 53, 54, 56, 61)

Appeal Partly allowed. (E-11)

List of Cases cited:

1. Amar Singh Vs St. (NCT of Delhi), (2020) 19 SCC 165

2. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537

3. Gopal Singh Vs St. of Uttrakhand, (2013) 7 SCC 545

4. Hari Kishan and St. of Har. Vs Sukhbir Singh, AIR 1988 SC 2127

5. Hema Vs State, (2013) 81 ACC 1 (SC)

6. Indrapal Singh Vs St. of U.P. (2022) 4 SCC 631

7. Maqbool Vs St. of Andhra Pradesh, AIR 2011 SC 184

8. Nankaunu Vs St. of U.P. (2016) 3 SCC 317

9. Raj Narain Singh Vs St. of U.P. 2010 AIR(SCW) 521

10. St. of Har. Vs Krishan, AIR 2017 SC 3125

11. Surinder Kumar Vs St. of Punj., (2020) 2 SCC 563

12. Sunil Kumar Vs St. (NCT of Delhi), (2003) 11 SCC 367

13. St. Vs Tahar Singh & ors., Sessions Trial No. 179 of 1986

14. St. of M.P. Vs Harjeet Singh & anr., AIR 2019 SC 1120

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

1. This criminal appeal has been preferred by the appellants Tahar Singh and Bal Krishna against the judgement and order dated 14.9.1988 passed by IInd Additional District & Sessions Judge, Kanpur Dehat in Sessions Trial No.179 of 1986 (State vs. Tahar Singh and others) convicting the appellants for the offence punishable under Sections 302/34 IPC and 307/34 IPC and sentencing them to undergo life imprisonment and to undergo five years rigorous imprisonment, respectively. All the sentences were directed to run concurrently.

2. At the outset, it is to be noted that against the impugned judgment and order, accused Sughar Singh and Munshi Lal had preferred Criminal Appeal No.2103 of 1988. Since these accused have expired, appeal preferred by them has been abated vide order dated 1.11.2022 passed by this Court.

3. Brief facts of the case, as unfolded by the informant Ramesh Chandra Yadav son of Gajodhar Singh in the First Information Report (in short 'F.I.R.'), are that the informant was married with the daughter of late Sovran Singh, resident of village Rasoolpur, police station Kakwan in the year 1971. He was having a brother-in-law, who expired. His mother-in-law (Smt. Kitab Shri) had no other issue except the wife of the informant i.e. Smt. Chhidani Devi. Informant had gone to village Rasoolpur to attend the marriage ceremony of daughter of Dharam Singh, cousin brother-in-law of the informant (chachera sala). On 25.6.1986, informant was about to return home alongwith his wife and mother-in-law by the bullock-cart of Dharam Singh. At about 9.00 a.m. when Dharam Singh entered the house just to get them parking the bullock carts outside the village and said aunt get ready soon, it is getting late, close family members Tahar Singh son of Sughar Singh armed with sword, Balkarishna armed with axe and Sughar Singh son of Lal Singh Yadav armed with lathi entered into the house. Sughar Singh asked to the mother-in-law of the informant that he will not let her go and if she goes, she will transfer the whole land to her son-in-law. To this, she said that she will definitely go. Hearing her words, Munshi Lal exhorted to kill her. On this, accused Tahar Singh and Bal Krishna surrounded her and started assaulting with their respective weapons. On call of the informant and Dharam Singh, Arvind Kumar son of Manfool, Nahar Singh son of Ram Ram Autar, Ram Bhajan son of Dissa, Ram Narayan son of Kuber Yadav and

several other people reached there and made alarm. At this moment, Tahar Singh, Bal Kishan and Sughar Singh surrounded Dharam Singh and made lethal assault upon him. Mother-in-law of the informant died on the spot on account of the injuries inflicted by them and Dharam Singh was seriously injured.

4. On the basis of the written report (Ext. ka-1), chik F.I.R. (Ext. Ka-4) was registered at Police Station concerned on 25.6.1986 at 1.15 p.m. mentioning all the details as described in Ext. Ka-.1. G.D. entry was also made at the same time, which is Ext. Ka-5.

5. Investigation of the case proceeded. The Investigating Officer recorded the statement of Dharam Singh at the police station itself. He further recorded the statement of other witnesses also and recovered the murder weapons. He inspected the spot and prepared site plan. He also prepared the inquest report of the deceased and papers relating to post mortem. The Investigating Officer also took the specimen of plain soil and bloodstained soil from the place of occurrence and prepared the memo Ext. ka-13. Post mortem of the dead body of the deceased was performed.

6. Autopsy report (Ext. ka-3) was prepared by Dr. O.P. Sharma (PW-5) after performing the post mortem of the deceased on 26.6.1986 at 1.00 p.m. On examination of the dead body of the deceased, following ante-mortem injuries were found:

"i. Incised wound 9 cm X 2.5 cm bone cut 8.5 cm backward from right lower ear.

ii. Incised wound size 7 cm X 2.5 cm bone cut started from lower right ear towards mouth obliquely.

iii. Incised wound size 6 cm X 2 cm it is one c.m. below injury no.2.Lower jaw broken.

iv. Incised wound 16 cm X 2.5 cm, bone cut started from upper lip towards frontal bone. Nose also cut.

v. Incised wound 5.2 cm X 2.5 cm right side neck & backward, it is 7 cm below right lower ear.

vi. Incised wound size 3 cm X 1 cm it is 4 cm upward from wrist, posterior on the forearm."

7. In the opinion of the doctor, death was caused by reason of shock and haemorrhage due to injuries sustained.

8. Injured Dharam Singh was examined on 25.6.1986 at 5.30 p.m. and during his examination, following injuries were found :

"(1). Incised wound on Rt. upper arm 10 cm below acromodavicular joint directed obliquely size 4 ½ cm X 1 cm muscle deep, clotted blood present on wrist.

(2) Linear abrasion on back 4 cm below last cervical vertebra directed obliquely size 7 cm X 0.1 cm.

(3) Contusion on fore head 2 cm above left eye brow size 3 cm x 2 cm."

9. In the opinion of the doctor, all the injuries were simple. Injuries no. 1 and 2 were caused by sharp edged weapon, while no. 3 by blunt object. Injury report Ext. ka-2 was prepared.

10. After completing the investigation, charge-sheet (Ext. ka-17)

against all the four accused persons was filed. Concerned Magistrate took the cognizance. The case being exclusively triable by sessions court, was committed to the Court of sessions.

11. Accused persons appeared before the trial court and charges under Section 302 IPC read with Section 34 IPC and Section 307 IPC read with Section 34 were framed against them. They denied the charges and claimed their trial.

12. Trial proceeded and to bring home the charges against the accused persons, prosecution has examined in all seven witnesses, who are as follows:

1	Ramesh Chandra	PW-1 (informant / eye witness)
2	Dharam Singh	PW-2 (injured
3	Meghraj Singh	PW-3 (carrier of body of deceased for post mortem)
4	Dr. Tej Bahadur Singh	PW-4 (witness of injury report)
5	Dr. O.P. Sharma	PW-5 (witness of autopsy)
6	H.C.P. Jag Mohan	PW-6 (scribe of F.I.R.)
7	S.O. Anshuman Singh	PW-7 (Investigating Officer)

13. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Injury Report	Ext. A-2
3	Post mortem report	Ext. A-3
4	Chik F.I.R.	Ext. A-4
5	G.D. entry	Ext. A-5
6	Inquest Report	Ext. A-6
7	Photo lash, challan lash, letter to R.I., letter to C.M.O. and specimen sea	Ext. A-7 to Ext. A-11
8	Site plan	Ext. A-12
9	Memo of plain and blood stained soil	Ext. A-13
10	Memo of cloth of deceased	Ext. A-14
11	Seizure memo of murder weapons	Ext. A-15
12	Site plan of place of recovery	Ext. A-16
13	Charge sheet	Ext. A-17

14. After conclusion of evidence, statements of accused persons were recorded under Section 313 of Cr.P.C., in which they pleaded their false implication. However, no defence evidence has been adduced.

15. PW-1 and PW-2 are the witnesses of fact.

16. P.W-1, namely, Ramesh Chandra, in his oral testimony, has stated that deceased was his mother in law. She had some property in the village concerned. At the time of occurrence, she had only one daughter, who was the wife of PW-1. He further stated that since accused persons wanted to inherit the property of the deceased, due to that reason, they committed her murder. He has proved the written report Ext. A-1. He has explained the whole occurrence and the role of all the

accused persons in the commission of crime in his testimony.

17. P.W.-2 Dharam Singh is the injured witness. He has also corroborated the F.I.R. version and supported the testimony of PW-1. Both the aforesaid witnesses have, in clear terms, disclosed the role of the present appellants in commission of crime and have stated that Tahar Singh and Bal Krishna inflicted the injuries upon the deceased with sword and axe respectively, which resulted into her spontaneous death. They have also proved this fact that the present appellants also made assault upon the injured - PW-2 with their above mentioned arms and accused Sughar Singh also inflicted injuries upon the injured by lathi. They have also specifically mentioned the role of other accused Munshi Lal, who was exhorting other co-accused persons to do away with the deceased.

18. PW-3 to PW-7 are the formal witnesses.

19. PW-3 - Constable Meghraj Singh, in his deposition has proved this fact that after the inquest proceeding of the deceased performed by the S.O. Anshuman Singh, he alongwith Constable Ram Bhajan had taken away the dead body of the deceased for post mortem to Kanpur.

20. PW-4 Dr. Tej Bahadur Singh has medically examined the injured Dharam Singh and has proved the injury report Ext. ka-2.

21. PW-5 Dr. O.P. Singh has performed the autopsy of the deceased and prepared the Autopsy Report Ext. ka-3. He has also opined that the death was possibly caused on 25.6.1986 at 8.30 a.m..

22. PW-6 is the scribe of F.I.R., who has proved chik F.I.R. Ext. ka-4 and registration G.D. Ext. ka-5.

23. PW-7 S.O. Anshuman Singh is the Investigating Officer of the case, who has proved the proceeding of investigation in his testimony and also identified material exhibit-1 bloodstained baniyan of the deceased and material exhibit -2 the murder weapon lathi. He has also clarified this fact that the plain and bloodstained soil alongwith murder weapons "sword' and "axe' were sent to F.S.L., Agra for examination.

24. On the basis of aforesaid oral and documentary evidence, learned trial court recorded the conviction of all the four accused persons and sentenced them, as mentioned above.

25. Since the appeal of accused Sughar Singh and Munshi Lal has already been abated, present appeal is operative against convicts / appellants Tahar Singh and Bal Krishna only.

26. The impugned judgment and order of the trial court has been assailed by the learned counsel for the appellants on various grounds. It has been argued that the prosecution story rests upon the testimonies of two witnesses of fact, who are the interested witnesses. No other witness of the same vicinity has been produced, whereas in the F.I.R. itself names of independent witnesses have been mentioned. It is further submitted that due to some property dispute, appellants have been falsely implicated in this case but the learned trial court has completely ignored this fact. It has also been submitted that the medical evidence does not corroborate the prosecution version. Moreover, all the

murder weapons have not been produced before the Court at the time of evidence and no F.S.L. report was made part of the record, which makes the prosecution story highly doubtful. The investigation is faulty. The trial court, in fact, without considering the evidence on record in proper manner and without appreciating the factual scenario of the matter passed the conviction order in an arbitrary manner which is not liable to be sustained. It has been further submitted that from a perusal of the injury report Ext. ka-2 and on the basis of evidence of PW-4, it is evident that no case under Section 307 IPC is made out against the present appellants.

27. Per contra, learned AGA has contended that the prosecution case is fully supported by the medical evidence and injured witness and also the informant / eye witness have fully supported the prosecution case. There is no material fault in the investigation of the case and the trial court has committed no legal or factual error in passing the impugned judgment and order. The appeal has no merits and is liable to be dismissed.

28. Heard Shri Vinod Kumar Srivastava, learned counsel for the appellants and Shri Amit Sinha, learned AGA for the State.

29. From a perusal of the written report it appears that there was some property dispute between the parties. From the statement of PW-1, it appears that the deceased intended to give her property to her daughter and son-in-law and accused persons were not ready for that and in order to prevent her to do so, they committed her murder. It also comes out from a perusal of the statement of PW-1 that he had come to the house of his mother-in-law alongwith his family to attend the marriage ceremony of the daughter of Dharam Singh, who was his cousin brother-in-law and at the time of occurrence they were preparing to go back to their home after attending the marriage. In that way, the presence of PW-1 at the place of occurrence is quite natural and probable. The date, time and place, the manner of assault, the arms used in crime and the names of the participant accused persons, all these facts have been clearly stated in the testimony of PW-1, which finds support from the deposition of PW-2 also. PW-1 has been cross-examined at length on various points by the defence, but nothing adverse comes out. Likewise, PW-2 is the injured witness and as an injured witness his deposition stands on a different footing. All the material particulars finds support from the testimony of PW-2. He has specifically mentioned the names of the accused persons, who inflicted injuries upon him and also who made fatal blows upon the deceased on the exhortation of accused Munshi Lal.

30. In ***State of Haryana vs. Krishan, AIR 2017 SC 3125*** it has been so held that the deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of contradictions and discrepancies for the reason that his presence on the scene has been established in the case and it is proved that he suffered injuries during the incident.

31. In fact the presence of injured witness at the time and place of occurrence cannot be doubted, as he has received injuries during the course of incident and he should normally be not disbelieved.

32. It is desirable to have a glance upon the injury report Ext. ka-2 of the

injured PW-2. As per the prosecution version and as also affirmed by PW-2, he was hit by sword, axe and lathi. PW-4, the doctor, who had medically examined the injured PW-2, has found three injuries on the body of injured. He has specifically opined that injury nos. 1 and 2 might be caused by sword and axe. It is pertinent to mention here that injury no.1 found on the body of injured is an incised wound. Injury no.3 is a contusion, which, according to PW-4, might be caused by lathi. The injury report was prepared on 25.6.1986 at about 5.30 p.m. and PW-4 has opined that the injuries might be inflicted at 9.30 a.m. same day.

33. Non-production of independent witnesses has been made another point for contention by the appellants.

34. Learned counsel for the appellants has vehemently argued that the prosecution has failed to explain as to why the independent witness of the same locality was not produced as witness in this case. In the F.I.R. itself many witnesses have been named but none was examined before the Court.

35. The learned AGA has contended that this is the discretion of the prosecution to produce as many as witnesses before the Court and the defence has nothing to do with that.

36 . Under Section 134 of the Indian Evidence Act, it has been provided that "No particular number of witnesses shall in any case be required for the proof of any fact." In fact, this is the quality of evidence of witness to prove a fact and not the number of the witnesses, which is important. If wholly reliable, testimony of a solitary witness may be sufficient to record conviction of an accused. This view has been reiterated in **Amar Singh Vs. State (NCT of Delhi) (2020) 19 Supreme Court Cases 165,** wherein it has been held as follows:

"....As a general rule the Court can and may act on the testimony of single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony Courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise (see Sunil Kumar V/s State (NCT of Delhi) (2003) 11 SCC 367)."

37. In fact, it is not the number of witnesses, but material evidence which has to be taken note of by the Courts to ascertain truth of allegations made by the prosecution. It is never necessary that all the persons, who were present on the spot, even in a murder case, must be examined.

38. If we translate the aforesaid legal principles into the facts of this case, we find that the testimonies of PW-1 and PW-2 have a ring of truth and are cogent, credible and trustworthy and corroborate each other and there was no necessity for the prosecution to search for any further corroboration of their evidence. Reference can be made on the Hon'ble Apex Court decision in **Raj Narain Singh Vs. State of U.P. 2010 AIR SCW 521,** wherein it has been held that it is not necessary that all

those persons, who were present at spot, must be examined. It is quality of evidence which is required to be taken note of by Courts.

39. It is true that PW-1 is the son-in-law of the deceased and deceased was Mausi (aunt) of PW-2. Hence, they were relatives of the deceased. The learned counsel for the appellants has contended that the evidence of related witnesses cannot be taken as gospel truth because they are interested witnesses. We have carefully gone through the depositions of PW-1 and PW-2 and find that a natural flow of occurrence has been deposed by them in their respective testimonies. Their evidence is not such as may be discarded on the ground of their being related to each other or related to the deceased. The evidence of PW-2, his being an injured witness, stands on a different and strong footing. It is to be remembered that the occurrence happened at the house of the deceased. The presence of PW-1 alongwith his family members was quite natural at the house of his mother-in-law and likewise, the presence of PW-2 was also not unnatural because he had gone to the house of his Mausi (aunt) to take away the informant and his family members, who had come to attend the marriage ceremony of his own daughter. He happened to be the cousin of the informant's wife. In these circumstances, the evidence of PW-1 and PW-2 cannot be discarded on the ground that they are the witnesses related to the deceased.

40. In the present context, the Hon'ble Apex Court in **Bhagwan JagannathMarkad Vs. State of Maharastra (2016) 10 SCC 537** has held that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case Court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of the testimony of such related witness.

41. Reliance has been placed on **Surinder Kumar Vs. State of Punjab (2020) 2 SCC 563** by the learned A.G.A. wherein it has been reiterated that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

42. The Autopsy Report Ext. ka-3 is an important piece of evidence. According to the evidence of PW-1 and PW-2 deceased was assaulted by sword and axe, as appellants Tahar Singh and Bal Krishna carried the aforesaid arms respectively. PW-5, who performed the post mortem of the deceased, has found in total six injuries on the dead body of the deceased and it is pertinent to mention here that all the injuries are incised wound which, according to PW-5, could probably be caused by use of sword and axe on 25.6.1986 at 8.30 a.m.. These injuries were inflicted over the sensitive parts of the body. Hence, the Autopsy Report also supports the prosecution case and it is proved that the injuries were inflicted by use of sword and axe on the body of deceased, as witnesses of fact also deposed.

43. Learned counsel for the appellants has also made it a point that the murder weapons have not been produced before the Court and no F.S.L. report is also on record. It has also been submitted that this is a big omission on the part of the

Investigating Officer of the case and as such faulty investigation also diminishes the entire prosecution story. Learned AGA, on the other hand, submitted that if the prosecution case is proved on the basis of other reliable evidence, non-production of murder weapon before the Court or non-availability of F.S.L. report on record may be no ground to discard the prosecution case. It has also been submitted that any fault or omission found into investigation is no ground to reject or disbelieve the otherwise reliable prosecution case.

44. The aforesaid pleas taken by the learned counsel for the appellants take us to go through the deposition of PW-7, the Investigating Officer.

45. PW-7, in his deposition, has stated that when co-accused Sughar Singh was arrested by the police, murder weapon bloodstained sword, bloodstained axe and lathi were recovered on his pointing out from his house. A memo of recovery was also prepared before the witnesses which has been proved as Ext. ka-15 by PW-7. A site pan of the place of aforesaid recovery has also been prepared by the Investigating Officer and proved as Ext. ka-16. It is pertinent to mention here that the bloodstained baniyan of the deceased and murder weapon lathi were produced before the Court and proved as material Ext.-1 and material Ext.-2 by the Investigating Officer - PW-7, who has also stated that bloodstained soil and bloodstained sword and axe were sent to F.S.L., Agra for examination. Hence, this is an admitted fact that the murder weapon sword and axe were not produced and proved before the Court, as same were sent to F.S.L., Agra but murder weapon lathi has been proved by the PW-7. It is true that this was the duty of the Investigating Officer to collect back the murder weapons sent for chemical examination and to produce it before the Court but he omitted to do so, however, at the same time, it is to be seen whether this omission of the Investigating Officer affects the prosecution case adversely in any way.

46. In this reference, emphasis may be laid down upon **Gopal Singh Vs. State of Uttrakhand (2013) 7 SCC 545 (para 12 & 13)** wherein the Hon'ble Apex Court found that the *"katta" and "knife*" used in causing the injuries to the victim were not recovered by the Investigating Officer but the doctor's evidence was available to prove that the victim had sustained gun shot and knife injuries, it was held that non-recovery of the said weapon was not fatal to the prosecution case as the injuries sustained by the victim proved the nature of the weapon used.

47. It is submitted by the learned AGA that even if the murder weapon is not produced before the Court or is not sent for chemical / technical examination or even if it is not recovered by the Investigating Officer, same is not fatal for the prosecution case, if it is proved sufficiently by the ocular evidence. Reliance has been placed upon ***Maqbool vs. State of Andhra Pradesh, AIR 2011 SC 184,*** wherein it has been held that not sending the weapons of assault, cartridge, pellets to ballistic expert for examination, would not be fatal to the case of prosecution if the ocular testimony is found credible and cogent.

48. In ***Nankaunu vs. State of U.P., (2016) 3 SCC 317***, it has been held that when there is ample unimpeachable ocular evidence corroborated by medical evidence, mere non-recovery of weapon from the accused does not affect the prosecution case relating to murder.

49. No other material negligence or omission on the part of the Investigating

Officer has been pointed-out by the learned counsel for the appellants. From a perusal of the evidence on record, particularly, the deposition of the Investigating Officer of the case, we also find no material negligence or omission on the part of the Investigating Officer. Moreover, since the prosecution case is well established and proved by the ocular evidence supported with the medical evidence, negligence or omission, if any, on the part of the Investigating Officer does not adversely affect the prosecution version at all.

50. In **Hema Vs. State (2013) 81 ACC 1 (Supreme Court),** it has been held by the Hon'ble Apex Court that any irregularity or deficiency in investigation by I.O. need not necessarily lead to rejection of the case on prosecution when it is otherwise proved. The only requirement is to use of extra caution. The defective investigation cannot be fatal to prosecution when ocular testimony is found credible and cogent. It may be reiterated at the cost of repetition that investigation, in the present case, does not suffer with any material irregularity.

51. One more material point has been raised by the learned counsel for the appellants, which is in respect of conviction of appellants under Section 307/34 IPC. It has been submitted that the injuries caused to the injured Dharam Singh are simple in nature. There is no X-Ray report of the injured on record. Injuries caused to the injured fall only to the extent of offence under Section 324 IPC and offence under Section 307 IPC in no way is made out.

52. Learned AGA has contended that for the offence under Section 307 IPC, it is the intention which is important and not the injury inflicted upon the person. It is submitted that the injury was caused to the injured with intention to kill him and, therefore, the appellants were rightly convicted under Section 307 IPC.

53. The law settled in the context of Section 307 IPC is that it is not necessary that injury, capable of causing death, should have been inflicted. What is material to attract the provisions of Section 307 is the intention or knowledge with which the all was done, irrespective of its result. The intention and knowledge are the matters of inference from totality of circumstances and cannot be measured merely from the results. In fact the important thing to bear in mind for determining the question whether the offence under Section 307 IPC is made out is the intention and not the injury, even if it may be simple or minor. Question of intention to kill or knowledge of death is always a question of fact and not of law. The Hon'ble Supreme Court in ***Hari Kishan and State of Haryana vs. Sukhbir Singh, AIR 1988 SC 2127*** has held that the intention or knowledge of the accused must be such as is necessary to constitute murder. In **State of Madhya Pradesh vs. Harjeet Singh and another, AIR 2019 SC 1120**, it was reiterated that Section 307 IPC does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 IPC.

54. The aforesaid legal principle, if examined in the context of the facts and circumstances of the present case, we find that offence under Section 307 IPC is not made out against the accused-appellants. The accused persons who, in continuation of the offence of murder of the deceased Kitab Shree, also attacked the injured

Dharam Singh, were clearly in a position to kill him but only simple injuries have been caused to him. In the F.I.R. it has been mentioned that when the injured was trying to hold the accused persons, he was assaulted by them. PW-1 also stated that when Dharam Singh tried to catch hold the accused persons they assaulted him with sword, axe and lathi. He has also deposed that co-accused Munshi Lal exhorted the other accused persons to do away with the deceased but that was not so in the case of injured. PW-2 injured himself, in his deposition, has stated that when they were trying to catch hold the accused persons by surrounding them, he was attacked by accused Tahar Singh, Bal Krishna and Sughar Snigh and then they fled away. No-where, in the statements of PW-1 and PW-2 it is found that the accused persons had any intention to kill the injured.

55. In his cross-examination, PW-2 has also stated that after receiving three injuries when he fell down, no assault was made over him. Had the accused persons any intention to kill the injured, they could easily do away with him when he fell down on the earth, has been vehemently argued by the learned counsel for the appellants.

56. In the facts and circumstances of the case, we find that the offence committed by the appellants in respect of injured PW-2 falls in the category of offence under Section 324 IPC and not in the category of Section 307 IPC.

57. From the discussions made above, in the totality of the facts and circumstances of the case, it is evident that the prosecution has proved each and every circumstance leading to the homicidal death of the deceased by cogent and trustworthy evidence. Both ocular and medical evidence corroborate each other. The depositions made by PW-1 and PW-2-injured are wholly reliable and their ocular version finds support from medical evidence. They have deposed without any material contradiction about the whole occurrence right from the beginning till the death of the deceased who succumbed to her injuries. The learned trial court has examined the matter meticulously and well appreciated the evidence on record. No infirmity, therefore, is found in the judgment of the trial court. The appellants alongwith other co-accused with pre-arranged plan armed with deadly weapons reached the house of the deceased to do her away and as such they acted in furtherance of common intention of all. Hence, they could be safely convicted with the aid of Section 34 IPC.

58. In I**ndrapal Singh v. State of U.P., (2022) 4 SCC 631,** the Hon'ble Apex Court held as under:

".....to attract the applicability of Section 34 IPC the prosecution is under an obligation to establish that there existed a common intention which requires a prearranged plan. That before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. In the absence of a prearranged plan and thus a common intention, even if several persons simultaneously attack the man, each one of them would be individually liable for whatever injury he caused and none could be vicariously convicted for the act of any or the other. Thus, it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and incriminating facts must be incompatible with the innocence of the

accused and incapable of explanation or any other reasonable hypothesis".

59. We have no hesitation to hold that the principle enumerated in the aforesaid case law is clearly applicable to the present case and no error was committed by the learned trial court to convict the appellants with the aid of Section 34 IPC.

60. The evidence of PW-1 and PW-2 is wholly reliable and cogent and they fall into the category of wholly reliable witness. The date, time and place of occurrence, the manner of assault, the names of assailants all these factors have been fully proved by the ocular evidence which finds support from the medical evidence. F.I.R. of the case is also prompt. We are, therefore, of the considered opinion that the prosecution has proved the charge under Section 302/34 IPC beyond reasonable doubt against both accused, namely, Tahar Singh and Bal Krishna but charge under Sections 307/34 IPC has not been proved on the basis of evidence on record, instead, charge under Section 324/34 IPC is proved against the present appellants beyond reasonable doubt.

61. Resultantly, appeal is **partly allowed** in the aforesaid terms. The conviction and sentence under Section 302/34 is hereby confirmed and the conviction and sentence under Section 307/34 I.P.C. is converted into Section 324/34 IPC and the appellants are sentenced to undergo imprisonment for a period of three years for the offence punishable under Sections 324/34 of IPC. Both the sentences are to run concurrently.

62. Appellants Tahar Singh and Bal Krishna are on bail, their bail bonds are cancelled and sureties are discharged. The concerned Court is directed to take the appellants Tahar Singh and Bal Krishna into custody forthwith and send them to jail to serve-out the remaining sentence.

63. Let the lower Court record be transmitted back along with the certified copy of this judgement for information and necessary compliance.

64. This Court is thankful to learned Advocates for ably assisting the Court.

(2022) 12 ILRA 824
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKAR PRASAD, J.

Criminal Appeal No. 2126 of 2013

Manjoor Alam @ Nirahu
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri B.K. Tripathi, Sri Araf Khan, Sri Mohammad Adnanul Haq, Sri Pradeep Kumar

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 162, 162(2), 313 & 437 (A) - Indian Penal Code, 1860 - Sections 302, 307, 308 & 326 - India Evidence Act, 1872 - Sections 32 & 32(1) - Criminal Appeal – challenging the order of Conviction & Sentence of Life Imprisonment - allegations upon accused-appellant that on account of enmity had thrown acid upon the deceased which caused serious injuries to him resulted he was died during treatment -

Evaluation of Evidence - Trial court relied upon the St.ment of PW-2 (wife of deceased who was sleeping with deceased husband on the date of incident) - Court finds that, there were no independence or credible witnesses who have seen the incident and alleged St.ment of deceased is not corroborated as neither the alleged motive is proved nor the testimony of eye-witnesses is found credible and reliable - mere recovery of burnt clothes or plastic bottle etc would not be sufficient to prove the cause of injury commissioned by accused – Appeal succeeds and is allowed – impugned order is set aside - appellant be set to liberty, forthwith, subject to compliance of section - 437A Cr.P.C.(Para – 12, 26, 31, 32)

Appeal Allowed. (E-11)

List of Cases cited:

1. Kamal Khudal Vs St. of Assam (2022 SCC Online SC 882),

2. Arvind Bajpai Vs St. of U.P. (Jail Appeal No. 3231/2015 decided on 01.10..2019),

3. Samsul Haque Vs The St. of Assam (AIR 2019 Sc 4163).

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This appeal is by the accused Manjoor Alam @ Nirahu challenging his conviction in Sessions Trial No. 8 of 2009 arising out of Case Crime No. 796 of 2008, under Section 302 IPC, Police Station Kolhui, District Maharajganj; whereby he has been sentenced to rigorous life imprisonment alongwith fine of Rs. 10000/- and on its failure to undergo further incarceration of two years.

2. The prosecution case proceeds on a written report dated 11.9.2008 (Exhibit Ka-1) by the informant (PW-1), who happens to be the father of the deceased, stating that he is a resident of District Maharajganj and his son Ramjan has returned about a month ago from Saudi and was sleeping with his wife Noorjahan (PW-2) on the roof. On 6.9.2008 at about 10.00 in the night the accused appellant who was residing at Bahduri on rent, on account of enmity came on the roof and threw acid on his son and daughter-in-law. The injured son was taken to Gorakhpur for treatment and the doctors have referred him for further treatment to Delhi where he is admitted and undergoing treatment. The son of the informant was not in a position to speak and the daughter-in-law (PW-2) who had sustained lesser injuries is being treated by doctor Maurya. Having returned from Delhi the report has been lodged with the request to take appropriate action. On the basis of the above report the first information report got registered as Case Crime No. 796 of 2008 at 8.35 pm on 11.9.2008.

3. The investigation proceeded and a plastic bottle used for throwing acid together with certain acid burnt clothes (Lungi and Odhani) were recovered vide Exhibit Ka-8 on 2.11.2008. After nearly three months of the incident the injured son of the informant died on 15.12.2008 at about 8.00 pm and an intimation of such fact was given to the Investigating Officer on 16.12.2008.

4. Initially the FIR was lodged under section 308 and 326 IPC but after the death of injured the offence was altered to one under Section 302 IPC. It may also be noticed that the offence under Section 308 IPC was also altered to Section 307 IPC during the course of investigation. The Investigating Officer proceeded in the matter and collected medico legal case sheet cover as also the summary prepared by the Medical College at Gorakhpur. The

case sheet shows that the injured was admitted at the Medical College at Gorakhpur on 7.9.2008 at 1.45 am and doctor has mentioned it to be a case of burn injury. The informant had informed the doctor that someone had thrown acid on the son of the informant while he was sleeping at about 11.00 pm. To similar effect is the document at Page 9 of the paper book wherein the doctor has recorded that it is a case of acid burn where acid was thrown by someone at around 11.00 pm on 6.9.2008 while the patient was sleeping. The Investigation ultimately concluded with submission of chargesheet (Ex.Ka-9) against the accused appellant. The implication of the accused appellant apparently surfaced on the basis of statement made by PW-2 and PW-1 who stated that the acid has been thrown on the deceased by the accused appellant.

5. The Magistrate took cognizance upon the charge-sheet and committed the case to the Court of Sessions wherein charges were framed against the accused appellant under Section 302 IPC. The accused appellant denied the accusations made against him and demanded trial. The trial accordingly commenced in which prosecution has produced three witnesses of fact namely Noor Ali (PW-1) (informant/father of the deceased); Noorjahan (PW-2) (wife of the deceased) and PW-3 Hamid, who happens to be the father of PW-2 and lives in an adjoining house but was sleeping next to PW-1 at the time of occurrence.

6. PW-1 in his statement has clearly stated that on the fateful night the deceased was sleeping with his wife (PW-2) on the roof of the house when the accused appellant on account of prior enmity came on the roof and threw acid on his son and daughter-in-law. The injured and his wife screamed on hearing of which PW-1 claims to have opened his torch and saw in the torch light the accused appellant fleeing. He also shouted to apprehend him but the accused appellant fled. He has further stated that PW-3 had also come to his house and was sleeping next to him. Both these witnesses namely PW-1 and PW-3 however saw the accused appellant fleeing from the place by the staircase in the torch light. The condition of injured was critical who was taken to Gorakhpur from where he was referred to Delhi and was admitted in AIIMS and he was not in a position to speak. He has further specified that on account of acid attack the injured had sustained injuries on his chest, back, hands, face, nose and ears and it was on account of such injuries that he ultimately died. He has also verified recovery made by the Investigating Officer. The witness PW-1 was again recalled and he stated that he had not seen the accused appellant going on the roof through the staircase and there was no light on the staircase. He also claimed that his daughter-in-law (PW-2) had also sustained burn injuries at 3-4 places. She also informed him that it was the accused appellant who had thrown acid on the deceased.

7. In the cross examination PW-1 has stated that in his statement under Section 161 Cr.P.C. he has not disclosed about recognizing the accused appellant in the torch light. He has admitted that in the FIR there is no reference of recognizing the accused appellant in the torch light. He has further stated that the torch has neither been recovered nor any recovery memo has been prepared in respect of the torch and even the description of the torch cannot be given by him as the torch was from Saudi. The torch has also not been produced before the

Court nor was it recovered by the Investigating Officer. He has disclosed that he is above 75 years of age and he uses specs and he can at best see upto a distance of 10 ft. He has stated that on hearing the screams of his son and daughter-in-law, he saw the accused appellant fleeing from the spot and was seen from behind in torch light by him. In the statement under Section 161 Cr.P.C., however, the version of PW-1 seeing the accused appellant fleeing after committing the offence in torch light has not been disclosed to the Investigating Officer. He has also stated about enmity between the accused appellant and his family but such enmity has not been substantiated nor any incident or event which caused the enmity has been disclosed. In the cross examination PW-1 has also stated that there was no dispute relating to landed property between him and the accused appellant and there was no enmity between them either. He has however stated that he was not on talking terms with the accused appellant nor the accused appellant was on talking terms with the deceased. He has also denied the suggestion that on account of the deceased living out of country he was not treated well by his daughter-in-law or their relations were not cordial or that his daughter-in-law had illicit relations with someone else due to which the incident occurred.

8. PW-2 is the wife of the deceased who has supported the prosecution case and has clearly stated that she was sleeping alongwith her husband on the roof of the house when accused appellant came through the staircase at about 10.00 in the night and due to enmity threw acid upon the deceased. In the cross-examination she has explained the circumstances in detail. She has stated that she went to sleep on the fateful night at about 10.00 and at the time when she went on the roof it was dark and there was no light. The deceased and the PW-2 were sleeping close-by but were facing different directions. She claims that she identified the accused appellant as being the person who had thrown acid upon her husband. In the same breath she has stated that she had not seen the acid being thrown and she started screaming. The accused appellant allegedly left by the same staircase and it was about five minutes after her screaming that her father and father-in-law (PW-3 and PW-1) came on the roof with the torch. She has clearly stated that by the time her father-in-law (PW-1) came on the roof the accused had already fled. She has also stated that there was enmity between the accused appellant and her family. The witness, however, has stated that the relations between the accused appellant and her family were not cordial and that she had never talked to the accused appellant nor had even met him. She has even denied having seen the accused appellant earlier or recognizing him. Although PW-2 claims to have sustained burn injuries but no proof in the form of injury report or doctor's opinion has been placed on record.

9. PW-3 has also supported the prosecution story but has clearly stated in the cross-examination that he never met the accused appellant nor had ever talked to him. He has further denied the suggestion that the accused appellant had any relations with his family or that his daughter had any relations with the accused. He has, however, not claimed to have seen the accused appellant at the place of incident himself.

10. PW-4 Sahadul and PW-5 Sadavriksh have proved the inquest report.

PW-6 is the Constable, who has proved the chick FIR. PW-7 is also an inquest witness. He has stated that the injured/deceased had informed him that someone had thrown acid upon him and has not alleged that such role was assigned to the accused appellant by the deceased. Dr. D.C. Pandey has appeared as PW-8, is autopsy surgeon and has proved the postmortem report. He has stated that the burn injuries caused to the deceased were not sufficient to cause death and that his death ultimately occurred on account of septicemia, as there was lack of proper treatment for the deceased.

11. Before proceeding further it may be worth noticing that the incident occurred on 6.9.2008 and the Investigating Officer also recorded the statement of the deceased under Section 161 Cr.P.C. on 29.9.2008. In his statement under Section 161 Cr.P.C. the deceased has stated that he had gone to sleep at about 10.00 when accused appellant Manjoor Alam, who lives in a rented accommodation at Bahduri, due to enmity came on the roof where he was sleeping and threw acid on him and his wife. Though the deceased remained alive for nearly 2 and half months thereafter but his dying declaration was never recorded. Incriminating material collected during the course of trial against the accused appellant were specifically confronted to him which he denied but the incriminating material in the form of statement of deceased under Section 161 Cr.P.C. implicating the appellant was never put to him and he was not confronted with such incriminating material.

12. The trial court on the basis of oral and documentary evidence placed on record by the prosecution came to the conclusion that the accused appellant on account of enmity had thrown acid upon the deceased which caused serious burn injuries to him and that due to it the injured died. For the purposes of arriving at a finding of guilt against the accused appellant the court below has essentially relied upon the statement of PW-2, who is said to have seen the occurrence. Her presence next to her husband while they were about to go to sleep is not doubted.

13. Sri Araf Khan, learned counsel for the appellant submits that the appellant has been falsely implicated in the present case, inasmuch as, the prosecution witnesses although have asserted that there was enmity between the accused appellant and the family of the informant, yet no material or cause of such enmity has been substantiated and, therefore, the first submission raised on behalf of the appellant is that there is absolutely no motive for the accused appellant to commit the offence. Learned counsel further submits that though PW-1 claims to have seen the accused appellant fleeing through the staircase in the torch light, but such testimony is not believable, inasmuch as, neither any source of light has been substantiated during the course of trial nor at such old age was it otherwise plausible to come to the roof so quickly. It is also argued that PW-2 has clearly stated that PW-1 reached the roof nearly 5 minutes after she screamed and that the accused appellant had already fled by then. So far as the statement of PW-2 is concerned, it is stated that she has clearly admitted in her cross-examination that she had neither met the accused appellant nor recognized him and as she otherwise has admitted that there was no light at the place of occurrence her statement that she could identify the accused appellant as being the person who threw acid on the deceased is not believable. Learned counsel also submits

that no test identification parade was otherwise conducted to ascertain the identity of the accused appellant.

14. Learned counsel for the appellant submits that the accused appellant has been implicated only on the basis of suspicion that there was affair between the wife of the deceased and the accused and that such suspicion, howsoever strong, cannot take the shape of evidence so as to convict the accused appellant.

15. Ms. Meena, learned AGA, on the other hand states that the statement of eye-witness PW-2 is absolutely credible and her presence near her husband could not be doubted and being a distant relative the identification by her of accused appellant cannot be doubted. She further submits that the medico legal examination report clearly shows that the deceased died due to burn injuries caused by the accused appellant and since there was a definite motive for him to commit such offence the conviction of the accused appellant as also his sentence is clearly based on the evidence available on record which warrants no interference.

16. At the very outset we may note that the accused appellant pursuant to his implication in the present case was arrested on 22.10.2008 and has remained in jail ever since then. The appellant, therefore, has undergone actual sentence of nearly 14 years. The accused appellant otherwise has no criminal history.

17. The implication of the accused appellant has surfaced on the basis of written report of PW-1 in which it is alleged that while the deceased had gone on the roof alongwith his wife to sleep the accused appellant threw acid upon him due to enmity and on account of such injuries sustained on 6.9.2008 he died on 15.12.2008. The prosecution case is that there was an enmity between the accused appellant and the family of the informant and the prosecution witnesses PW-1 and PW-2 have clearly supported the plea of enmity between accused appellant and the family of the informant. However, we find on a careful perusal of the evidence brought on record that except for allegation made by the prosecution witnesses with regard to enmity between them no specific instance or exact motive/reason of such enmity has been substantiated on record. PW-1 although has stated that there was an enmity between his family and the accused appellant, but in the cross-examination he has clearly admitted that there was no dispute between them with regard to landed property and has rather gone to the extent of saying that there was no prior enmity between them. Similarly PW-2 has also stated that there was enmity between the parties but no exact cause of enmity has been disclosed or substantiated by her either. No other material in the form of documentary evidence has otherwise been placed on record by the prosecution to substantiate the plea of enmity between the parties. In such circumstances, we find substance in the contention advanced on behalf of the appellant that the plea of enmity, set up as a ground for commissioning of offence, by the accused appellant has not been substantiated on record. In its absence the motive for the alleged commissioning of offence on part of the accused appellant has not been proved by the prosecution.

18. From the suggestions given to PW-3, it appears that the prosecution has suggested that there was some relationship between the accused appellant and PW-2,

since her husband was living abroad, but this suggestion has also been denied and no other material in the form of positive evidence has been placed by the prosecution to demonstrate that on account of his living abroad his wife (PW-2) had developed relations with the accused appellant. In such circumstances, the plea of there being relations between PW-2 and the accused appellant remains only in the nature of doubt or suspicion and such material cannot be a substitute for evidence, which alone could be relied upon to implicate the accused appellant.

19. The present case nonetheless is of direct evidence and in case the prosecution is able to prove it the lack of motive may not be of much substance. In such circumstances, the Court is required to examine the evidentiary value of the statements of PW-1, PW-2 and PW-3 who are the witnesses of fact and have supported the prosecution story. So far as PW-1 is concerned, he has clearly admitted that he had not seen the accused appellant alighting the staircase to the roof and that there was no light on the staircase either. The incident is admitted to have occurred in the darkness of night while the deceased had gone to sleep alongwith his wife. The implication of accused appellant in the testimony of PW-1 is based upon his statement that having heard screams of his son and daughter-in-law he rushed and saw the accused appellant fleeing from behind in the torch light. In order to prove such assertion the first evidence which is required to be proved by the prosecution is the existence of light in which the prosecution witnesses PW-1 allegedly saw the accused appellant from behind. In the statement before the Court such source of light is alleged to be a torch brought by the deceased from Saudi and in which the incident was seen by PW-1. Admittedly no such torch has been recovered by the police nor has been produced before the Court by PW-1. We further find that such assertion has otherwise not been made in the FIR. PW-1 has stated that he did tell about the torch light but the scribe omitted to mention it. We further find that even in the statement made to the police under Section 161 Cr.P.C., PW-1 has not narrated about existence of torch light in which he claims to have seen the accused appellant fleeing from the place of occurrence. The plea with regard to torch light is, therefore, taken for the first time at the stage of trial. Existence of light was one of the crucial aspects which had to be proved by the prosecution before the statement of PW-1 of having seen the accused appellant fleeing from the place of occurrence could be relied upon. The fact that such source of light has not been substantiated by either recovering the torch; preparing a recovery memo and producing the torch clearly casts a dent on the prosecution case. We may at this stage refer to the statement of the Investigating Officer who appeared as PW-9 S.I. Umashankar Yadav who has stated that neither possession of torch was taken nor any of the witnesses had informed him about seeing the accused appellant or identifying him in torch light. The statement of PW-9, in that regard, is relevant and is reproduced hereinafter:-

"मैने कोई टार्च कब्जा पुलिस गवाहान से नहीं लिया था ना किसी से गवाह ने घटना को टार्च से देखने की बात व टार्च की रोशनी में मुलजिम को पहचानने की बातें बताई हैं।

प्रथम सूचना रिपोर्ट में मुल्जिम को टार्च की रोशनी में घटनास्थल या घटना कारित देखने बात नही बताया न ही भागते हुए टार्च की रोशनी में पहचानने की बात आयी है।"

20. PW-2 is the star witness of the prosecution case who claims to have seen the

accused appellant throwing acid on her husband. She has admitted that the incident is of about 10.00 pm and that neither on the staircase nor at the place of occurrence there was any light. She has further admitted that while lying nearby her husband she was facing in a different direction from the direction of her husband. She has stated that there existed a staircase from outside the house by which the accused appellant came on the roof and she recognized the accused appellant while throwing the acid. In the very next sentence PW-2 has however stated that when the accused appellant threw acid she could not see it nor could see as to what was worn by the accused appellant and she started screaming. She has stated that accused appellant fled from the same staircase and her father-in-law and father (PW-1 and PW-3) came on the roof with the torch nearly five minutes after her screaming. She has also categorically stated that by the time her father-in-law came on the roof the accused appellant had already fled. It has otherwise been noticed that PW-2 in the cross-examination has clearly stated that relations between her family and that of the accused appellant were not good and she had never spoken to the accused appellant nor had met him. She has further admitted that neither she had seen the accused appellant nor recognized him. The statement of PW-2, made in the cross-examination is reproduced hereinafter:-

"मुल्जिम से मैं कभी मिली जुली नहीं क्योंकि उनके घर से मेरे घर के सम्बन्ध अच्छे नहीं है। मुल्जिम ने कभी मुझसे बातचीत नहीं किया था न मिला जुला था। मुल्जिम आज तक मुझसे कभी न मिला न बातचीत किया न मै ही उससे कभी मिली। मुल्जिम से मेरी कोई मित्रता नहीं है कोई जान पहचान नही हैं। पुलिस ने या किसी भी व्यक्ति ने मुल्जिम की मुझसे जान पहचान नहीं करायी। **मुल्जिम को मैंने कभी न देखा न पहचाना।**"

21. In the backdrop of the fact that there was otherwise no source of light on the roof top, we find it difficult to accept the testimony of PW-2 that she saw the accused appellant committing the offence, particularly when she admits that she had neither seen the accused appellant earlier, nor recognized him.

22. Although, learned AGA has laid much emphasis on the fact that PW-2 in the examination-in-chief has supported the prosecution case of having seen the accused appellant committing the offence and his being a distant relative (pattidar) but we find that PW-2 has not been put to further examination by the prosecution on this aspect of the matter, particularly after she stated that she had not seen the accused appellant earlier or recognized him. The prosecution having failed to confront PW-2 on this aspect of the matter cannot be heard now to state that the statement of PW-2 made at the time of examination-in-chief be relied upon, by overlooking the statement made by her in the cross-examination, which goes contrary to the earlier statement.

23. Similarly PW-3 has reached the roof top alongwith PW-1 and has not seen the occurrence or the alleged fleeing of accused appellant in the torch light. PW-3 has merely stated that he reached the roof and saw his daughter and son-in-law screaming. He, therefore, admits that he has not seen the throwing of acid by the appellant on the deceased. When we notice the statements of witnesses of fact PW-1, PW-2 and PW-3 cumulatively, we find that the prosecution version that accused appellant had thrown acid upon the deceased is clearly not substantiated. PW-3 moreover has stated that he neither knew the accused appellant nor recognized him.

24. The last arguments advanced by learned AGA is with regard to the statement of the deceased, made to the police, under Section 161 Cr.P.C. being treated as dying declaration. Record reveals that the alleged statement to the police was made by the injured deceased on 29.9.2008 and it is after nearly two and half months that the injured died. The statement of the deceased under Section 161 Cr.P.C., therefore, cannot be treated to be a statement made just before his death. It is only when the statement is made just before his death that the statement is entitled to weight in view of Section 32 of the Indian Evidence Act, 1872.

25. As the person making the statement under Section 161 Cr.P.C. has not signed the statement and otherwise there is neither any certification by the doctor that the deceased was in a fit state of mind to make the statement nor is it made before the Magistrate, as is the case in a written dying declaration, the oral dying declaration made to police under Section 161 Cr.P.C., would have to be subjected to careful scrutiny and corroboration before such statement could be relied upon. Law on the subject of oral dying declaration has recently been examined by the Supreme Court in Kamal Khudal Vs. State of Assam, 2022 SCC OnLine SC 882, wherein the Court observed as under in Paragraphs 21 and 22:-

"21. The law regarding the nature, scope and value as a piece of evidence of oral and written dying declarations is now fairly well settled by various judicial decisions of this Court. A dying declaration, oral or written, before it could be relied upon, must pass a test of reliability as it is a statement made in the absence of the accused and there is no opportunity to the accused even to put it through the fire of cross examination to test is genuinity or veracity. The court has, therefore, to subject it to close scrutiny. But once the court is satisfied that it is a truthful version as to the circumstances in which the death resulted and the persons causing injuries, the law does not expect that there should be corroboration before it can be relied upon. However, if there are infirmities and the court does not find it safe to base any conclusion on it without some further evidence to support it, the question of corroboration arises.

22. We may refer to one of the decisions of this Court in the case of Heikrujam Chaoba Singh v. State of Manipur, (1999) 8 SCC 458, wherein in para 3 this Court observed as under:

"3. An oral dying declaration no doubt can form the basis of conviction, though the Courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability. ...""

26. In the present case the injured died almost after two and half months due to septicemia. It cannot be said that the author of the statement was aware that he is likely to die soon which is the necessary condition for attaching credibility to the statement of the person itself on the premise that the person about to die would not go with falsehood in his mouth. There are otherwise no independent or credible

witnesses who have seen the recording of statement by the Investigating Officer of the alleged disclosure made by the deceased.

27. Learned counsel for the appellant has placed reliance upon a Division Bench Judgment of this Court in Arvind Bajpai Vs. State of U.P., Jail Appeal No. 3231 of 2015, dated 1.10.2019, wherein Paragraph 115 of Police Regulations has been noticed, which provides that the officer investigating a case in which a person has been so seriously injured that he is likely to die before he can reach a dispensary, where his dying declaration can be recorded, should himself record the declaration at once in the presence of two respectable witnesses. The Court has opined that non observance of paragraph 115 would be a material circumstance. After noticing Section 32 of the Indian Evidence Act the Court has adverted to the evidentiary value of a statement made under Section 161 Cr.P.C. in following words:-

"31. As far as implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Act, 1872, then whatever credence would apply to a declaration governed by Section 32(1), should automatically deemed to apply with all force to such a statement though recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 Cr.P.C. of a victim having regard to the subsequent event of death of the person making statement who was a victim would enable prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Act, 1872 and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

32. We now propose to deal the validity of the dying declaration. Court in Paniben vs. State of Gujarat, (1992) 2 SCC 474, laid down certain principles regarding dying declaration, which are as under :-

"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 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 dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of M.P.).

(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 Sugar Yadav, Ramawati Devi vs. State of Bihar).

(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. (Ram Chandra Reddy v. Public Prosecutor).

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

(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).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.).

(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).

(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).

(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 and Anr. v. State of M.P.).

(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).

33. In the case in hand we thus found that statement under Section 161 Cr.P.C. which was relied upon as dying declaration, does not fulfill the requirement of every provisions of law and fact.

34. PW-6, Chandra Prakas Bhatt, deposed that on 26.05.2012, he undertook investigation, recorded statement of Smt. Aneeta Bajpai (injured). He further deposed in cross-examination that dying declaration was not got recorded because she had come to her house after getting cured from hospital. He did not take container and Match box in his possession from spot; she died after five days from the date of incident. Thus, it is very clear, when Investigator recorded statement of victim under Section 161 Cr.P.C., she was not under the expectation of death and she remained alive about two weeks. Evidently, dying declaration was not recorded by Investigating Officer before two reliable witnesses, therefore, statement under Section 161 Cr.P.C. does not fall under the

category of 'dying declaration' under Section 32 of Act,1872."

28. We have examined the evidence on record and find that the alleged statement of deceased is not corroborated as neither the alleged motive is proved nor the statement of eye-witnesses is found credible and reliable. We are also inclined to accept the argument of Sri Khan that as the alleged statement of deceased under Section 161 Cr.P.C. has not been confronted to the accused appellant, as being one of the incriminating material under Section 313 Cr.P.C., such circumstance otherwise cannot be relied upon against the accused appellant. Reliance is placed upon a judgment of the Supreme Court in Samsul Haque Vs. The State of Assam, AIR 2019 SC 4163, wherein the Supreme Court has examined the consequences of failure on part of the prosecution to confront the accused with material circumstance appearing against him under Section 313 Cr.P.C. In paragraphs 21 to 25, the Court has held as under:-

"21. The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to accused No.9, and the statement recorded under Section 313 of the Cr.P.C. To say the least it is perfunctory.

22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. State of Assam. The relevant observations are in the following paragraphs:

"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

23. While making the aforesaid observations, this Court also referred to its earlier judgment of the three Judge Bench in Shivaji Sahabrao Bobade v. State of Maharashtra 8, which considered the fall out of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 of the Cr.P.C., the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed.

24. We are, however, not inclined to follow that course in the given circumstances of this case as the inconsistencies in the testimonies also create a doubt in the case of the prosecution qua any role of accused No.9. The aforesaid being the factual matrix, the appellate court could hardly have overturned the acquittal of the trial court into one of conviction. The trial court took note of the close relationship of PW-3, PW-4 & PW-6 to the deceased, as also the array of the accused and the murder of accused No.1, to come to the conclusion that the abetment of accused No.9, as alleged, had not been proved beyond reasonable doubt. In fact, it is opined that there is no evidence that the said accused was inside or outside Kalia Hotel at the time of the occurrence. Given the circumstances, while not disagreeing with the legal proposition stated in the impugned judgment, that there is no law that the evidence of relatives cannot be acted upon, but, with extra care and caution, the presence of disinterested witnesses as PW-1 and DW-1 relate another story. The finding in the impugned order, that in the FIR filed by PW-3 as the complainant, on the very date of the occurrence, setting out the involvement of all the accused as clearly stated, again cannot be sustained for the reason of the improvements and embellishments between what was stated in the FIR and what came from the mouth of PW-3 as his testimony in the court.

25. We are, thus, of the view that the prosecution has not been able to establish a case against accused No.9, much less beyond reasonable doubt."

29. In the facts of the case as the accused appellant has not been confronted with the incriminating material in the nature of alleged statement of the deceased given to police under Section 161 Cr.P.C., therefore, this circumstance otherwise cannot be read and relied upon against the accused appellant.

30. Upon a cumulative assessment of the evidence led by the prosecution and in view of the analysis made by us of the evidence adduced, we find that the court below has clearly erred in returning a finding of guilt against the accused appellant beyond reasonable doubt. The court below has neither taken note of the fact that the source of light has not been proved which renders the statement of PW-1 unreliable nor has it taken note of the fact that motive is not proved and the prosecution's star witness PW-2, in her cross-examination, has admitted that she had not seen the accused appellant earlier and does not recognize him and, therefore, the identification of accused appellant by PW-2 itself is unreliable. PW-1 and PW-3

have otherwise not seen the incident and their testimony also does not support the prosecution case. The court below has also not noticed that in the bed head ticket also it is mentioned that someone had thrown acid on informant's son without naming the accused appellant as being the author of the injury.

31. The recovery of clothes and plastic bottle by the prosecution at best shows that injury was caused to the deceased by throwing of acid. Burn injury caused to the injured is otherwise not disputed. In such circumstances, the mere recovery of burnt clothes or plastic bottle, etc., would be sufficient to prove the cause of injury but it cannot be relied upon to implicate the appellant when there is otherwise no evidence to connect him to the commissioning of the offence itself. The responsibility of the prosecution is not only to prove that the offence was committed but it has to prove that the commissioning of offence is by the accused appellant in the manner disclosed by the prosecution. The recovery made after two months of the alleged incident, therefore, would not be a material circumstance to implicate the appellant.

32. For the reasons and discussions held above, this appeal succeeds and is allowed. The judgment and order dated 15.3.2013, passed by the Additional Sessions Judge, Court No. 1, Maharajganj in Sessions Trial No. 8 of 2009 arising out of Case Crime No. 796 of 2008, under Section 302 IPC, Police Station Kolhui, District Maharajganj; whereby the appellant Manjoor Alam @ Nirahu has been sentenced to rigorous life imprisonment alongwith fine of Rs. 10000/- and on its failure to undergo further incarceration of two years, is set aside. He shall be set to liberty, forthwith, unless he is wanted in any other case, subject to compliance of Section 437A Cr.P.C.

(2022) 12 ILRA 837
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2022

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 3122 of 1985

Ram Sarikh & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri D.B. Yadav

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

Criminal Law – Criminal Procedure Code, 1973 - Sections 313, 357, 357(a), - Indian Penal Code, 1860 - Section 147, 148, 149, 307 & 323 - Criminal Appeal – challenging the judgment & Order of Conviction & Sentence by the Trial Court - allegations are cutting *Lathi* from informant's bamboos trees and when forbid them by informant's son accused persons abused him and assaulted upon him with *Danda* & *Bhala* - Evaluation of evidences - trial court rightly convicted and sentenced to the accused-appellants - Principle of Sentencing - since, incident was took place at the spur of moment and without any pre-plan and they are all living with peace and harmony for more than 35 years having no any criminal history - thus, instead of sending them into jail, in view of law propounded by Supreme Court regarding providing compensation to the victim - Appeal is partly allowed & sentence is modified - appellants/accused are directed to pay fine & compensation to the injured person - direction accordingly. (Para – 19, 20, 25)

Appeal partly allowed. (E-11)

List of Cases cited:

1. Accused X Vs St. of Mah. (2019 vol. 7 SCC 1),

2. St. of M.P. Vs Udham & ors. (2019 vol 10 SCC 300),

3. Manohar Singh Vs St. of Raj. & ors. (2015 vol. 3 SCC 449),

(Delivered by Hon'ble Surendra Singh-I, J.)

1. This criminal appeal has been instituted against the judgement and order dated 05.11.1985 passed by the Vth Additional Sessions Judge, Azamgarh in Sessions Trial No. 35 of 1984, State vs. Jheenak and others. By the impugned judgement aforesaid, the Trial Court had convicted appellants Ram Sarikh s/o Dashrath, Ram Lachhan s/o Dashrath, Dhaneshwar s/o Navrang and Shiv Chand s/o Sanehi under Sections 147, 323 read with Section 149 I.P.C. and sentenced each accused-appellants to one year's rigorous imprisonment under Section 147 I.P.C., six month's rigorous imprisonment under Section 323 read with Section 149 I.P.C. Both sentences were directed to run concurrently.

2. During pendency of appeal, appellant-accused, Ram Lachhan and Dhaneshwar have died and Criminal Appeal qua them has been abated vide order dated 23.09.2022. Thus, criminal appeal against accused-appellants, Ram Sarikh and Shiv Chand is pending for disposal.

3. The prosecution case, as revealed in written report dated 05.04.1980 at 10 am submitted to the Police Station Madhuban is that that informant Triveni s/o Cheekhur is resident of Daryabad, Police Station Madhuban, District Azamgarh. On 05.04.1980, when his son Chandra Pati was returning to his home from his shop, he saw that Jheenak s/o Dhaneshwar r/o Parvejpur was cutting Lathi from his bamboos trees (Banskoth). Informant's son forbid him from cutting Lathi. Being enraged on this, accused Jheenak started abusing the informant's son. Hearing the noise, accused Ram Sarikh and Ram Lachhan s/o Dashrath, Dhaneshwar s/o Navrang, Shiv Chand s/o Sanehi and 12 other accused, in pursuance of common intention exhorting others, assaulted informant's son Chandra Pati with *Danda and Bhala.*

4. Hearing the crying of his son, informant Triveni reached at the place of occurrence and started defending his son. Ram Sheesh Lal fired by a country made pistol on him and his son causing injuries to them. On the basis of written report (Exhibit Ka-1) Case Crime No. 79 of 1980 under Sections 147,148,149 and 307 I.P.C. was registered against the accused-appellants. Exhibit Ka-4 is the Chik FIR. Entry of the criminal case was made in the GD as report no. 26 time 3:20 dated 05.04.1980 by the Head Moharrir present in the police station. The certified copies of the written report is Exhibit Ka-5.

5. Medical Officer, Dr. Digvijay Singh examined the informant injured Triveni on 05.04.1980 at 9:30 p.m. at PHC Fatehpur Mandav. During examination the following injuries were found on the person of injured Triveni:

1. Contusion 1.5 cm X 1 cm on middle of back crossing the midline 15 cm below the inferior angle of right scapula. Red in color.

2. Lacerated wound 0.5 cm X 0.2 cm X 0.2 cm on right palm, 4 cm below the right wrist joint.

In the opinion of the doctor injuries were simple in nature, caused by blunt object. Duration about one day old.

6. Kavalpati s/o Triveni was examined by Dr. Digvijay Singh on 05.04.1980 at 9:50 pm and following injuries were found:

1. Traumatic swelling 8 cm X 4 cm on back of left forearm, 8 cm below the left elbow joint without any color change.

2. Lacerated wound 0.8 cum X 0.2 cm right little finger on outer side near the nail bed.

3. Contusion 3 cm X 1.5 cm on left palm, inner side touching the left wrist joint. Red in color.

4. Contusion 5 cm X 1 cm on back of left knee joint outer side. Red in color.

According to the opinion of the doctor, all injuries were simple in nature, caused by a blunt object. Except injury no. 1, all injuries were about one day old. Duration of injury no. 1 could not be assessed.

7. On the basis of the injury report, the criminal case was converted into under Section 147/323 I.P.C. G.D. entry thereof is Exhibit Ka-6.

8. The investigation of the case was done by Investigation Officer, S.I. Vishnukant Singh (PW-6), who visited the place of occurrence and prepared the site plan. After investigation he submitted final report. In the case, on the direction of the C.O. concerned, the Investigating Officer again submitted a charge sheet under Sections 147 and 323 I.P.C. P.W. 6, S.I. Vishnukant Singh has also investigated the cross criminal case registered on behalf of the accused-appellants and after investigation submitted a charge sheet (Exhibit Kha-1) against the informant and his son. PW-6, S.I. Vishnukant Singh has proved the Chik FIR (Exhibit Kha-1) and site plan (Exhibit Kha-2) of the cross case.

9. The case was received after committal and registered as Sessions Trial No. 35 of 1984. On 28.02.1984, the 6th Additional Sessions Judge, Azamgarh framed charges under Section 147 and 323 read with Section 149 I.P.C. against accused Ram Sarikh, Ram Lachhan, Shiv Chand, Dhaneshwar, Jheenak, Baburam, Rambachan, Rajpati, Sanehi, Harinandan, Deepchand, Rajendra, Ramsevak, Jamuna, Bhuvan, Surat, Ramasheesh and Balli. Accused denied charge and claimed trial.

10. To prove the charge, the prosecution has examined informant PW-1 Triveni, injured, P.W.-2 Kavalpati and eyewitness PW-3 Chandrapati as witnesses of facts. Prosecution has also examined formal witnesses PW-4 Dr. Digvijay Singh, the then Head Moharrir PW-5, Dinesh Singh and Investigating Officer PW-6 Vishnukant Singh.

11. On 04.10.1984, the trial court has recorded statement under Section 313 Cr.P.C. of accused, who have denied the prosecution case. They have also denied the evidence given by the witnesses against them. They have stated that the witnesses were giving false evidence due to enmity and they are being falsely prosecuted due to enmity. Accused-applicants have also stated in their additional evidence that the informant, his son and other persons of their side had attacked them. They have

further stated in their additional evidence that one day before the date of occurrence at night, the Dhekul of accused Ram Serikh was stolen from his pond, when he inquired regarding it from the son of informant, Chandrapti he started quarrelling with him and on the next day at 8.30 am informant and his son including total six person in which two were having countrymade pistols in their hands, fired at him. Shiv Chand, Dhaneshwar and Ram Lachhan came their to protect him then informant Triveni and his son Kavalpati and Suresh set ablaze the crops lying in his khalihan which were burnt to ashes. Ram Sarikh also stated that due to the firing he received bullet injuries. Persons of his side received pellet injuries and FIR was also lodged by him against the informant and persons of his side.

12. The accused have also got proved the Chik FIR, GD of registration of criminal case filed by them, the site plan and injury report regarding the injuries received by them. They have also filed certified copy of the injury report of injuries received by accused in the incident.

13. Heard learned counsel for the appellants-accused and learned A.G.A. on behalf of the State.

14. It has been stated on behalf of the accused that the Trial Court without examining the oral and documentary evidence produced by the defence, has wrongly decided the case and convicted the appellants-accused. It has been also stated that from the evidence on record and statement of accused under Section 313 Cr.P.C. it is well proved that they were attacked by informant, his sons and persons of his side and their crops, lying in his Khalihan, was also burnt. The injuries were caused to them by the informant, his son and other persons of his side. But the Trial Court did not accept their plea of right of defence and wrongly convicted them.

15. Per contra learned A.G.A. for the State has argued that the prosecution has proved the charge under Section 147 and 323 read with Section 149 I.P.C. against accused persons beyond reasonable doubt and the Court has rightly convicted and sentenced the appellants under the Sections mentioned above.

16. Informant injured PW-1 Triveni has proved the written report. It was submitted by him that after the occurrence he submitted a written report to the concerned police Station and on the basis of which criminal case was registered against the accused-appellants. PW-1 Triveni has also proved his evidence that on the alleged date, time and place accused Ram Sarikh and Shiv Chand with other co-accused, some of them died during pendency of appeal while some of them did not file the criminal appeal, in pursuance of common object attacked him, his son Kavalpati with Lathi and caused injuries to them. The incident was witnessed by his other son, PW-3 Chandrapati and other villagers. He got medical examination of himself and his son Kavalpati done in PHC Fatehpur.

17. Injured kavalpati PW-2 and eye witness PW-3 Chandrapati has also corroborated the facts in the deposition made by PW-1 Triveni. The evidence of PW-1, PW-2 and PW-3 appears to be cogent, reliable and convincing. In their cross-examination by defence nothing has come which may cause it appear to be a false or unreliable. The oral evidence of aforesaid PWs have been corroborated by

the documentary evidence namely Chik FIR, copy of GD of institution of criminal case against accused, injury report of PW-1 and PW-2 and charge sheet filed against appellant-accused, Ram Sarikh and Shiv Chand.

18. Defence has filed a copy of the Chik FIR, copy of GD of institution of criminal case and the site plan of their case prepared by PW-6 Vishnu Datt Singh. They have filed injury reports regarding the injuries received by accused Ram Sarikh and other persons of their side but they have not got it proved by statement of medical officer. Therefore, it cannot be read in evidence. They have not filed other prosecution papers as charge sheet. Thus, it is not clear whether charge sheet was filed against informant and persons belonging to his side.

19. From the appreciation of the above discussion and analysis, which has been introduced by the prosecution in support of the charge and accused in support of their defence, it is proved that on the date time and place of occurrence appellants-accused Ram Sarikh, Shiv Chand and other persons of their side surrounded Kavalpati s/o Triveni and on alarm being raised by Kavalpati, Triveni and his other son arrived to save Kavalpati. Then appellants-accused, along with other persons of their side, attacked informant and caused injuries to informant and his son Kavalpati. The prosecution has proved the charge under Section 147, 323/149 IPC against accused-appellants Ram Sarikh and Shiv Chand beyond reasonable doubt. The Trial Court has rightly convicted and sentenced the accused-appellants under Sections 147, 323/149 IPC. There is no force in the appeal.

20. Learned counsel for the appellant-accused Shri D.B. Yadav has argued that the incident relates to the year 1984. Informant and accused belongs to same village. They are living with peace and harmony for more than 35 years. Appellants do not have any criminal history. The incident took place at the spur of moment without any pre-plan on behalf of the appellants-accused. Instead of sending them jail to undergo the sentence, fine may be imposed on them. It is further submitted that more than 37 years have been passed since the incident took place. Informant, his sons and appellants are living with peace and harmony in the same village since then. Presently, the age of appellant-accused Ram Sarikh is about 77 years and that of Shiv Chand is 57 years. Only simple injuries were caused to the informant and his son.

21. Principle of sentencing has been an issue of concern before the Supreme Court in many cases and tried to provide clarity on the issue. Apex Court has time and again cautioned against the cavalier manner considering the way sentencing is dealt by High Courts and Trial Courts.

"... It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature peroxided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner." (para 49 of **Accused 'X' vs. State of Maharastra (2019) 7 SCC 1)**

"12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime,

disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. Additionally, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support of amenity; (iii) extent of humiliation; and (iv) privacy breach." (**State of Madhya Pradesh vs. Udham and others (2019) 10 SCC 300)**

22. It is also notable that "... *where minimum sentence if provided for, the Court cannot impose less than minimum sentence.*" (Para 8 of ***State of Madhya Pradhesh vs. Vikram Das (2019) 4 SCC 125)***

23. Section 357 Cr.P.C. provides power to the Court to award compensation to victim, which is in addition and not ancillary to other sentences. While granting just and proper compensation Court ought to have consider capacity of the accused for such payment as well as relevant factors such as medical expenses, loss of earning, pain and sufferings etc.

24. Supreme Court has reiterated need for proper exercise of power of granting compensation under Section 357 Cr.P.C. in ***Manohar Singh Vs. State of Rajasthan and others : (2015) 3 SCC 449*** and in paras 11, 31 and 54 it is stated that:

"11....Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guess work in such a situation is inevitable. Compensation is payable under Section 357 and 357- A. While under section 357, financial capacity of the accused has to be kept in mind, Section 357-A under which compensation comes out of State funds, has to be invoked to make up the requirement of just compensation."

"31. The amount of compensation, observed this Court, was to be determined by the courts depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay."

"54. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact

specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision."

25. Considering the facts and circumstances of the case and the law propounded by Supreme Court regarding sentence of accused as well as providing compensation to the victim, the interest of justice will be better served if fine is imposed on the accused-appellants and injured victims are compensated from the portion of fine. Appeal is partly allowed and the sentence is modified. The appellants-accused are imposed the fine of Rs. 4,000/- each, under Section 147 IPC and Rs.1,000/- each under Section 323 IPC. Out of the fine received from the appellants-accused Rs.3,000/- each shall be paid to injured Triveni and Kavalpati. Accused-appellants shall deposit the fine within two months from the date of this judgement. In case they do not deposit the fine within the prescribed time, they shall have to undergo period of sentence/imprisonment passed by the Trial Court against them.

26. Let the lower court record along with a copy of this judgment and order be sent to the Sessions Judge, Azamgarh for getting it executed by the Trial Court.

(2022) 12 ILRA 843
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Appeal No. 5663 of 2013

Smt. Jonha @ Jonhi Devi & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ayank Mishra, Sri D.P. Singh, Sri Kumar Ashutosh Srivastava, Sri Vishnu Gupta

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Evidence Act, 1872 - Section - 113-B - Indian Penal Code, 1860 - Sections 201, 304-B, & 498-A – Dowry Prohibition Act, 1961 - Sections 3 & 4 - Criminal Appeal – challenging the judgment & Order of Conviction & Sentence by the Trial Court - offence of giving them benefit of doubt - on the ground that – all the evidence are not proved the story of prosecution & holding that all witnesses are interested witnesses – court held that – in the light of settle law by the Apex Court – Trial Court can only concerned with quality not with the quantity of evidence – the testimony of interested witness has to be examined with extra care and caution – finding of trial court cannot at all be termed as perverse – appellant fails to make out any ground – hence Appeal dismissed. (Para – 17, 19, 21, 23, 24)

Appeal Dismissed. (E-11)

List of Cases cited:

1. Kans Raj Vs St. of Punj. & ors. (2000 (5) SC 207),

2. Gumansinh @ Lalo @ Raju Bhikhabhai Vs The St. of Gujr. (AIR 2021 SC 4174).

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. This Criminal appeal under Section 374(2) Cr.P.C. has been filed by appellants Smt. Jonha @ Jonhi Devi, Baiju and Ganga Kohar, against judgment of conviction and order of sentence dated 21.11.2013, passed by the Additional District and Sessions Judge, Court No. 1, Mahrajganj, in Session Trial No. 96 of 2010 State vs. Baiju and others, whereby appellants have been convicted under Sections 304-B, 498-A, 201 I.P.C. and Section ¾ of D.P. Act, they have been sentenced with multiple sentences.

2. We have heard learned counsel for both the parties and have gone through the evidence on record.

3. The brief facts of the prosecution unfolds that one Ram Bilas presented a written application to the Superintendent of Police, Maharajganj, stating therein that marriage of his daughter Sangeeta was solemnised on 25.04.2004, as per the Hindu customs and rituals and on 10.03.2006 she had departed for her matrimonial house. He had given dowry as per his financial capacity, his son-in-law and her father-in-law demanded colour T.V. and motorcycle as an additional dowry ten months before death of the deceased and beaten her daughter for the same; he went to the matrimonial house of her daughter but his son-in-law and his father threatened him not to visit their house hence he could not go to the matrimonial house of her daughter. It is next averred in the written F.I.R./application that on 13.03.2009 at 5:00 a.m. his daughter Sangeeta was killed by family members of her sasural and her dead body in a hush hush manner was cremated and no information was sent to his family members in this regard; upon coming to know about the incident he, his brother and his nephew went at village Jhamat and inquired from Smt. Jonha Devi (saas) and Ganga Kohar, father of Baiju (sasur), but they did not give them satisfactory explanation. Since she had died, no information was given to them, thereafter, they went to the police station, but their F.I.R. was not written, therefore, it was urged to Senior Superintendent of Police to issue direction to the Police Station to register the F.I.R.

4. On the application moved to S.S.P. an F.I.R. vide Case Crime No. 226 of 2009, under Sections 498-A, 304-B, 201 I.P.C. and Section ¾ D.P. Act, against Baiju, Jonha Devi, Ganga and Ramdeen, was registered on 25.03.2009 at 10:30, at the concerned police station by constable Nagendra Bahadur Singh and he also entered the substance of the F.I.R. in the G.D. No.8-Ka. Investigation was entrusted to one Devendra Nath, Additional Police Superintendent, Azamgarh, who took it up and at the instance of informant Ram Bilas, I.O. visited the place of occurrence and sketched a site plan. The Investigating Officer, during investigation recorded the statement of informant Ram Bilas and others and upon collecting evidence for offences under3 Sections 498-A, 304-B, 201 and Section ¾ D.P. Act, he submitted challan, Paper No.3 to court concerned.

5. The learned Magistrate registered a Criminal Case No.4177 of 2009 against the accused and in view of challan and other materials on record vide order dated 09.06.2009, in the exercise of his powers enshrined under Section 190(1) clause (b) took cognizance of the aforestated offences against all the accused and committed the said criminal case vide

order dated 29.06.2010, to the district Sessions Judge for trial of the accused.

6. Upon receiving criminal case No.4177 of 2009, the same was got registered in the District & Sessions court as S.T. No.46 of 2010.

7. The learned trial court vide order dated 30.10.2010, framed the charges against Baiju and three others under Sections 498-A, 304-B, 201 I.P.C. and Section ¾ D.P. Act. All the accused pleaded not guilty and claimed trial. As such, trial of the accused commenced.

8. In order to prove the charges against the accused, prosecution examined informant, P.W.1-Ram Bilas Kohar, P.W.2-Dashrath, P.W.3-Smt. Israwati w/o P.W.1, Ram Vilas Kohar, P.W.4-Radhey Shyam, who is the brother of the informant, P.W.1-Ram Bilas Kohar, P.W.5- Smt. Sharda wife of P.W.4 Radhey Shyam, P.W.6 Ram Samujh, who is the uncle of the deceased, P.W.7 Smt. Reshama w/o P.W.6, Ram Samujh, P.W.8, Additional Police Superintendent, Devendra Nath and P.W.9- Nagendra Bahadur Singh.

9. Statements of accused under Section 313 Cr.P.C. were recorded and accused have stated that the instant case came to be registered on account of enmity and misunderstanding. They have also stated in their statements that they had not made any demand of additional dowry, nor, deceased was subjected to mental and physical torture on account of non-fulfilment of any such demand. They also stated that they have not killed the deceased for nonfulfilment of demand of colour T.V. and motorcycle and they did not cremate the deceased in order to efface evidence of the offence with an intention to screen themselves from legal punishment.

10. Accused have also denied that they had subjected the deceased to cruelty. P.W.1 to P.W.4 in their testimonies have not stated the truth. Whereas, accused in respect of the evidence of P.W.5 Sharda, P.W.6 Ram Bilas Kohar, P.W.7 Reshama they have not made any comments; accused have also stated that the Investigating Officer had not made investigation properly and P.W.9- Nagendra Bahadur Singh has also given false evidence. Accused have also expressed their willingness to adduce evidence in their defence; but subsequently, they did not lead any evidence in their defence.

11. During trial, co-accused Ram Deehal @ Ramdeen had died on 20.10.2003 and on the strength of the death certificate, the trial against deceased was abated.

12. The learned trial court after hearing the learned counsel for both the parties, convicted accused/appellants Jonha Devi, Baiju and Ganga vide judgment and order dated 21.11.2013 and sentenced them for life imprisonment and they have also been convicted under Section 498-A I.P.C. and sentenced for one year imprisonment each and fine to the tune of Rs.5,000/- and learned trial court has also convicted the accused under Section ¾ D.P. Act and has sentenced for five years and fine of Rs.15,000/- each and in default of fine awarded 3 months additional imprisonment.

13. Appellants feeling aggrieved by the impugned judgement and order dated

21.11.2013 have preferred present criminal appeal and have challenged the impugned judgement, inter-alia, on the grounds that they have no criminal history. No offence can be made out against them. In view of the evidence of the witnesses, the learned trial court has recorded their conviction arbitrarily and illegally. The impugned judgement and order has also been challenged on the ground that the evidence on record has not been appreciated properly and their conviction and sentence is against the evidence on record. The impugned judgement and order is contrary to law. Therefore, the instant criminal appeal be allowed and impugned judgement and order dated 21.11.2013 passed by the learned Additional Sessions Judge, Court No.1, Maharajganj in S.T. No.96 of 2010, State Vs. Baiju be set aside and appellants/accused be acquitted.

14. P.W. 1 Ram Vilas, has stated in his deposition on 24.01.2011 that six and half years earlier he had married her daughter Sangeeta as per Hindu rituals and ceremonies and in the marriage he according to his financial capacity had given dowry. After three years of marriage, in "Gauna' Ceremony, his daughter with her husband, father in law and great father in law departed for her matrimonial house; thereafter his son in law Baiju and others demanded T.V. and Motorcycle and also said unless aforementioned articles were given, they shall not take Smt. Sangeeta with them; he expressed his inability to satisfy their demand, and due to non fulfilment of their demand all the aforementioned persons on his persuasion took her daughter Sangeeta with them; they also complained and threatened that unless the demanded articles were provided they shall not send her daughter Sangeeta to his house and they shall also ill treat her. Thinking, in marriages such demand is not uncommon and also persuaded himself that in due course every thing would become normal; his daughter in her matrimonial house for non fulfilment of demand, her mother in law Jonha Devi, son in law - Baiju, father in law-Ganga and also her great grand father in law Ramdeen subjected her to torture; he went to meet his daughter to her matrimonial house; her daughter kept weeping and informed him that she was being subjected to torture and also being beaten for not satisfying their demand for additional dowry; he said to his daughter that since he is a poor man, therefore, is not in a position to meet the said demand; his daughter told him that if the demand of T.V. and Motor Cycle was not met these persons shall kill her.

16. After pacifying his daughter and family members of her inlaws he returned to his house.

17. P.W.-1 Ram Vilas, has further deposed in examination in chief that on the information that the family members of matrimonial house of her daughter Sangeeta had beaten her; he went there, where, Smt. Jonha Devi and other family members told him that if their demand for T.V. and Motor Cycle was not fulfilled some unfortunate would happen; he had returned from their house and narrated the whole story to his wife, brother and other family members.

18. P.W.-1, Ram Vilas, in his examination in chief has stated that about the occurrence he went to file First Information Report at the police station but no action was taken; later he got an application typed and had put his thumb impression thereon; the First Information Report was presented to the police

Superintendent, Maharajganj, on whose direction a criminal case at Police Station against the accused came to be registered.

19. P.W.-5 Ram Vilas in his cross examination has admitted that he is an illiterate person; he does not remember month and year of the marriage of his daughter; he also cannot tell the month and year of "Gauna'. He has also admitted that after death of his daughter, he had presented a typed application to Police Superintendent; he had not presented any other application. Subject matter of the typed application was got written by a stranger; he had narrated him the details; which was described in the application and typist had typed that subject-matter in his typed application.

20. P.W.-1 Ram Vilas Kumhar, has admitted that he does not know the meaning of "Nivedan' and "Prarthi'; he does not know the reason as to how such words have been written in the written First Information Report, Exhibit Ka-1. During his deposition before the Court, F.I.R. Exhibit Ka-1, was shown to him to which he said that apart from the typed subject matter, some words have also been written by him. Witness-P.W.-1, Ram Vilas, has admitted that application, Exhibit-Ka-1 bears his thumb impression but he can not say as to who had written his name. He has also admitted that in written First Information Report Exhibit-Ka-1 date of marriage and Gauna, i.e. 25.04.2004 and 10.03.2006 are noted but how they came to be mentioned in the application he cannot shed light.

21. P.W.-1, Ram Vilas has further stated that he does not remember the date, month and year of the death of his daughter but how it came to be noted in his First Inforation Report, Exhibit- Ka-1, he cannot explain.

22. P.W.-1-Ram Vilas has also deposed that the Police Stationfalls within the district-Mahrajganj, he is native of Village-Badharai Vishambharpur, whereas, the matrimonial house of the deceased is situated at village Jhamat, Police Station-Purandarpur, District-Mahrajganj; distance between his house and the matrimonial house was about "Char Kos'; In a "Kos' how many kilometres are comprised of, he does not know.

23. He also does not know how many miles a "Kos' comprises; he came to know about the death of his daughter through passerby passing through the road, conversing among themselves that his daughter has been done to death; he did not ask the name of any passerby; after hearing about the death of his daughter, he reached on a motor cycle at around 10 a.m. at the matrimonial house where he found only mother in law of the deceased but husband, and father in law and the great grand father in law were absconding; he does not know whether at the time of marriage electricity connection in matrimonial house was operational or not.

24. He further states that despite his endeavours, his daughter was not allowed to go with him from her matrimonial house because of non fulfilment of additional dowry. About one month, earlier he had visited the matrimonial house of his daughter who kept weeping without pause and complained that for non fulfilment of demand of additional dowry, she was being consistantly beaten and was being subjected to torture.

25. He has further stated that after killing her daughter Sangeeta, all the

aforesaid accused persons had cremated her dead body; he and his brother went to the house of his son in law and inquired about his daughter but no satisfactory answer came; Smt. Johna Devi, Baiju and Ramdeen informed that his daughter had died; they had also told him that he was asked to satisfy their demand for colour T.V. and Motor cycle but he did not meet their demand, therefore, no intimation in this regard was given to him. Thus, the accused Baiju, Ganga, Johna Devi and Ramdeen for non fulfilment of their demand of dowry have killed his daughter and have cremated her.

26. P.W.-1 Ram Vilas, further deposed that he is a labour and owns less than one acre land; at the time of marriage apart from dowry he had also given cash; after death of his daughter he had gone to the matrimonial house of his daughter but had not met the village headman (Pradhan); he did not inquire about the death of his daughter from the villagers of matrimonial village; he had visited the matrimonial house only on the date of her death thereafter, he did not go there; at the matrimonial house he had not found police. In between death of Sangeeta and lodging of the First Information Report, he did not convene any Panchayat.

27. He also deposed that it would be wrong to say that on provocation of some rivals of accused and for wrongful gain they have been falsely roped in this case.

28. The accused have not offered suggestion to P.W.-1 Ram Vilas, that his written First Information Report was false and fictitious and was not written at his dictation; it has also not been suggested to P.W.-1 Ram Vilas as to who were rivals of accused. Since he is a poor labour, hence, he was not in a position to put any undue pressure upon the police officers to falsely implicate them.

29. On behalf of the accused, P.W.-1 Ram Vilas, has not been cross examined about his evidence given in his examination in chief to the effect that passerby had met him in between his village and matrimonial house of his daughter and through them he came to know about the death of his daughter.

30. Evidence of P.W.-1, Ram Vilas adduced in his examination in chief has also not been challenged in the cross examination to the effect that after the alleged incident, he had gone to local police station wherein his First Information Report was not lodged; he has also not been challenged in his cross examination about his evidence deposed in examination in chief that he had got typed the draft of the First Information Report.

31. P.W.-1 Ram Vilas has averred in written First Infomration Report Exhibit-Ka 1 that marriage and "Gauna' of his daughter were took place on 28.04.2001 and 10.03.2006 respectively, though P.W.-1, Ram Vilas has expressed inability in his testimony about the said dates noted in his written First Information Report but it is not the defence of the accused/appellant that marriage of the deceased with Baiju, had not been solemnized on 25.04.2004 and it is also not denied by the appellants/accused that Gauna of the deceased had taken place on 10.03.2006.

32. It is an undisputed fact that death of the deceased occurred within seven years of her marriage with Baiju.

33. Deposition of P.W.-1, Ram Vilas, has not been confronted in his cross

examination to the effect that the deceased had shared her condition with her father and other family members regarding the torture and cruelty she was consistently subjected to on account of non satisfaction of demand of colour T.V. and Motor Cycle.

34. P.W.-1 Ram Vilas has denied the suggestion offered to him in his cross examination that it would be wrong to say that the appellant/accused did not make any demand for colour T.V. and motor cycle and also it would be wrong to suggest that the deceased was not subjected to torture due to non satisfaction of demand of additional dowry by the appellants/accused.

35. P.W.-1-Ram Vilas has also not been confronted in his cross examination about his evidence that he tried to persuade the accused/appellants not to make demands, for colour T.V. and Motor cycle because of his financial constraint.

36. Further, he has also not been cross examined regarding his piece of evidence to the effect that on his visit one month before, from the date of alleged incident, deceased had informed him about the cruelty and her ill treatment by the accused due to non satisfaction of additional demand of dowry. P.W.1, has also not been challenged in his cross examination him on the effect that he paid visit to matrimonial house to meet her daughter because after Gauna they did not send her to his house; and or his last visit to matrimonial house one month before the incident, the deceased kept weeping because of harassment and torture at her matrimonial house. The accused have put suggestion to P.W.-1 Ram Vilas regarding additional demand of dowry and their false implication which has been categorically denied by him.

37. P.W.-2 Dashrath, who happens to be brother of the deceased states in his testimony dated 21.04.2011 that about 6-7 years earlier, marriage of his sister Sangeeta was solemnized with Baiju and after two years "Gauna' had been performed; at the time of "Gauna' Baiju and his other family members demanded motor cycle and colour T.V.; he had come to know that Baiju and others for non fulfilment of their demand for colour T.V. and motor cycle had harassed his sister.

38. He has further deposed that he has passed 2-3 standard; he does not know when the marriage of his sister was solemnized; he also does not remember date of her "Gauna'; at the time of the death of the deceased, he was staying in Mumbai and had returned after four days of her death; after his return from Mumbai, he did not go to the matrimonial house of the deceased; his father had informed him telephonically on the date of death of his sister; his father had also told him that he had gone to the matrimonial house of the deceased; his father had called him at 3-4 p.m.; "Gauna' was performed within three years from the marriage; after lapse of one year from Gauna, his sister had died; No member of husband's family, in respect of death of the deceased had informed him; after the death of his sister no Panchayat was convened; P.W.-2 has admitted in his examination in chief that the deceased had died at the house of her husband; but, how she had died was not known to him.

39. P.W.-2 Dashrath, has admitted in his cross examination that at the time of death of his sister, he was staying in Mumbai and he came to know about the death of his sister on the information given by his fahter P.W.-1 Ram Vilas, therefore, his deposition pertaining to death of the

deceased or place of death, is based on indirect evidence. P.W. -2 Dashrath, in his examination in chief states that at the time of "Gauna', his brother in law Baiju and his other family members had demanded motor cycle and colour T.V. finds support from the statement of P.W.-1 Ram Vilas. This statement of P.W.-2 has also not been challenged in cross examination nor any specific suggestion on behalf of the accused has been offered to him.

40. P.W.-3 Ishrawati, mother of the deceased, has stated in her statement recorded before the learned trial Court on 04.08.2011 and 22.10.2012 that in the marriage of her daughter with Baiju, dowry was given as per her financial capacity; at the time of Gauna of the deceased, Baiju, Ganga and other members of their family had made demand of T.V. and Motor cycle but some how after the "Gauna' her daughter had gone to her matrimonial house; at the time of "Gauna', Baiju and his family members had also said that Sangeeta will not be allowed to go to her parental house unless their aforesaid demand for additional dowry was satisfied.

41. P.W.-3, Ishrawati, has next deposed that after "Gauna' her husband had gone to meet the deceased to take stock of her welfare but there also Baiju and his family members had repeated their demand of additional dowry; deceased had also informed his father about continuous torture by her husband Baiju, father in law, mother in law, and great father in law and during such narration she kept weeping. She further states that two and half years earlier, for non fulfilment of the demand of additional dowry of motor cycle and colour T.V.- husband, father in law, mother in law killed Sangeeta and they had cremated the body of the deceased; on coming to know about the incident, her husband and other family members went to the house of accused.

42. P.W.-3 Ishrawati, has not stated in her examination in chief that after the Gauna of the deceased she had ever visited the house of the accused but, what was transpired at matrimonial house of the deceased between her husband and accused, is stated to have been shared by her husband with P.W.3 Ishrawati.

43. P.W. 3 Ishrawati, like her husband P.W.-1 Ram Vilas, is illiterate and is resident of vilallge Badhara, Vishambharpur. She is not only a house wife but also she and her husband have rural background. In this backdrop not only her statement but also the deposition of P.W. 1, Ram Vilas should be read, understood and scrutinized.

44. P.W. 3, Ishrawati, in her cross examination says that she does not remember the date, month and year of marriage or Gauna of her daughter of the deceased, after the marriage within a period of 2-3 years "Gauna' was performed; she has expressed her inability that after "Gauna', in how many days Sangeeta had died or after "Gauna' the deceased was not allowed by her husband and in laws to visit her parental house.

45. P.W.-1 has also deposed that accused had also said to him in the presence of his other family members, that if their demand for additional dowry was not satisfied, deceased Sangeeta, in the Sasural will not stay happy.

46. P.W.3-Ishrawati, has also been examined about the fact as to how she came to know about the death of the

deceased, to which she has stated that at the time of death of Sangeeta she was not present at her house but her husband had come to know about the death of the Sangeeta through passerby, and, her husband had informed her.

47. The statement of P.W.-3 Ishrawati, is not based on direct or indirect evidence because she has specifically disclosed that on the date of death of her daughter she was not present at her house. It appears that after her return to her house she had come to know about the death of Sangeeta.

48. P.W.-3, Ishrawati, has also admitted that she did not visit the inlaws house of her daughter. On receiving the information about the death of Sangeeta, Dashrath and her husband with other persons whose name she does not know had visited her in laws house.

49. P.W.-2 Dashrath, has not stated in his entire statement that after "Gauna', he had visited with his father or others to the in laws house of her sister.

50. P.W.-3, in response to the suggestion in her cross examination has stated that it would be correct to say that her knowledge pertaining to the incident is based on the information of her husband, son and others. She has also admitted that she has not witnessed the incident.

51. It is not the case of the prosecution that P.W.3-Ishrawati, P.W.-1 Ram Vilas, or P.W.-2 Dashrath, have seen the incident. On the contrary, it is case of prosecution that about the death of the deceased, P.W.-1 Ram Vilas had come to know through passerby and her cremation had also taken place.

52. P.W.-1 Ram Vilas has also deposed that none of the inlaws of her daughter, had informed him or any member of his family in respect of the death of Sangeeta.

53. P.W. -3, Smt. Ishrawati, also has stated in her cross examination that there is no electric connection in the house of Baiju; accused had made demand for colour T.V. and Motor cycle at the time of marriage. She has also expressed her inability to reveal the reason of her previous statement in examination in chief that accused had made demand for colour T.V. and motor cycle at the time of "Gauna'.

54. In sequence of her cross examination or elsewhere, the reply of the P.W.-3 Ishrawati Devi, with regard to which one of her statements is true is not on record nor any observation of the learned trial Court has been recorded, therefore, it cannot be said that she (P.W.-3) maintained silence with regard to the said question, as such no adverse inference in this regard can be drawn.

55. P.W.-3 Ishrawati Devi, has not been cross examined, nor any suggestion on behalf of the accused/appellants has been given to the effect that her statement in her examination in chief that Baiju, Ganga and other members of their family had not only made demand for colour T.V. and motor cycle at the time of "Gauna', but also had repeated their such demand and had also threatened that unless their demand of additional dowry was fulfilled, deceased will not be sent to her parental house.

56. P.W.-3-Ishrawati, in her cross examination has said that her husband after

Gauna had gone to take information of welfare of her daughter at her in-laws house, wherein again the demand of additional dowry, by the husband and other members of the matrimonial family was made and for its non fulfilment, he was insulted.

57. "Gauna', after marriage of the deceased with Baiju is not in dispute and the death of the deceased occurred in her matrimonial house is also not disputed. It is also not defence of the accused that any member of the family of the deceased had participated in the cremation of the deceased. Further, this fact has also been questioned in the cross examination of any of the aforementioned three witnesses that after the Gauna, Ram Vilas did not visit the matrimonial house of his daughter to enquire about her welfare.

58. The visit of P.W.-1 Ram Vilas to his daughter's matrimonial house is also natural and trustworthy because accused/appellants had threatened not only P.W.-1 Ram Vilas but also other members of his family at the time of "Gauna' that if their demand of additional dowry was not met deceased would not be allowed to visit her house and it is also not the defence of the appellants that after Gauna, the deceased had ever visited her parental house.

59. It is also evident from the above that the evidence of P.W.-1 Ram Vilas and P.W. 3-Smt. Ishrawati Devi, in their cross examinations, has not been challenged. Even with regard to the torture to the deceased for additional demand of dowry; frequent visit after "Gauna' made by P.W.-1 Ram Vilas and during visit of P.W.-1 Ram Vilas to meet her daughter at her matrimonial house, narration of the deceased to P.W.-1 Ram Vilas about the constant demand for additional dowry and for its non fulfilment, putting the deceased to torture has also not been challenged, nor in this connection, on behalf of the accused appellants suggestion/suggestions has/have been put to the said witnesses.

60. Under the provisions of the Indian Evidence Act, it is stipulated that if on material particulars/depositions of the witnesses, in examination in chief, is not challenged in the cross examination, then it shall be presumed that such an unchallenged portion of testimony of a witness is admitted to the accused. It is also provided under Indian Evidence Act, that if any fact is admitted to other party, then that fact is not needed to be proved by first party, as such the above referred testimony of P.W.-1 Ram Vilas and P.W.-3-Smt. Ishrawati Devi, has not been challenged in their cross examinations, therefore, an inference against the accused shall be drawn that such evidence/facts are admitted to them.

61. It has also emerged from the above that demand of additional dowry, not only at the time of "Gauna' but also thereafter was made constantly and deceased was maltreated on account of its non fulfilment. The deceased was not happy after "Gauna' till her death and this fact was also brought to the knowledge of P.W.-1 Ram Vilas during his last visit which took place about one month before the death of the deceased.

62. In Indian Evidence Act, the quantity of the witnesses is not sine-qua-non to hold conviction of an accused. Rather, charges against an accused could be proved if testimony of a witness is found natural, independent, truthful and consistent.

63. Appellants/accused have denied to have made demand for colour T.V. and

motorcycle in between 13.03.2009 to 25.04.2004 and they have also denied in their statements recorded under Sections 313 Cr.P.C. to have subjected the deceased to torture for non satisfaction of demand of additional dowry. Appellants/accused have also denied to have subjected the deceased with cruelty because of non fulfilment of demand for dowry.

64. Appellants/accused have also denied in their statements that after causing dowry death to the deceased they had with an intention to erase the evidence, as well, to screen themselves from the legal punishment, they had cremated the deceased.

65. Appellants/accused have also stated in their statements that the evidence of P.W.-1 Ram Vilas, P.W.-2 Dashrath and P.W.-3 Smt. Ishrawati, as well as First Information Report (Exhibit-Ka-1) is false.

66. Accused/appellants, in their statements, under Section 313 Cr.P.C. have not claimed to inform her family members about the death of deceased.

67. P.W.-1 Ram Vilas has stated that the factum of death and cremation of the deceased was not communicated to him or any member of his family.

68. P.W.-4 Radhe Shyam states in his ocular evidence, recorded on 03.03.2012 before the learned trial Court that the incident had occurred about three years prior to the killing of the deceased; the deceased Smt. Sangeeta was married with Baiju and in third year after marriage, "Gauna' of the deceased had taken place. Further, he has stated that accused/appellants have not killed Smt. Sangeeta for non satisfaction of any demand for additional dowry.

69. P.W.-4 Radheshyam turned hostile, therefore, was declared hostile but in his cross examination by the prosecution he has not supported the version of P.W.-1 Ram Vilas, P.W.-2 Dashrath or P.W.-3 Smt. Ishrawati Devi. However, this witness in his cross examination done on behalf of the appellant/accused has stated that after the death of Sangeeta, information about the death by in-laws and the family of her matrimonial house was sent at her village.

70. Deposition of P.W.-4, Radheshyam, pertaining to the information of death of the deceased is vague and ambiguous; he has not stated that which member of the family of husband/accused or Baiju himself had sent information to any member of her parental family, nor this witness has deposed that if any such information he had received, the same was shared by him with P.W.-1 Ram Vilas or any of his family members.

71. Since P.W.-4 Radhe Shyam, has turned hostile and appears he has been won over by the appellants/accused, therefore, he seems to have stated in his cross examination that information by the members of the matrimonial house of the deceased was sent to her village. In our opinion this piece of evidence of P.W.-4 Radhe Shaym, cannot be believed.

72. P.W.-5-Sharda, wife of P.W.-4 Radhe Shyam has also deposed before the trial Court on 22.03.2012 that the deceased was the daughter of her husband's elder brother; about 5 years before her death, she was married to Baiju and within a period of three years, "Gauna' of the deceased had taken place. This witness like her husband-P.W.-4, Radheshyam, has not supported the prosecution story. In her remaining examination in chief, she has feigned

ignorance about the demand of any additional dowry and for its non fulfilment, the deceased was murdered by the appellants/accused.

73. P.W.-5, Smt. Sharda, after she was declared hostile was put to cross examination on behalf of the State but she has also not supported the prosecution story in her cross examination.

74. P.W.-5, Smt. Sharda, has not been cross examined by appellants/accused.

75. P.W.-6, Ram Samujh, in his testimony recorded on 04.06.2012 before the learned trial Court has said that three years earlier Sangeeta had died; Sangeeta was married with Baiju and thereafter, "Gauna' had taken place, but he does not remember exact time of Gauna.

76. P.W.6, Ram Samujh has also not supported the prosecution story in his remaining examination. Whereupon, he was declared hostile and this witness in his cross examination by the prosecution, has also not given any evidence against the appellants/accused.

77. P.W.-6, Ram Samujh, in his cross examination done on behalf of the appellant/ accused has denied his previous statement under Section 161 Cr.P.C. given to the Investigating Officer. As such P.W.-6 Ram Samujh, also does not support P.W.-1 Ram Vilas, P.W.2-Dashrath and P.W. 3 Smt. Ishrawati Devi.

78. P.W.7, Smt. Reshma, wife of P.W.-6, Ram Samujh, was also examined before the learned trial Court on 17.07.2012. She has admitted that three years before "Gauna' the marriage of the deceased with Baiju was solemnized but she has not supported remaining prosecution story in rest of her examination in chief. On the request of the prosecution, P.W.-7 Reshma was declared hostile and was allowed to be cross examined by prosecution but she in her cross examination has denied to have given her statement to the Investigating Officer.

79. P.W.-7, Smt Reshma, in her cross examination done by the accused/appellants, she has feigned ignorance about the alleged incident. As such the prosecution story does not find support from the statement of P.W.-7 Reshma.

80. P.W.-4, Radhe Shyam, P.W.-5 Smt. Sharda, P.W. 7-Smt. Reshma, are not the members of the family of the deceased but they are informant's relative.

81. In such matrimonial matters it is not common to share such dispute with relatives, therefore, the evidence of P.W.-4, P.W.-5 Smt. Sharda, P.W.-6 Ram Samujh and P.W.-7-Smt. Reshma, with regard to the alleged incident they have expressed their ignorance about the incident is quite natural and on the strength of their evidence, depositions of P.W.-1 Ram Vilas, P.W.-2-Dashrath, and P.W.-3 Smt. Ishrawati Devi, can not be rendered shaken.

82. We are of the opinion that it is just and proper to discard the evidence of P.W.-4 Ram Dular, P.W.-5 Sharda, P.W.6- Ram Samujh and P.W.7 Smt. Reshma.

83. P.W.8, Devendra Nath, Additional Police Superintendent, who has conducted the investigation in this case, states that on 26.03.2009 he was posted as Circle Officer at Karenda and Criminal Case had registered at Case Crime No. 226 of 2009

under Sections 498-A, 304, 201 I.P.C. and Section ¾ of Dowry Prohibition Act, of which investigation was entrusted to him, he had recorded statement of informant Ram Vilas and also had inspected the place of the occurrence at the instance of the informant; he had sketched the site plan of the such place and had also recorded the statements of Satya Pal and others; he had also recorded the statements of the Smt. Ishrawati, Dashrath, Radhe Shyam, Smt. Sharda, Ram Samujh and Smt. Reshma, on 29.03.2009.

84. P.W.8 Devendra Nath, in his cross examination has stated that it would be wrong to say that if witness Radhe Shyam has denied his statement recorded under Section 161 Cr.P.C.. He has stated that he had recorded his statement.

85. P.W.-8, Investigating Officer, Devendra Nath has also further said that it would be wrong if witness Smt. Sharda says that she had not got her statement recorded to him to the effect that deceased was subjected to harassment for non fulfilment of demand of T.V. and Motor Cycle.

86. P.W.-8, Investigating Officer, Devendra Nath, in his cross examination has also said that the statement of Smt. Reshma W/o Ram Samujh in the Court, would be false if she has expressed her ignorance about the occurrence of the incident.

87. From the above cross examination of P.W.-8 Devendra Nath, it is evident that the applicant/accused by implication having admitted that witnesses, Radhe Shyam, Smt. Reshma W/o Ram Samujh, had got their statements recorded during investigation and on behalf of the appellant/accused, the comment of P.W.-8 Devendra Nath, with regard to witnesses Radhe Shyam, Smt. Sharda and Smt. Reshma, has been sought about their specific evidence in which these three witnesses have not supported the prosecution story and have turned hostile. Therefore, the statement of P.W.-4 Radhe Shyam, P.W.5 Smt. Sharda wife of Radhe Shyam and P.W. 7-Smt. Reshma W/o Ram Samujh, in their cross examination to the effect that their statements under Section 161 Cr.P.C. were not having been recorded by the investigating officer are unbelievable.

88. P.W.-8, Investigating Officer, Devendra Nath, has also stated in his cross examination that he had not recorded the statement of any member of the matrimonial house of the deceased. This witness further states that during investigation he had interrogated in-laws, other family members and villagers but they had expressed their ignorance about the death of the deceased.

89. P.W.8- Devendra Nath, investigating Officer has also stated in his cross examination that informant had told him 10 month prior to his statement to him, he had visited the house of the deceased; he has not collected any evidence during investigation whether there was electric connection in the house of the accused or not.

90. There is a distance of about 12 Kilometres in between the matrimonial house and parental house of the deceased.

91. P.W.8, Devendra Nath, also states in his cross examination that during investigation he was told by the informant that marriage of the deceased was

solemnized on 25.04.2004 and "Gauna' performed on 10.03.2006. According to the statement of informant, "Gauna' of the deceased had been performed within three years of marriage of the deceased.

92. Appellant/accused have not challenged the evidence of P.W.8-Devendra Nath that marriage on 25.09.2004 and thereafter, within a period of three years, "Gauna' was on 10.03.2006.

93. Appellant/accused have not challenged the time of marriage and Gauna of the deceased in the cross examination. For appellants/accused even informant P.W.-1-Ram Vilas, P.W.-2 Dashrath, P.W.-3-Ishrawati, have not been cross examined in this regard.

94. The appellants/accused, in their statement under Section 313 Cr.P.C. have not disputed the time of the marriage and "Gauna' of the deceased, therefore the evidence of P.W.-1 Ram Vilas and other witnesses, who have supported P.W.-1 Ram Vilas to the effect that marriage had taken place about six and half years before the death of deceased and "Gauna' had been performed within a period of three years of marriage is trustworthy. Statement of P.W.-1 Ram Vilas was recorded on 24.01.2011 and also on 25.01.2011 thus the period of marriage and Gauna has been calculated by P.W.-1 Ram Vilas on the date of his evidence is dated 24.01.2011.

95. It is stated by P.W.-8, Devendra Nath, Investigating Officer, that it would be wrong to say if witness Dashrath states in his statement before the Court that he (investigating officer) had recorded the date of marriage as 25.04.2009 and the date of "Gauna' as 10.03.2006. This witness in sequence of his cross examination has clarified that during investigation Dashrath had told him the date of marriage, "Gauna' and the incident. Considering the evidence on record with regard to the marriage and "Gauna' of the deceased, there is trustworthy evidence, therefore, contradictory statements of P.W. 8-Investigating Officer, Devendra Nath, in this respect cannot be discarded in face of the other evidence on record.

96. Appellants/accused have strangely sought opinion of P.W.-8, Devendra Nath, regarding the piece of evidence of Radhe Shyam, Smt. Sharda, Smt. Reshma, which cannot be read against the prosecution.

97. Investigating Officer P.W.-8 in his statement could have been contradicted with regard to the statement that on 29.04.2010 he had recorded the statements of Village Pradhan-Shamshuddin, villager Jagdish, Hisahunnah, Hansraj and Suresh and also on 15.05.2009 statements of Baiju, Smt. Johna Devi, Ganga Kumhar and Ramdeen @ Ram Dihla. In his cross examination he has admitted that the family members of the matrimonial house of the deceased had not supported prosecution story. He has also stated in his deposition that on the basis of evidence collected during investigation he had submitted charge sheet against the accused on 30.05.2009 to the Court concerned. He has also proved site plan as Exhibit Ka-2 and charge sheet/ Chalan as Exhibit Ka-3. He has further stated that bones and remaining ash of the dead body of the deceased were not been recovered from the place of cremation. Cremation is said to have occurred on 13.03.2009 at around 5 a.m. at Jhamat. Constant demand of T.V. and motorcycle, since the time of "Gauna' to the last visit of P.W.-1 Ram Vilas at the house of the accused/appellants, one month

before the death of the deceased and also thereafter was made. On visit of Ram Vilas at the house of accused appellants, one month before the death of the deceased, informant came to know that the accused/appellant Baiju and Ganga repeatedly made demand of dowry and on non satisfaction of their demand they ill treated the deceased and also subjected her to torture. However, P.W.-1 Ram Vilas has not stated in his deposition that on his last visit to the matrimonial house of the deceased accused/appellant Smt. Johna Devi had also made demand for additional dowry, therefore, there is no clinching evidence on record to the effect that appellant/accused Johna Devi had also made demand for dowry soon before the death of Sangeeta. P.W. 1-Ram Vilas has also stated in his statement that after his visit to the matrimonial house of the deceased he had come to know about her maltreatment due to non fulfilment of demand of dowry was made by Baiju and Ganga.

98. P.W.9, Constable-Nagendra Bahadur Singh, has deposed on 16.07.2013 before the learned trial Court that he was posted in the office of Police Station-Purandarpur. On 25.03.2009 at around 10.30 a.m. he had received a typed application bearing the order of Superintendent of Police Maharajganj directing for registration of the case, in pursuance of the said order, he had got written First Information Report Chik No. 34/09 and registered a Case at Crime No. 226 of 2009 under Sections 498-A, 304-B, 201 I.P.C. and ¾ of Dowry Prohibition Act and on that date and time, he had entered substance of the First Information Report in the G.D., and has proved First Information Report Chik, copy of the GD as Exhibit Ka-4 and Ka-5 respectively.

99. P.W.-9 Constable Nagendra Singh has stated that the original G.D. was not before him. This witness in his examination in chief has deposed that he has brought carbon copy of the original GD and both were prepared in his writing and signatures. As such P.W.-9 Constable Nagendra Singh has admitted that original GD was not with him at the time of deposition before the Court which is a normal practice because the original G.D. is supposed to be kept at the police station so that in the case of registration of any criminal case, substance of the same could be entered into the same. Since G.D. was not before the P.W.9, Constable Nagendra Singh, at the time of his deposition in the Court therefore he was not in a position to say whether before or after the instant case which case had been registered at the police station. P.W.-9 Nagendra Singh has also said in his cross examination that in the G.D., it is written that after G.D. was prepared, separate special report shall be sent. Further he says that there is no such evidence on record to the effect whether the special report as per the rule was sent or not, however, such report is necessarily forwarded. It appears from the said cross examination of P.W.9 Nagendra Bahadur, that the appellant/accused wanted to ask the witness whether the separate special report with regard to commission of the instant incident was sent to the higher police officer or not. There is such a rule in the police regulations but if it is accepted on the face that no such separate report was forwarded to superior police officer is on the record then no adverse inference against the prosecution case could be drawn nor F.I.R. could be deemed as anti time. As such P.W.9 Constable Nagendra Bahadur by his deposition has proved the First Information Report Chik and Carbon

copy of G.D. as Exhibit-Ka 4, and 5 respectively.

100. Accused in their statements under Section 313 Cr.P.C. have said that registration of case on the basis of written First Information Report is false and has no justification.

101. Submission of accused under Section 313 Cr.P.C. that P.W.-8, Devendra Nath investigating officer has conducted wrong investigation hence Chalan against them is not valid is not based on material on the record.

102. That case against them was registered and their trial was concluded was the result of enmity and misconception does also not hold water because the accused have not suggested about the alleged enmity and the alleged misconception of any witnesses in the cross examination nor any evidence in support of their statement has been adduced. However, appellant/accused, in their statements under Section 313 Cr.P.C. have expressed their desire to adduce evidence in their defence but they could not muster up courage to do so.

103. P.W.-1 Ram Vilas, has stated that for the cruelty meeted out to the deceased at her matrimonial house, the deceased had named her husband, mother in law and father in law, but during last visit of P.W.-1 Ram Vilas before death of deceased he has deposed that the deceased had complained about harassment due to non satisfaction of their demand for additional dowry by her husband and father in law and after lapse of a month deceased died unnaturally in her matrimonial house, therefore, there is no inconsistency in the evidence of P.W.-1 Ram Vilas with regard to the cruelty/harassment by husband and father in law on account of non satisfaction of demand of additional dowry. However, there is no cogent evidence on record as to whether soon before the death of the deceased, mother in law had also subjected the deceased to harassment due to non fulfilment of demand of additional dowry. Therefore, there is no reliable evidence for offence under Section 304-B of I.P.C. against the mother in law. That at the time of "Gauna' and till his last visit of P.W-1, Ram vilas, at her daughter's residence. However, there is consistent and trustworthy evidence against all the three appellants/accused.

104. In case of **Kans Raj vs State Of Punjab & Ors.** 2000 (5) SCC 207, a three Judge Bench, of Hon'ble Apex Court laid down that: " Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straight jacket formula can be laid down by fixing any time limit."

105. In the present case the deceased was not allowed to visit her parental house after "Gauna'; her husband and in laws had threatened P.W.-1 Ram Vilas and P.W.-3 Ishrawati Devi that in case their demand for additional dowry was not met their daughter (deceased) will not remain happy in her matrimonial house. Admittedly, the matrimonial house is not situated at much distance from the parental house and there is evidence on record that the distance in between these two houses is about 14 kilometers.

106. In the facts and circumstances of the case the deceased was not happy in her matrimonial house on account of non fulfilment of additional demand of dowry, she was subjected to harassment and

torture, therefore, being father it is quite normal that P.W.-1 Ram Vilas, would pay visit to the matrimonial house to find about the welfare of the deceased.

107. Learned counsel for the appellant/ accused has contended that P.W.-1 Ram Vilas, P.W.-3 Smt. Ishrawati Devi are parents of the deceased, whereas, P.W.-2 Dashrath is her brother. He further submits that in the instant case since P.W.-4 to 7 have not supported the case of prosecution and the depositions of P.W.-1, P.W.-3 are also inconsistent and contradictory, therefore appellants/ accused could not be held guilty.

108. In **Gumansinh @ Lalo @ Raju Bhikhabhai ... vs The State Of Gujarat reported in** AIR, 2021, SC 4174, the Hon'ble Apex Court has held that:

"Most often the offence of subjecting the married woman to cruelty is committed within the boundaries of the house which in itself diminishes the chances of availability of any independent witness and even if an independent witness is available whether he or she would be willing to be a witness in the case is also a big question because normally no independent or unconnected person would prefer to become a witness for a number of reasons. There is nothing unnatural for a victim of domestic cruelty to share her trauma with her parents, brothers and sisters and other such close relatives. The evidentiary value of the close relatives/interested witness is not liable to be rejected on the ground of being a relative of the deceased. Law does not disqualify the relatives to be produced as a witness though they may be interested witness. However, when the Court has to appreciate the evidence of any interested witness it has to be very cautious in weighing their evidence or in other words, the evidence of an interested witness requires a scrutiny with utmost care and caution."

109. In this case though the relatives, as witnesses, were examined by the prosecution but they are also related to accused/ appellants. However, there is trustworthy and reliable evidence of P.W.-1 Ram Vilas, P.W.-3 Smt. Ishrawati Devi and also evidence of P.W.-2 with regard to marriage and "Gauna' of the deceased and also consistent evidence with regard to repeated demand of dowry and for its non fulfilment accused subjected the deceased to harassment and also there is trustworthy and reliable evidence on the record as having been referred above that Baiju and Ganga soon before the death of deceased had also made consistent demand of dowry not only to the deceased but also to P.W.-1, Ram Vilas who had lastly visited matrimonial house within a month, thereafter, she had died in her Sasural within seven years of her wedlock.

110. It also transpires from the above discussion that for offences under Sections 304-B, 498-A, I.P.C. and ¾ D.P. Act against appellants Baiju and Ganga, whereas, the charge under Section 304-B I.P.C. has not proved against the mother in law Jonha Devi.

111. However, charges for offences under Section 498-A I.P.C. and Section ¾ D.P. Act, are proved against Jonha Devi.

112. It is also evident from the above discussion that the factum of death of the deceased was not communicated to the parents by any member of the family of accused appellants and cremation of the deceased was done clandestinely.

113. The parents of the deceased or any member of their family did not get an

opportunity to attend the cremation of the deceased and also they could not see the face of the deceased as it is a normal desire of every Indian.

114. Section 113 B of Indian Evidence Act provides that:

"When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death"

Explanation has also been appended to the said Section which reads as follows:

"Explanation.--For the purposes of this section, "dowry death" shall have the
same meaning as in section 304B, of the Indian Penal Code."

115. Hon'ble Supreme Court in ***Banshi Lal vs. State of Haryana, (2011) 11 SCC 359*** emphasized that:

" the mandatory application of presumption under Section 113-B of the Indian Evidence Act, ones the ingredients of Section 304-B I.P.C. stood proved the presumption as to dowry death shall be drawn."

Therefore, the onus of essential ingredients established by the prosecution, presumption under Section 113-B of Evidence Act, mandatorily operates against the accused. This presumption of causality can be rebutted by the accused.

116. In the instant case to rebut the presumption under Section 113-B of Indian Evidence Act, accused have not adduced any oral or written evidence.

117. All the accused in their statements under Section 313 I.P.C. have not explained as to how the deceased had died. They have merely stated that they have been falsely implicated due to enmity and misconception but there is no evidence on record to establish that prior to the death of the deceased any enmity existed between the deceased and accused or between the accused and any member of the family of the deceased.

118. Accused have also not thrown light on their statements with regard to misconception, therefore, appellants/ accused Baiju and Ganga have failed to rebut the presumption under Section 113-B of Indian Evidence Act.

119. In the light of above findings after perusing the relevant material and the evidence available we find that the learned Trial Court has not committed any error in convicting the appellants/accused Baiju and Ganga under Section 498-A, 304-B I.P.C. and Section ¾ of Dowry Prohibition Act. However, upon appreciation of facts, circumstances and relevant materials and evidence available on record we find that the learned lower Court committed error in convicting and sentencing appellants/accused Smt. Johna Devi, for offence under Section 304-B I.P.C., therefore, her conviction and sentence under Section 304-B I.P.C. is set aside. However, there is no error in convicting and sentencing Smt. Johna Devi, under Section 498-A, I.P.C. and Section ¾ of D.P. Act.

120. As discussed above, appellant/accused Smt. Jonha Devi has remained in prison in the instant case for a considerable time therefore, in the facts and circumstances of the case her sentence under Section 498-A I.P.C. and ¾ D.P. Act is modified to the extent she has undergone imprisonment, therefore, she deserves to be released if in judicial custody from jail. If she is detained in judicial custody her release order be transmitted to the concerned jail Superintendent forthwith.

121. However, considering the relationship of appellant Ganga with the deceased we are of the opinion that sentence awarded to him for offences under Section 304-B I.P.C. is too stringent, therefore Appellant Ganga instead of sentence of life imprisonment, it is modified to the extent of 7 years rigorous imprisonment.

122. In the result, the appeal against the judgment and order 21.11.2013 passed by Additional District and Sessions Judge, Court No. 1, Mahrajganj, in Session Trial No. 96 of 2010, State vs. Baiju and others, arising out of Case Crime No. 226 of 2009, under Sections 498-A, 304-B, 201 I.P.C. and Section ¾ of Dowry Prohibition Act, Police Station-Purandarpur, District-Mahrajganj, to the extent of conviction of appellant Jonha Devi and Ganga, is modified as above and is ***partly allowed*** and for appellant Baiju, the judgment and order dated 21.11.2013 is affirmed and upheld and the appeal for him subject to above conclusion is ***dismissed.***

123. Appellant/accused Ganga, who has been enlarged on bail, is hereby directed to surrender before the learned Additional Sessions Judge, Court No. 1, Mahrajganj, within a period of one month from the date of delivery of this judgment, to undergo the remaining sentence of 7 years awarded by this judgment failing which the learned trial Court shall secure his presence before it and forward him to jail concerned to serve the remaining sentence. It is also clarified that the period of his judicial detention, in the present case shall be adjusted, in accordance with the Jail Manual.

124. The Superintendent of Police, Maharajganj, to ensure compliance and send a report to this Court.

125. The bail bond/ security of accused Ganga shall stand cancelled/ discharged.

126. Registry to send the lower Court record along with a copy of this judgment/order to the lower Court for compliance and obtain report thereof.

(2022) 12 ILRA 861
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Jail No. 5932 of 2017

Ram Naresh ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Smt. Kalpana Singh, A.C.

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

Criminal Law – Criminal Procedure Code, Section - 313 - Indian Penal Code,1860 -

Sections – 304 & 304-A, - Explosive Substance Act,1908 - Sections 3 & 5 - Jail Appeal – challenging the order of Conviction – offence of causing dowry death & demand of additional dowry - within seven years of marriage - on perusal of the record & combined reading of St.ment of prosecution - court held that - no any eye witnesses - even investigation officer has not visited the place of occurrence, means no investigation is carried out at all - no recovery effected regarding illegal Grenade - there is neither any direct evidence nor circumstantial evidences - place of occurrence & manner of incident is also highly doubtful - therefore, it is hard to uphold the conviction - hence, appeal allowed, order of trial court set-aside, appellant is acquitted from all the charges. (Para –18, 22, 23, 24)

Appeal Allowed. (E-11)

List of Cases cited:

Takhaji Hiraji Vs Thakore Kubersingh Chaman Singh & ors. (2001Criminal Law Journal 2602)

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Smt. Kalpana Singh learned Amicus Curiae counsel for the appellant and learned A.G.A. for the State.

2. The present appeal has been filed against the judgment and order dated 27.11.2015 passed by the Additional Sessions Judge, Court No. 2, Farrukhabad in Session Case No. 84/2011, "State Vs. Ram Naresh", arising out of case crime No. 396/2009, under Sections 304 I.P.C. and Section 3/5 of Explosive Substance Act, Police Station Kamalganj, District Farrukhabad, whereby the appellant has been convicted under Section 304 I.P.C. and Section 3/5 of Explosive Substance Act of sentencing the appellant to undergo ten years of rigorous imprisonment with a fine of Rs. 10000/- under Section 304 I.P.C. and ten years rigorous imprisonment with a fine of Rs. 5000/- under section 3/5 of Explosive Substance Act, with default provision in each of the offences.

3. As per the written report dated 15.07.2009, prosecution case is that the informant who was Chowkidar of the village on 30.06.2009, who went in his relation and had come back on that day, then he came to know that on 30.06.2009 at about 6:30 PM, Ram Naresh in the influence of liquor in his both hands was holding hand grenades which are used in marriages and are thrown on the surface, was threatening to crack the hand grenade while demanding money from his wife for drinking liquor. After refusal by his wife to pay money, he said that he will crack the hand grenade. His wife and son in order to avoid any incident tried to take grenades from him but due to negligence of Ram Naresh, both the grenades exploded, as a result thereof his wife and he himself got injured. The nearby relatives and neighbors got her admitted in the Ram Manohar Lohia Hospital and on the second day she died. Ram Naresh was still admitted in the hospital. This incident has happened due to the negligence of Ram Naresh. The written report dated 15.07.2009 was given to the police station and consequently chik F.I.R. was lodged on the same day i.e. on 15.07.2009 which is exhibited as Exh. Ka-10.

4. The investigating officer took the statements of the prosecution witnesses. On the basis of the inquest report and postmortem report as well as on the basis of the material collected by the investigating officer, the charge sheet was filed which is exhibited as Exh. Ka-9 under Section 304-A I.P.C. read with Section 3/5 Explosive Substance Act against the appellant Ram Naresh, whereupon learned

Additional and Sessions Judge vide its order dated 14.06.2012 framed the charges under Section 304A I.P.C. The accused denied the charges and pleaded for trial.

5. Learned Special Judge/S.C./S.T. Act Farrukhabad, vide its order dated 17.08.2015 framed additional charge under Section 304 I.P.C. read with Section 3/4 Explosive Substance Act. The charges were denied by the accused and claimed for trial.

6. The incident occurred on 30.06.2009. The inquest as well as postmortem was carried on 01.07.2009. Awadesh Kumar, Mahendra, Virendra, Mannu and Ajay Pal were the inquest witnesses.

7. Prosecution in order to prove its case has produced PW-1 Virendra Kumar (informant), PW-2 Doctor Singh Vikram Katiyar who conducted the postmortem of the deceased, PW-3 Ajay Pal (inquest witness), PW-4 Virendar (inquest witness), PW-5 A.K. Bhardwaj who has conducted the inquest, PW-6 S.I. Indrapal Singh, the investigating officer who prepared the site plan, conducted the investigation and filed the charge sheet and PW-7 Head Constable Kamla Prasad who prepared the chik F.I.R. The statement of the accused under Section 313 Cr.P.C. were recorded in which his case was of total denial. In his defence he stated that he is a labour, he was not in a intoxicated state, he remained admitted for 18 days in the Hospital and he has been falsely implicated.

8. PW-1 while deposing before the Court has said that on 13.06.2009, he went away for some personal work and has returned after 15 days to his home, then he came to know about the incident. He further stated that he came to know that on 30.06.2009 at about 7:30 PM, Ram Naresh in the drunken state was holding grenades in his both hands demanding money from his wife by threatening to crack the grenade. After refusal by his wife to pay money, he said that he will crack the hand grenade. Thereafter, the deceased and her son namely Awadhesh in order to avoid the incident, tried to take the grenades, all of a sudden due to negligence of Ram Naresh, the grenades exploded. Due explosion of the grenades, the appellant and his wife got injured. His wife got admitted by the nearby people in the Ram Manohar Lohia Hospital and on the next day she died. Ram Naresh remained admitted in the hospital.

In the cross he has stated that Ram Naresh never consumed liquor. On the date of incident he was not present. He returned after 10 to 15 days. The written report was got prepared by the son of Ram Gopal and he only signed the written report. He further stated that Ram Naresh and his wife never used to quarrel. He never took the investigating officer at the place of occurrence, neither he told about the explosion of grenade nor regarding the death of the deceased (wife of the appellant) to the investigating officer.

9. PW-2 Doctor Singh Vikram Katiyar received the dead body of the deceased namely Nanhi Devi. He conducted the postmortem of the deceased who died on 30.06.2009 at about 10:20 PM at Ram Manohar Lohia Hospital. Perusal of the dead body, he found two ante-mortem head injuries on the parital region as a result thereof the parital bone was fractured. In the cross, he has stated that she died due to head injury which came in the middle of her head. It has been suggested by PW-2 that if the deceased is standing near almira or tar and something

fells upon her head, then she can sustain such injury and can die. The injury sustained by the deceased could not come from the front or her back.

10. PW-3 is the inquest witness. After getting the information about death of the deceased, he went to Ram Manohar Lohia Hospital. Thereafter, he reached at the place of occurrence when both the appellant and the deceased were already taken to Ram Monohar Lohia Hospital. He further stated that he did not saw the incident.

11. Likewise PW-4 has also stated that he was not at the place of occurrence when the incident took place. He has also not seen the quarrel between Ram Naresh and the deceased. He further stated that he did not go to the house of Ram Naresh. Ram Naresh never drunk in front of him. He had no information about the incident neither he was present at the time of incident.

12. PW-5 A.K. Bhardwaj is a formal witness who has prepared the inquest and has proved it.

13 . PW-6 is the investigating officer who has conducted the investigation. He stated that on the pointing out of PW-1 complainant, he went to inspect the place of occurrence and prepared the site plan. In the cross, he has stated that the complainant did not inform him whether he was present at the place of incident in the village or not. It has been further stated that the complainant did not inform him as to how he came to know about the incident. The complainant was the chowkidar of the village. The complainant had also not told him as to from whom he got information about the incident. It has been further stated in the cross-examination that he prepared the site plan in presence of complainant Virendra Kumar and except him at the time of making site plan, no one else of the village was present.

14. PW-7 is a formal witness who has proved the chik F.I.R. (exhibit ka-10).

15. Learned amicus curie appearing on behalf of the appellant has submitted that the incident took place on 30.06.2009 and the inquest was prepared on the very next day i.e. 01.07.2009. Postmortem was conducted on 01.07.2009, however, F.I.R. was lodged after a delay of 15 days of the incident. There is no explanation to the delay in lodging of the F.I.R. She has further submitted that at the time of conducting inquest on 17.09.2022 and post mortem on the same day, the F.I.R. ought to have been lodged by the police on the same day. She has further submitted that out of five inquest witnesses Awadhesh who was son of the appellant and was the eye witness has been withheld by the prosecution. Another inquest witness namely Mahendra has also been withheld by the prosecution. These two witnesses have been withheld by moving two applications numbered as 11-B and 12-B which are on record.

16. It is next submitted that no one has seen the incident. Neither there is any direct evidence nor even a circumstantial evidence against the appellant. The appellant has been falsely implicated. It has been further submitted that PW-2 nowhere has stated that the injury sustained by the deceased on her head could have come from explosion of the grenade rather a contrary opinion has been given by PW-2. The investigating officer has not prepared the site plan on the pointing out of PW-1 and he has not even visited the spot.

17. Learned A.G.A. has opposed the argument of learned amicus curiae submitting that since the incident has taken place in the house of the appellant,

therefore, onus to explain the incident was on the appellant. He has further submitted that two persons one was appellant and another was deceased who got injured in the same incident and both were admitted in the hospital and this fact has not been denied by the appellant.

18. On due consideration to the argument advanced by the parties, perusal of the record, the first question which crops up before this Court whether the prosecution has been able to prove the place of occurrence. It is admitted case of the prosecution that PW-1 is not the eye witness. In his statement PW-1 has stated that he signed the written report which was written by the son of Ram Gopal. He further stated that he has not seen the place of incident neither has taken the investigating officer to the place of occurrence and he has not narrated the fact to the investigating officer that the grenade exploded and the wife of the appellant namely Nanhi Devi died.

19. PW-2 in his statement has nowhere stated that the deceased died due to injuries sustained by the grenade, however, on the contrary he has stated that if some heavy thing falls on her head then she can sustain such injury and these injuries could not have been sustained from the front or back by hitting anything from front or her back.

20. PW-4 has also stated that he was not at the place of occurrence when the incident took place. He has also not seen the quarrel between Ram Naresh and the deceased. He further stated that he did not go to the house of Ram Naresh. Ram Naresh never drunk in front of him. He has no information about the incident neither he was present at the time of incident. PW-5 A.K. Bhardwaj is formal witness who has prepared the inquest and has proved it.

21. PW-6 in his statement has stated that on the pointing out of PW-1 complainant, he inspected the place of occurrence and prepared the site plan which has been outrightly denied by PW-1. He further stated that the complainant has not told him how he came to know about the incident and who gave him information about the incident.

22. The combined reading of the statement of the prosecution witnesses show that there is no eye witness to the incident; no one has seen the incident; the investigating officer has not visited the place of occurrence and therefore in view of the testimony of PW1, the statement of PW-6 regarding the inspection of the place of occurrence and preparation of the site plan in presence of PW-1 cannot be believed. Not only the place of occurrence could not be proved by the prosecution, the prosecution could not also prove as to whether the injury sustained by the deceased could have come from the grenade or otherwise and statement of PW-2 clearly suggests that the deceased sustained injury on the top of her head while she was standing some heavy object fell on her head and as a result thereof, the parital bone of the head can be fractured. Thus the prosecution has failed to prove the place of occurrence as well as the incident itself and perusal of the entire record it is also evident that the investigating officer has conducted no investigation at all. The prosecution has failed to prove the charge under Section 304 Cr.P.C. and so far as the charge under Section 3/5 of Explosive Substance Act is concerned, there is no recovery effected by the investigating officer regarding illegal grenade.

23. This Court has also noticed that in the written report, the incident is alleged to have happened in front of son of the appellant namely Awadhesh who was the eye witness and who could have stated the true and correct version of the prosecution case, however, he has not been produced by the prosecution. Another inquest witness namely Mahendra has also been withheld by the prosecution by moving application before the trial court. Had these two witnesses were produced before the trial court particularly Awadhesh who has seen the incident, the true version of the prosecution case could have come. Because of the fact that these witnesses were withheld by the prosecution as a result thereof they could not be examined before the trial court, therefore, the question of drawing adverse inference arises against the prosecution as held by the Apex Court in the case of ***"Takhaji Hiraji Vs. Thakore Kubersing Chamansingh and others"***, reported in "***2001 Criminal Law Journal 2602***". Relevant para 19 is reproduced as under:-

"19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. ***It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinize the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coning from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein.*** *The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not pre-*

meditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non-explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and the circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight-rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case."

(Emphasised by me)

24. On perusal of the statements of all the prosecution witnesses, it is clear that not a single prosecution witness has seen the incident, there is no direct evidence or there is not even a circumstantial evidence, place of occurrence is highly doubtful and the incident itself could not be proved by the prosecution, coupled with the fact that the two witnesses namely Awadhesh son of the appellant and deceased and Mahendra (inquest witness) have been withheld who could have given the true version of the prosecution case, therefore, on the basis of such evidence, it is hard to uphold the conviction of the appellant on this quality of evidence. Accordingly, the criminal appeal filed against the judgment and order of conviction dated 27.11.2015 and order of sentence dated 28.11.2015 is allowed. The order of the trial court convicting and sentencing the appellant is set aside. The appellant is acquitted of all the charges levelled against him. The appellant be discharged of his bail bonds.

25. Let a copy of this judgment be transmitted to the learned trial court as well as concerned Jail Superintendent for compliance. Lower court record be sent back to the lower court.

26. Smt. Kalpana Singh learned Amicus Curiae shall be paid a sum of Rs. 20,000/- for assisting the Court from the State Exchequer through Registrar General within two months from the date of production of certified copy of this order.

(2022) 12 ILRA 867
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2022

BEFORE

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

Matter Under Article 227 No. 816 of 2019

Smt. Subhawati & Ors. ...Petitioners
Versus
Smt. Lalita & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Tiwari, Smt. Ruchi Gupta

Counsel for the Respondents:
Sri Ram Avatar, Sri Mahabir Yadav

Civil Law - Code of Civil Procedure,1908 - Application by plaintiff seeking amendment to the plaint allowed by the Appellate Court-Defendant filed Writ-Plaintiffs introducing new cause of action and a completely different relief to cloud defendant's title which they have received through impugned sale deed-amendment sought in Appeal after the suit has been tried and decided-facts sought to be amendment was well within the knowledge of Plaintiff-no justification of delay-Amendment that is malafide should never be granted-impugned order-cryptic-quashed.

Petition allowed. (E-9)

List of Cases cited:

1 Rajendra Prasad Vs A.D.J./Fast Track Court-I, Gonda & anr., 2015 SCC OnLine All 8100

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

This is a defendants' petition under Article 227 of the Constitution challenging the order, granting an amendment to the plaint by the Appellate Court.

2. Sadavriksha, a native of Village Digra Somali, Pargana and Tehsil Salempur, District Deoria, was twice married. He married Smt. Tetri, of whom two sons were born, Triloki and Kapildev. Smt. Tetri passed away in Sadavriksha's life time. After her demise, Sadavriksha married Smt. Lalita. Lakkhu, another son of Sadavriksha, was born of the wedlock of Sadavriksha and Smt. Lalita. Smt. Subhawati is Triloki's wife whereas Smt. Dhanmati is Kapildev's. It is between Smt. Lalita and Lakkhu on one hand and Smt. Subhawati, Smt. Dhanmati, Sadavriksha, Triloki and Kapildev on the other, that litigation erupted in the year 2005, when Sadavriksha, now deceased, executed a sale deed of his land in favour of Smt. Subhawati and Smt. Dhanmati.

3. Smt. Lalita and Lakkhu, who shall hereinafter be referred to as 'the plaintiffs' (unless the context requires individual reference), commenced action by instituting O.S. No. 333 of 2005 in the Court of the Civil Judge (Jr. Div.), Deoria, seeking cancellation of the sale deed and permanent prohibitory injunction. Smt. Subhawati, Smt. Dhanmati, the two vendees were arrayed as the defendants first set to the suit, Sadavriksha, the vendor was arrayed as the defendant second set and Triloki and Kapildev, husbands of the two vendees and sons of Sadavriksha, were arrayed as the defendants third set.

4. Now, Sadavriksha is no more, which leaves for the defendants, Smt. Subhawati, Smt. Dhanmati, Triloki and Kapildev. All of them together, shall hereinafter be called as 'the defendants, unless the context requires individual reference.

5. The plaintiffs' case briefly put is that they represent Sadavriksha's family after his second marriage to Smt. Lalita, who was married to Sadavriksha some 30 years antedating the commencement of action. Lakkhu was born to parties and 18 years old at the time of institution of the suit. For some time past, relations between the plaintiffs and Sadavriksha had come under strain in consequence whereof Smt. Lalita had brought proceedings against Sadavriksha for the grant of maintenance. A maintenance order had been passed against Sadavriksha. In compliance, Smt. Lalita was in receipt of maintenance.

6. Of late, the daughters-in-law of Sadavriksha had become the recipients of his favour and for the said reason, his sons Triloki and Kapildev together with their wives had colluded and ganged up to motivate and defraud Sadavriksha into executing a sale deed of his entire landed property in their favour. They succeeded in defrauding Sadavriksha into executing a registered sale deed dated 14.04.2005 in favour of Smt. Subhawati and Smt. Dhanmati. Upon coming to know of the execution of the sale deed aforesaid, the plaintiffs instituted the suit for cancellation and permanent injunction on the following grounds:

(a) No sale consideration was paid to Sadavriksha at the time of execution of the sale deed and the consideration shown is a sham.

(b) The suit property is the acquisition of Jokhu, Sadavriksha's ancestor, on account of which the plaintiffs have a one-third share therein.

(c) The execution of the impugned sale deed by Sadavriksha has been secured through fraud, deceit and misrepresentation.

(d) Sadavriksha had no right to alienate the property that was ancestral and the sale deed is ultra vires.

(e) Succession to the property in dispute is governed by the Hindu Succession Act and the plaintiffs, therefore, have a right as co-sharers therein.

(f) Sadavriksha had no legal necessity to execute the sale deed.

(g) The impugned sale deed is not properly executed and verified.

(h) The plaintiffs are in possession of the suit property in accordance with the family settlement.

(i) The impugned sale deed is not Sadavriksha's mental act.

7. It is on these grounds that a decree for cancellation of the registered sale deed dated 14.02.2005 was sought with a prayer that the cancellation may be communicated to the Sub-Registrar. A further decree for permanent prohibitory injunction has been sought to the effect that the defendant be restrained from interfering in the peaceful possession of the plaintiffs over their half share in the suit property, threatening them or raising construction. The details of the suit property are given at the foot of the plaint, which are three agricultural plots, bearing Nos. 102, 381 and 233, with a total area of 0.704 hectare to the extent of a half share.

8. The defendants contested the suit pleading a case, in substance, that after Sadavriksha married Smt. Lalita, the two lived together, but Sadavriksha's sons born of the first marriage, Triloki and Kapildev were estranged with their father. Sadavriksha executed a sale deed of his land that he owned in Delhi in favour of Lakkhu, his son born of Smt. Lalita. Triloki and Kapildev took up work as casual labourers and with their savings started a business of their own. After they turned young men, Triloki married Smt. Subhawati and Kapildev Smt. Dhanmati. At that point of time, Sadavriksha was in need of money for Smt. Lalita's daughter's wedding and medical expenses for the family. For the purpose, he had taken a loan that he could not repay. It was on that account that he sold off the suit property to his daughters-in-law, Smt. Subhawati and Smt. Dhanmati by the sale deed impugned. The plaintiffs had knowledge of the sale deed since the date it was executed and registered. The sale deed was executed by Sadavriksha with the consent of the plaintiffs, and, therefore, the suit is barred by estoppel. The impugned sale deed was

executed by Sadavriksha in favour of Smt. Subhawati and Smt. Dhanmati after receipt of the due sale consideration, where no fraud or deceit is involved. Sadavriksha was a bhumidhar with transferable rights. He had a right to transfer his bhumidhari. The defendants are in possession of the suit property in accordance with the impugned sale deed, whereas the plaintiffs are not. The suit was, therefore, demanded to be dismissed.

9. Upon the pleadings of parties, the following issues were framed by the Trial Court (translated into English from Hindi):

(i) Whether the impugned sale deed is liable to be cancelled on the grounds enumerated in the plaint?

(iv) Whether the suit is undervalued?

(v) Whether the court-fee paid is insufficient?

(vi) To what relief is the plaintiffs entitled?

10. Parties led oral and documentary evidence in support of their case, which need not be recapitulated here. It is listed in the judgment of the Trial Court.

11. The Trial Court after a full trial dismissed the suit, holding that the impugned sale deed on the grounds raised was not liable to be cancelled.

12. Aggrieved by the Trial Court's decree, the plaintiffs appealed to the District Judge of Deoria. There, the appeal was registered on the file of the learned District Judge as Civil Appeal No. 3 of 2013. Some nine grounds were raised in the appeal.

13. Pending the appeal, the plaintiffs made an application for amendment before the Additional District Judge, Court No.5, Deoria, seeking amendment by adding the following pleas to the existing Paragraph No. 6 of the plaint:

"क्यो कि आराजी नम्बर 12 रकबा 0.247 हे0 व आराजी नम्बर 381 व रकबा 0.0(0) हे० एवम् आराजी नम्बर 233 रकबा 0.356 हे० मे हम वादिनी के श्वसुर ने 126 सी०आर०पी०सी० वाद नं०- 258/ 85 मे पारित आदेश दिनांक- 12.06.86 के पारित होने के बाद उपरोक्त आराजी मे हम वादिनी को जीविका निर्वाह हेतु दे दिया तथा हम वादिनी एवम उसकी पुत्री उक्त आराजीयात से अपना जीवन निर्वाह करती चली आ रही है उपरोक्त आराजियात पर हम वादिनी के भरणपोषण का भार है। उपरोक्त आराजियात पर हम वादिनी काबिज दखिल चली आ रही है बैनामा दिनांक - 04.02.05 या हम वादिनी के भरणपोषण को वंचित करने की नियत से किया गया बैनामा दिनांक- 04.02.05 मात्र इसी आधार पर खारिज होने योग्य है।"

14. In addition, the following relief numbered as 1(a) was sought to be added:

"यह कि वादिनी के ललीता के पक्ष मे प्रतिवादीगण के विरूद्व इस प्रकार की डिकी पारित करके यह घोषित कर दिया जावे कि आराजी नम्बर 102 व रकबा 0.247 हे0 व आराजी नम्बर 381 व रकबा 0.101 हे0 एवम आराजी नम्बर 233 व रकबा 0.356 हे0 में 1/2 भाग स्थित मौजा दिबडा सोमाली तथा मईल परगना स०म० जिला देवरिया मरहमवादिनी के भरणपोषण का पात्र है।"

15. The Appellate Court upon hearing the plaintiffs proceeded to allow the application seeking amendment to the plaint vide an order dated 12.12.2018. The defendants are aggrieved by this order, which they have impugned through the instant petition.

16. Heard Mr. Rajesh Kumar Tiwari, learned Counsel for the defendants and Mr. Mahabir Yadav, Advocate holding brief of Mr. Ram Autar, learned Counsel for the plaintiffs.

17. Upon a perusal of the plaint and the amendment sought, what appears from the record is that the plaintiffs are seeking to introduce a new cause of action and a completely different relief to cloud the defendants' title that they have received under the impugned sale deed. The cancellation that the plaintiffs have sought is on numerous grounds, which include Sadavriksha being defrauded into executing the sale deed and the sale deed being one executed without right, or at least, in excess of the vendor's right. The cause of action in the suit originally pleaded is one that impeaches the validity of the sale deed on grounds of fraud and misrepresentation said to be practiced by Triloki and Kapildev and their wives, Smt. Subhawati and Smt. Dhanmati, leading Sadavriksha to execute the conveyance or the lack of title authorizing him to alienate the entire suit property. There is not a whisper in the plaintiffs' case originally pleaded about the suit property being subject to a charge, under the maintenance order passed in favour of Smt. Lalita and against Sadavriksha. Now, through the amendment, the plaintiffs say that the suit property is subject to a charge for the amount of maintenance due from Sadavriksha under the maintenance order passed by the Court. It is for the said purpose that a declaration to the said effect, apart from amendments to the pleadings, has been sought.

18. Now, the fact that there was a maintenance order in existence, if that be so, was well within the knowledge of the plaintiffs when the suit was instituted and during the entire course of trial. At no stage of the trial, much less at the time of institution of the suit, the plea was taken or a case set up that the suit property to the extent of a half share share was subject to a charge for the amount due to Smt. Lalita, under the maintenance order passed against Sadavriksha. This case was not introduced, assuming that it was omitted by oversight when the suit was instituted, early into the commencement of proceedings before the Trial Court. The amendment has been sought in appeal after the suit has been tried and decided. The amendment is not about a fact which can remotely be said to be not within the plaintiffs' knowledge, when the suit was instituted or trial pending. It is an amendment that has been sought to be belatedly introduced at the stage of appeal, with no justification at all for the delay also. It introduces a new case altogether, that is to say, the case of the suit property being subject to a charge arising out of the maintenance order in favour of Smt. Lalita, one of the two plaintiffs. By not pleading the right based on the alleged charge in the plaint or soon after the suit was instituted, the plaintiffs must be taken to have waived right, if at all they had one, based on the case of a charge. It cannot be permitted to be introduced at this belated stage, pleading a new case altogether, different from the one set up in the plaint.

19. The grounds on which an amendment can be refused, include a case where entirely a new case is set up, different from the one originally pleaded.

20. This apart, post amendment of Order VI Rule 17 CPC by Act No. 22 of 2002, the scope for amendment after trial, has been curtailed. The amended provisions of Order VI Rule 17 of the Code read:

"17. Amendment of pleadings.-The Court may at any stage of the proceedings

allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

21. Now, in the case of an amendment brought after commencement of trial by a party, the Code empowers the Court and obliges it as well to require the party applying for amendment to show that despite due diligence, the party could not have sought the amendment before the trial commenced. Here, is a case where the suit has run its full course and the plaintiffs have lost before the Court of first instance. They are now in appeal. By the amendment, they seek to bring in facts, a cause of action and relief, that were well within their knowledge throughout. This Court must remark that at the appellate stage, the Court cannot grant an amendment for the asking of a party. Where rights have already crystallized under one judgment, adding a new case or even facts by amendment, is unsettling a settled position, where rights have already been determined. Normally, the decision in an appeal is to be confined to the correctness of the judgment of the Trial Court on the pleaded case of parties and the evidence led. An amendment in appeal is a rarity.

22. Here, the Appellate Court has granted it by a casually worded order, which hardly addresses the requirement of Order VI Rule 17 CPC, post the 2002 Amendment. Reference, in this connection may be made to the decision of this Court in **Rajendra Prasad v. Additional District Judge/Fast Track Court-I, Gonda and another, 2015 SCC OnLine All 8100**, where it has been held:

"**17**. The Hon'ble Apex Court had an occasion to consider the matter in issue in Rajkumar Gurawara (dead) through LRs. v. S.K. Sarwagi and Co. Pvt. Ltd., [2008 (5) CTC 253.] wherein, the Hon'ble Apex Court has held as follows:

"The first part of the rule makes it abundantly clear that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the purpose of determining the real questions in controversy. However, this rule is subject to Proviso appended therein. The said rule with Proviso again substituted by Act 22 of 2002 with effect from 1.7.2002 makes it clear that after the commencement of the trial, no Application for amendment shall be allowed. However, if the parties to the proceedings able to satisfy the Court that in spite of due diligence could not raise the issue before the commencement of trial and the Court satisfies their explanation, amendment can be allowed even after commencement of the trial."

18. Again in Vidyabai v. Padmalatha [(2009) 2 SCC 409.] the Hon'ble Apex Court has held as follows:

"Order VI, Rule 17, C.P.C. is couched in a mandatory form. Unless the jurisdictional fact, as envisaged in the proviso to Order VI, Rule 17, C.P.C. is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion

that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. From the order passed by the Trial Judge, it is evident that the respondents had not been able to fulfil the said precondition."

19. It is true that an amendment can be permitted to avoid, multiplicity of proceedings. But at the same time, Courts have held that an amendment cannot be allowed, if it causes prejudice to the right of the party against whom an amendment is sought for. It is also a settled law, that the scope of the Appeal late Court is to test the correctness of the judgment under the appeal and any benefit or vested right, on account of declaration of the rights, inter se be tween the parties to the lis, by the Trial Court, cannot be allowed to be taken away by allowing an amendment to the pleadings, at the appellate stage, when the party seeking an amendment could have brought in such amendment, even at the time of the commencement of the trial. An amendment admitting to wipe out the pleadings and admissions of tine party, already considered by the Trial Court, for the purpose of arriving at a decision, in the suit, cannot be allowed to be substituted with a new case, at the appellate stage, which would certainly cause serious prejudice to the party, against whom the amendment is sought for. The effect of an admission in earlier pleading shall not be permitted to be taken away, by any proposed amendment."

23. There is also another reason, which ought to have weighed with the Appellate Court in the opinion of this Court. It is true that normally amendments are to be granted, if sought promptly or even with some delay. An amendment, that is mala fide or not made in good faith, should never be granted. Here, the amendment, in the opinion of this Court, squarely falls into that category. There is not the slightest of reason for the plaintiffs to have waited until the stage of appeal to seek this amendment and introduce a case, of which they had knowledge all along. The said fact by itself betrays lack of bona fides on the plaintiffs' part.

24. So far as the impugned order goes, it has already been remarked that it is an entirely cryptic disposition of the amendment application and the Appellate Court hardly seems to have bestowed any consideration to the plea before it, which has been casually allowed.

25. In the circumstances, the impugned order in the considered opinion of this Court, cannot be sustained.

26. This petition succeeds and is **allowed**. The impugned order dated 12.12.2018 passed by the Additional District Judge, Court No.5, Deoria in Civil Appeal No. 3 of 2013 is hereby set aside and the amendment application rejected. The Appellate Court shall now proceed with the hearing of the appeal expeditiously, fixing at least one date of hearing every week considering that the appeal is of the year 2013. The parties shall appear before the Appellate Court on **15.12.2022**.

(2022) 12 ILRA 873
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Matter Under Article 227 No. 1436 of 2015

Senior Suptt. Dept. of Post, Moradabad Division & Ors. ...Petitioners

Versus

Bundu & Anr. ...Respondents

Counsel for the Petitioners:
Sri Praveen Shukla, Arachana Srivastava

Counsel for the Respondents:

Award of compensation of Rs. 4,500/- on account of loss of articles sent by speed-post-challenged-Award challenged-Postal services are Public Utility Services-Permanent Lok Adalat has the same powers and jurisdiction as civil courts to decide such cases-award valid.

Petition dismissed. (E-9)

List of Cases cited:

1. Dr. Shri Dev Mishra Vs St. of U.P. & ors., Writ-A No.- 17240 of 2011, judgment dated 05.04.2011

2.Ram Dhari Yadav & ors. Vs St. of U.P. & anr., Writ- A No.- 387 of 2015;, judgment dated 09.02.2019

3. Neena Chaturvedi Vs Public Service Commission reported in (2011) 1 All LJ 382

4. The Postmaster General Kerala & ors. Vs Kiron Rasheed A.S. Manzil reported in 2011 (2)C.P.C. 328

5. Gurgaon Gramin Bank Vs Khazani & ors. reported in AIR 2012 SC 2881

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

1. By the present writ petition, the petitioner is challenging the award/order dated 30.09.2014, passed by the Permanent Lok Adalat, Moradabad awarding compensation to the extent of Rs. 4,500/- each to the applicants in Application No. 153 of 2013 on account of loss of the articles sent by speed-post by the complainants which contained their passports and demand drafts.

2. Counsel for the petitioner contends that as per Section 6 of the Indian Post Office Act, 1898 (hereinafter referred to as the Act, 1898), the Postal Department enjoys immunity with regard to any liability arising out of any loss, mis-delivery, delay or damage of any postal article in the course of its transmission. She further adds that the Permanent Lok Adalat can not entertain an application for award against the Postal Department in light of the immunity of the Postal Department as provided under Section 6 of the Act, 1898. Counsel for petitioner has also relied upon judgments of this Court in the cases of (i) unreported judgment dated **05.04.2011** in Writ-A No.- 17240 of 2011; Dr. Shri Dev Mishra vs. State of U.P. And Others, (ii) unreported judgment dated **09.02.2019** in **Writ- A No.- 387 of 2015; Ram Dhari Yadav and 7 Ors vs. State of U.P. And Anr,** and (iii) A reported judgment dated **13.08.2010** by a full bench of this Court in the case of **Neena Chaturvedi vs. Public Service Commission** reported in **(2011) 1 All LJ 382**.

3. Heard Counsel for the petitioner and perused the record with her assistance.

4. The judgments of this Court relied upon by the petitioner do not apply to the facts of this petition. The judgments in the case of **Dr. Shri Dev Mishra (Supra)** and **Ram Dhari Yadav (Supra)** relate to whether relief could be granted to petitioners who sent their applications through India Post, but due to delay their applications could not reach in time to the recruitment body and therefore their prayer was that the respondents should admit their applications even after a delay. Both these judgments have relied upon the full bench judgment of **Neena Chaturvedi (Supra),** which is also relied upon by the counsel for the petitioner in the present petition. The Full Bench of this Court in the case of

Neena Chaturvedi (Supra) was deciding upon the issue whether the post office acts as an agent of the sender or the receiver. The relevant **paragraph 5** of the **Neena Chaturvedi (Supra)** where the Full Bench formulated the question of reference is as follows:

"5. The question that can be formulated for consideration would be "when applications are invited, one through post office and the other by any other means or only through post, does the post office become the agent of the addressee, because there is express or implied authorisation by the addressee to send the articles by post."

In its judgment, the Full Bench has not settled whether the protection from liability of the post office extends to all the activities carried on by it apart from the regular post. Therefore, for the issues involved in this petition, the law settled in **Neena Chaturvedi (Supra)** has no applicability.

5. The primary contention of the learned counsel for the petitioner is that the Postal Department enjoys immunity from any liability in light of immunity under Section 6 of the Act, 1898, which reads as under:

"6. Exemption from liability for loss, misdelivery, delay or damage:- *The Government shall not incur any liability by reason of the loss, mis delivery or delay of, or damage to, any postal article in course of transmission by post, except in so far as such liability may in express terms be undertaken by the Government as hereinafter provided; and no officer of the Post Office shall incur any liability by reason of any such loss, mis delivery, delay or damage, unless he has caused the same fraudulently or by his willful act or default."*

He submits that it protects the Government and the Officers of the Post Office from any liability by reason of loss, mis-delivery or delays for damage to any postal article except insofar as such liability is undertaken, in expressed terms, by the Central Government. However, in the present petition, the respondents have availed the services of speed-post and not that of a regular post. Speed post as a value added faster service was first introduced in the year 1986, some eighty-eight years after the Act, 1898 was enacted and therefore by any stretch of the imagination, the immunity under Section 6 of the Act, 1898 can not be expected to also cover the same. The National Consumer Disputes Redressal Commission in the case of **The Postmaster General Kerala and Ors. vs. Kiron Rasheed A.S. Manzil reported in 2011 (2)C.P.C. 328** has taken the same view while rejecting a revision petition filed by the Postal Department against an order for payment of damages for delay in the arrival of a speed post. The relevant paragraph 3 of **The Postmaster Genral (Supra)** reads as under:

"3. Coming to the merits, the only substantive ground for challenge to the order of the Kerala State Disputes Redressal Commission is that under Section 6 of the Indian Post Office Act 1898, the RP/OP incurs no liability for loss, mis-delivery or damage/delay in delivery, except when caused fraudulently or willfully. This ground was raised before, and examined in sufficient detail, in the impugned order. The State Commission has very rightly observed that this provision "is not in any way connected with the

modernized forms of transactions like speed post, e-mail, money transfer etc."

This Court agrees with and approves the view taken by the National Consumer Disputes Redressal Commission.

6. Next contention of counsel for the petitioner is that Permanent Lok Adalat has no jurisdiction to decide the cases involving the loss or mis-delivery of a postal article in light of the immunity that the Postal Department enjoys by virtue of Section 6 of the Act, 1898. This Court does not find any force in his contention. Permanent Lok Adalat is a special adjudicatory body set up under The Legal Services Authorities Act, 1987 (hereinafter referred to as the Act, 1987). Powers of Permanent Lok Adalat are provided under Section 22 of the Act, 1987. It reads as under:

"22. Powers of Lok Adalat or Permanent Lok Adalat.--(1) The Lok Adalat or Permanent Lok Adalat shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:--

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document;

(c) the reception of evidence on affidavits;

(d) the requisitioning of any public record or document or copy of such record or document from any court or office; and

(e) such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat or Permanent Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(3) All proceedings before a Lok Adalat or Permanent Lok Adalat shall be deemed to be judicial proceedings within the meaning of sections 193,219 and 228 of the Indian Penal Code (45 of 1860) and every Lok Adalat or Permanent Lok Adalat shall be deemed to be a Civil Court for the purpose of section195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

Section 22A of the Act, 1987 defines "Permanent Lok Adalat" and "Public Utility Services", which reads as follows:

*"**22A. Definitions.**--In this Chapter and for the purposes of sections 22 and 23, unless the context otherwise requires,--*

(a) "Permanent Lok Adalat" means a Permanent Lok Adalat established under sub-section (1) of section22B;

(b) "public utility service" means any--

*(i) transport service for the carriage of passengers or goods by air, road or water; or *

(ii) postal, telegraph or telephone service; or

(iii) supply of power, light or water to the public by any establishment; or

(iv) system of public conservancy or sanitation; or

(v) service in hospital or dispensary; or

(vi)insurance service,

and includes any service which the Central Government or the State Government, as the case may be, in the public interest, by notification, declare to

be a public utility service for the purposes of this Chapter."

Furthermore, Section 22B of the Act, 1987 provides the establishment of Permanent Lok Adalat for exercising jurisdiction regarding Public utility services, which reads as follows:

***"22B. Establishment of Permanent Lok Adalat.**--(1) Notwithstanding anything contained in section19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalat at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.*

(2) Every Permanent Lok Adalat established for an area notified under sub-section (1) shall consist of--

(a) a person who is, or has been, a district judge or additional district judge or has held judicial office higher in rank than that of a district judge, shall be the Chairman of the Permanent Lok Adalat; and

(b) two other persons having adequate experience in public utility service to be nominated by the Central Government or, as the case may be, the State Government on the recommendation of the Central Authority or, as the case may be, the State Authority, appointed by the Central Authority or, as the case may be, the State Authority, establishing such Permanent Lok Adalat and the other terms and conditions of the appointment of the Chairman and other persons referred to in clause (b) shall be such as may be prescribed by the Central Government."

From the joint reading of both the above provisions regarding the power and subject matters that can be entertained by the Permanent Lok Adalat, it becomes clear that postal services are Public Utility Services as Section 22A of the Act, 1987 and as per Section 22 and Section 22B, Permanent Lok Adalat has the same powers and jurisdiction as civil courts to decide such cases. Therefore, this Court does not find any strength in the contention that Permanent Lok Adalat can not decide cases against the Postal Department.

7. In view of the aforesaid, all the grounds of challenge to the impugned order could not be sustained. The petitioners have approached this Court against an award of Rs.4,500/- in favour of each respondent. This petition has been pending before this Court since 2015, seven years of litigation challenging damages worth only Rs.4,500/- , that too by a Department of Government seems a cruel joke on the judiciary. The Department has definitely lost much more amount throughout this litigation than it was ordered to pay as damages to the respondents. What speaks volumes is that even the respondents are not contesting this petition. Furthermore, it is worth pointing out that even in a suit for recovery of less than Rs.25,000/-, a second appeal is barred under Section 102 of the Civil Procedure Code, 1908.

8. The Supreme Court has time and again warned against unnecessary and frivolous litigations taking up valuable time of courts. In the case of **Gurgaon Gramin Bank vs. Khazani and Ors.** reported in **AIR 2012 SC 2881**, the Supreme Court has lamented upon the conduct of the appellant bank and asked for an affidavit detailing total expenditure on litigation till the Special Leave Petition. On finding that the total expenditure was Rs.15,950/- and the award challenged by the bank was a paltry

sum of just Rs.15,000/-, the Court was shocked and made the following observations:-

13. Gramin Bank like the Appellant should stand for the benefit of the gramins who sometimes avail of loan for buying buffaloes, to purchase agricultural implements, manure, seeds and so on. Repayment, to a large extent, depends upon the income which they get out of that. Crop failure, due to drought or natural calamities, disease to cattle or their death may cause difficulties to gramins to repay the amount. Rather than coming to their rescue, banks often drive them to litigation leading them extreme penury. Assuming that the bank is right, but once an authority like District Forum takes a view, the bank should graciously accept it rather than going in for further litigation and even to the level of Supreme Court. Driving poor gramins to various litigative forums should be strongly deprecated because they have also to spend large amounts for conducting litigation. We condemn this type of practice, unless the stake is very high or the matter affects large number of persons or affects a general policy of the Bank which has far reaching consequences."

9. In light of the above observations, this Court does not find any illegality in the award dated 30.09.2014 passed by the Permanent Lok Adalat. Devoid of any merit, this petition is, accordingly **dismissed**.

(2022) 12 ILRA 878
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2022

BEFORE

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

Matter Under Article 227 No. 1459 of 2017

Raja Ram ...Petitioner

Versus

Saroj Bala ...Respondent

Counsel for the Petitioner:
Sri Ashish Kumar Singh, Sri Rajesh Chandra Gupta, Sri Abu Bakht, Sri Ajay Kumar Singh, Sri P.K. Jain

Counsel for the Respondent:
Sri Manish Goyal (Sr. Advocate),Ms. Akanksha Sharma, Sri Siddharth Singhal

Civil Law -The Uttar Pradesh Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972-Decree of eviction-Monthly tenant-arrears of rent-deposits made u/s 30 to deposit rent at own risk-invalid-no compliance of the provisions of section 30 r/w Rule 21 -short deposits of rent-tenant did not remit the entire outstandings of rent-on the date of institution of the suit-not paid within 30 days of service of notice-case of actionable default-complete payment no made on the date of first hearing.

Petition dismissed. (E-9)

List of Cases cited:

1. Smt. Chameli Devi 13 Vs VIth A.D.J., Pilibhit & anr., 2004 All LJ 1945

2. Smt. Siddheshwari Dixit & anr. Vs Hasina Begum & ors., 2019 (3) ALJ 725

3. Shekhar Bahuguna Vs Suresh Chandra Kapoor, 2010 SCC OnLine All 1891,

4. Rani Devi Vs Addl. Distt. & Sessions Judge, 2018 SCC OnLine All 6406

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

This is a tenant's petition arising out of a decree for eviction passed by the Judge, Small Cause Court in a suit for eviction and recovery of arrears of rent and mesne

profits etc. The decree has been affirmed in revision by the Additional District Judge.

2. Saroj Bala, wife of Jai Prakash instituted S.C.C. Suit No. 30 of 2007 before the Judge, Small Cause Court, Ghaziabad on allegations that she is the owner and landlady of a house bearing premises No. 5 (presently numbered as 3), situate at Purvi Ismail Khan, Turab Nagar, Ghaziabad. Within the said premises, she has a shop, assigned private No. 8, wherein Raja Ram, the defendant, is a tenant at the rate of Rs. 30/- per month (excluding taxes - water tax, house tax and sewer tax). The tenancy is one from month to month. Raja Ram, who shall hereinafter be called 'the tenant', carries on a tailor's shop in the aforesaid tenanted premises (for short, 'the demised shop') under the name and style of "Samrat Tailors'. The business he keeps on changing and is currently engaging himself in the retail of shoes and other footwear. The tenancy commences on the first of every calendar month and ends on the last day. The premises, housing the demised shop, are an old construction and the provisions of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972), for short, "the Act', are applicable to it. The tenant has never paid Smt. Saroj Bala (hereinafter referred to as 'the landlady') rent for the demised shop on the date that it fell due and without the service of a demand notice upon him. In this regard, the landlady served a notice upon the tenant on 17.07.2000, demanding rent for the period, then in arrears, that is to say, from 01.01.2000 to July, 2000. The notice was duly served upon the tenant.

3. It is averred that the tenant is in arrears of rent since 01.01.2002, which the landlady has, time and again, demanded of him orally. The tenant, however, did not remit all arrears of rent to the landlady. The tenant does not carry on any gainful business in the demised shop. On this account, he is found, time and again, partnering or subletting the demised shop to persons, who are not members of his family, without the landlady's consent. It is averred that it had recently come to the landlady's knowledge that in the month of September, 1994, the tenant sublet the demised shop to one Neeraj Garg son of Kailash Chand Garg, a resident of Modi Nagar, Ghaziabad, inducting the subtenant aforesaid in the demised shop for a sum of Rs.1500/- per mensem. The subtenancy is for a period of five years. In this connection, the tenant and Neeraj had entered into a rent agreement in the presence of witnesses. The aforesaid act of the tenant also renders him liable for ejectment.

4. It is pleaded by the landlady specifically that the rent due to her, outstanding against the tenant, is for the period of 01.01.2002 to July, 2007. Upon this state of default, the landlady instructed her Counsel, Mr. Satyadev Verma to serve the tenant a notice of demand and quit. Accordingly, a notice of demand and quit dated 11.07.2007 was issued to him.

5. It is pleaded that after the landlady had caused the earlier notice of demand in the year 2002 to be served upon the tenant, he instituted Misc. Case No. 35 of 2002, under Section 30(1) of the Act before the Civil Judge (Jr. Div.), Ghaziabad, seeking permission of the Court to deposit rent. The case aforesaid was instituted by the tenant on incorrect facts. Upon receipt of notice of the said case, the landlady filed her written objections, stating that she had never declined to receive rent and further made a

prayer in writing as well as orally, that the tenant may pay the due rent to her by hand. On the aforesaid basis, the Court, seized of the Section 30 proceedings, directed the tenant to pay all outstandings of rent due until then which the landlady demanded, but the tenant did not pay the entire rent due, despite orders of the Court.

6. It is also the landlady's case that the Court sought the tenant's explanation about the basis on which the tenant deposited rent upto 31.03.2006 in Court, and further that the tenant was permitted to deposit rent by the Civil Judge in Misc. Case No. 35 of 2003 at his own risk. It is the landlady's case that the rent deposited by the tenant is not valid tender. Despite the landlady's demand, the tenant did not pay rent to her and, therefore, he is not entitled to the benefit of deposit made by him in Misc. Case No. 35 of 2002; particularly so, as rent cannot be deposited in advance. It is also the landlady's case that the notice to quit dated 11.07.2007 was personally served upon the tenant, but despite expiry of the period, after which the tenancy was to stand determined and the demand raised made good, the tenant did not remit the due rent to the landlady together with taxes payable. Accordingly, the tenant was liable to be evicted on the ground of actionable default.

7. It is the further case of the landlady that the demised shop displays the board of Samrat Tailors, whereas the shop is utilized by the tenant for the retail of footwear, a purpose for which the demised shop was never let out. The aforesaid change in user for the demised shop is without the landlady's consent in writing, rendering the tenant liable to eviction. The notice to quit dated 11.07.2007, that was served upon the tenant on 15.07.2007, was answered by his Counsel, Mr. Anil Vohra, Advocate on 07.08.2007, on incorrect premises. The current rental value of the demised shop was claimed by the landlady to be Rs.5000/- per month.

8. Accordingly, the present suit was instituted by the landlady against the tenant, after the determination of his tenancy for eviction, recovery of arrears of rent for the past three years, that is to say, from 14.08.2004 to 14.08.2007, amounting to a sum of Rs.1080/-, arrears of taxes amounting to a sum of Rs.1152/-, the expenses of notice and Counsel fee being a sum of Rs.1500/- and mesne profits from the date of determination of tenancy till delivery of actual physical possession, for which Court fee was payable in the Execution Department.

9. A written statement was filed by the tenant, saying that he is in occupation of the demised shop as such at the rate of Rs.30/- per month, including taxes since a long time. The suit has been filed on incorrect facts. The tenant claimed that he has never been a defaulter. The landlady wants to get the demised shop vacated. The tenant is depositing the due rent in Misc. Case No. 35 of 2002, under Section 30 of the Act. The tenant is not in arrears of rent. The tenant has his business under the name and style of Samrat Tailors and the footwear that he sells is with the consent of the landlady. Both the businesses are carried on in the demised shop. The tenant never sublet the demised shop to Neeraj Garg.

10. It is the tenant who is in occupation of the demised shop and carries on his own business. No cause of action has arisen to the landlady to institute the present suit. Upon service of notice issued

on behalf of the landlady, the tenant has got a reply sent, mentioning correct facts. The tenant has deposited all due rent in Misc. Case No. 35 of 2002, under Section 30 of the Act and is ready to further deposit it. It is quaintly pleaded in the written statement that the provisions of the Act are not applicable to the demised shop.

11. It appears that going by the law relating to the trial of S.C.C. Suits, no formal issues were framed, and after the written statement was filed, the suit proceeded to final hearing, when the parties led evidence both oral and documentary. However, the Trial Court while writing the judgment, for the sake of convenience, formulated six issues on the case of parties suited. The issues are more like points of determination for the felicity of understanding and judgment. These read (translated into English from Hindi):

(1) Whether any rent is due to the plaintiff from the defendant, meaning thereby whether the defendant is a defaulter?

(2) Whether the defendant, without the permission of the plaintiff, has established the business of footwear in the shop in dispute?

(3) Whether deposit of rent by the defendant under Section 30 of U.P. Act No. 13 of 1972 is invalid? If yes, its effect?

(4) Whether the provisions of U.P. Act No. 13 of 1972 do not apply to the shop in dispute?

(5) To what relief is the plaintiff entitled?

(6) Whether the defendant has inducted a subtenant in the shop in dispute?

12. The landlady, in support of her case, examined Sanjay Mangal as PW-1. In her documentary evidence, a carbon copy of the notice dated 11.07.2007, paper No. 8-Ga was filed. Likewise, the relative registered post receipt, paper No. 9-Ga, the U.P.C. in proof of Dispatch, paper No. 10-Ga, a certified copy of the order-sheet in Misc. Case No. 35 of 2002, paper No. 11-Ga, a carbon copy of notice dated 17.07.2000, paper No. 12-Ga, the relative registered post receipt, paper No. 13-Ga, were also filed. Along with the affidavit, that was filed in lieu of the examination-in-chief of PW-1, a photostat copy of the power of attorney, paper No. 23-Ga/7 and a photostat copy of the agreement, Paper No. 23-Ga/10 were annexed.

13. On behalf of the tenant, he examined himself as DW-1. In his documentary evidence, the tenant filed, through a list of documents, paper No. 30-Ga, money order receipts and tender receipts, bearing paper Nos. 31-Ga to 47-Ga.

14. The Trial Court dealt with Issues Nos. 1 and 3 together, which are the most crucial part of the determination. The relevant findings of the Trial Court, wherever necessary, shall be referred to in the course of this judgment. It was opined by the Trial Court on Issues Nos. 1 and 3 that the deposit made by the tenant under Section 30 of the Act was not valid and the tenant was in actionable default. On Issue No. 2, it was held that the tenant by establishing a footwear retail in the demised shop, that was taken on rent for a tailor's shop, without the written consent of the landlady, had indulged in inconsistent user, prohibited by the Statute. On Issue No.4, it was held that the provisions of the Act apply. On Issue No. 6, the Trial Court held for the tenant that no case of subletting was made out. Issue No. 5 was answered for the landlady and the suit decreed for

eviction, recovery of arrears of rent, arrears of taxes, expenses of notices and Counsel fee, besides mesne profits from the date of institution of the suit till delivery of actual physical possession at the rate of Rs.5000/- per month. The suit was decreed by the Trial Court as aforesaid vide judgment and decree dated 11.01.2010.

15. Aggrieved, the tenant instituted an S.C.C. Revision before the District Judge, Ghaziabad, which was numbered on the file of the District Judge as S.C.C. Revision No. 19 of 2010. The Revision, upon assignment, came up before the Additional District Judge, Court No.14, Ghaziabad, who set aside one finding of the Trial Court, that is to say, the one relating to inconsistent user, but upheld the findings on the validity of deposit under Section 30 of the Act and actionable default. Consequently, the Court of Revision affirmed the Trial Court's decree and dismissed the Revision.

16. Aggrieved, the tenant has instituted this petition under Article 227 of the Constitution.

17. Heard Mr. Ashish Kumar Singh, learned Counsel for the petitioner and Mr. Manish Goyal, learned Senior Advocate assisted by Ms. Akanksha Sharma, Advocate appearing on behalf of heirs and LRs of the deceased landlady-respondent.

18. It may be recorded at the outset and before noticing the contention of parties that the suit was filed on three grounds, to wit, actionable default in the payment of rent, change of user without the consent in writing of the landlady and subletting. Both the Courts below have discarded the tenant's case for eviction on the ground of subletting. The Trial Court decreed the suit on the ground of change of user and actionable default. Upon revision by the tenant, the learned Additional District has set aside the finding about the change of user without permission of the landlady. Thus, the decree for eviction, that has been passed by the Courts below consistently, is one founded on the ground of actionable default alone. The period of default alleged by the landlady is 01.01.2002 to July, 2007. The notice to quit was issued on 11.07.2007 and served upon the tenant on 15.07.2007. There was an earlier notice of demand dated 17.07.2000 issued on behalf of the landlady, claiming arrears for the period 01.01.2000 to July, 2000, but about that notice or the arrears of rent for the said period, there is no issue involved in the present suit. The issue, as already noticed hereinabove, is about default for the period commencing 01.01.2002. The tenant has instituted proceedings under Section 30(1) of the Act before the Court of the Civil Judge (Jr. Div.), Ghaziabad, as a perusal of the relative order-sheet would show, on 01.05.2002 alleging refusal of rent by the landlady for the period commencing 01.01.2002 (the period of default).

19. It is upon this state of proceedings, of which the other relevant details shall be mentioned during the course of judgment, that the two Courts below have returned unanimous findings of actionable default against the tenant.

20. Mr. Ashish Kumar Singh, learned Counsel for the tenant has submitted that no case for an actionable default within the meaning of Section 20(2)(a) of the Act is made out, because on the date of issue of the notice to quit dated 11.07.2007, claiming rent for the period 01.01.2000 to July, 2007, the entire rent stood deposited

under Section 30(1) of the Act in Misc. Case No. 35 of 2002. It is emphasized that prior to issue of the notice to quit, the rent for one year i.e. 11.04.2007 to April, 2008 was deposited on 11.05.2007 in proceedings under Section 30 of the Act, that is to say, around two months prior to the issue of notice under reference. It is submitted that money orders were sent to the landlady prior to institution of proceedings under Section 30(1) of the Act, which were refused. It was thereafter that the last mentioned proceedings to deposit rent were instituted. The application under Section 30(1) of the Act was allowed on 06.04.2007.

21. The learned Counsel for the tenant has, particularly, criticized the finding of the Trial Court to the effect that no money order receipt could be produced by the tenant, bearing endorsement by the Postal Department that rent had been refused. He points out that the Trial Court, at Page No. 77 of the paper-book, in the second paragraph, has mentioned paper Nos. 34-Ga to 47-Ga, referring to these documents as receipts of tender. It is submitted that later on in this judgment, the Trial Court has misdirected itself in holding that the notice to quit was issued on 11.07.2007, but the amount of rent due was deposited thereafter on 29.07.2002, which the learned Counsel says is an absolutely perverse finding. It is also argued with much vehemence that the Trial Court has held that the tenant has not paid the entire rent due but that finding is perverse, inasmuch as all documents were on record before the Trial Court regarding deposit of rent, and those that were not, were there on record of Case No. 35 of 2002. The entire record of Case No. 35 of 2002 was before the Trial Court. There is still further criticism of the Trial Court's findings by the learned Counsel for the tenant, saying that the Court at Page No. 78 of the paper-book has held that after 09.04.2008, no rent has been deposited in Misc. Case No. 35 of 2002. This finding is said to be manifestly illegal as no rent could be deposited under Section 30(1) of the Act, after the institution of the suit.

22. Before the institution of the suit, which was done in the year 2007, it is submitted by the learned Counsel for the tenant that the learned Civil Judge had allowed the application under Section 30(1) of the Act, but the Trial Judge has misinterpreted the said order to hold that the Court had not allowed the application; instead, the Court merely permitted the tenant to deposit rent at his own risk. It has been inferred by the Trial Court, from the aforesaid understanding of the order passed under Section 30, that the deposit made in those proceedings cannot be taken into consideration. It is emphatically argued that after refusal of the money orders sent remitting rent, rent for each and every month was deposited and record of deposit of all due rent was available to the Trial Court. As such, the findings of the Trial Court regarding non-deposit of rent in proceedings under Section 30 for certain periods of time are perverse.

23. It is pointed out by Mr. Ashish Kumar Singh that since the Court of first instance did not consider the record and documents of Misc. Case No. 35 of 2002, the tenant brought on record, through a list of documents, receipts, including refused money orders before the Revisional Court. These documents are on record of the paper-book at Page Nos. 98 to 102, bearing paper Nos. 34-Ga onwards. It is emphasized that paper No. 34-Ga, as mentioned on the face of the said

document, is a paper number assigned to it before the Trial Judge. The said documents have been ignored from consideration by the Revisional Court, according to the learned Counsel for the tenant, inasmuch as there is a finding that the receipts do not disclose the period of tender, that is to say, the month for which the rent deposited relates. Likewise, it is emphasized that about the money orders, it is said by the Revisional Court that the period for which rent was remitted through these money orders is not disclosed. It is urged that in the money orders, that were refused and copies of which were filed before the Revisional Court, the period of rent remitted is clearly mentioned. It is submitted that the finding of the Revisional Court about non-mention of the period for which the rent was remitted is, therefore, perverse.

24. The learned Counsel for the tenant has particularly criticized that finding of the Revisional Court, where it is mentioned that rent for certain periods of time has not been deposited at all, whereas the entire rent stood deposited, regarding which the tender receipts have been brought on record through affidavit and the documents appended to the writ petition. There is a finding by the Revisional Court to the effect that rent for the period 1st June, 2003 to 31st July, 2003, being a sum of Rs.60/-, has been deposited vide tender bearing No. 43-Ga, but the stamp of receipt by the State Bank of India shows that it bears the date of deposit as 30th May, 2008. From the said fact, the Revisional Court has drawn a conclusion that if rent due in the year 2003 was deposited in the year 2008, no benefit thereof can be given to the tenant.

25. The learned Counsel for the tenant has criticized the said finding as the result of an error apparent and pointed out, from the xerox copy of the records summoned from the Courts below, that just above the stamp of receipt by the Bank, the date "30.05.2003' has been mentioned. The stamp, which appears to show the date of receipt as "30.05.2008', is the result of an aberration in the stamp marking. It is next submitted that the landlady has consistently refused money orders and in Misc. Case No. 35 of 2002, where she appeared and objected, she never showed her willingness to receive rent. In fact, she has said in proceedings under Section 30 of the Act that in case the tenant would pay the entire amount of rent due, she would think of accepting it. According to the learned Counsel for the tenant, the Court hearing the case under Section 30 of the Act has clearly observed that the entire amount of rent has been deposited and the landlady is free to withdraw it. It is emphasized that the tenant never refused to pay rent. The rent has been deposited since 2002 to 2007 in proceedings under Section 30(1) of the Act, and thereafter, before the Judge, Small Cause Court, Ghaziabad in the suit. It is urged that there is no default in the payment of rent during the entire period. The findings regarding actionable default recorded by the Courts below are, therefore, perverse.

26. About the part of the findings recorded by the Courts below that the deposit made under Section 30(1) of the Act would not enure to the tenant's benefits, because of non-compliance with Rule 21 of the U.P. U.B. Rules, it is submitted by the learned Counsel for the tenant that the said rule has no application in the present case, after the landlady had appeared in proceedings under Section 30 and contested the same. There is no requirement to deposit process fee and

notice for communication of each deposit of rent in a case like the present one, in view of the decisions of this Court in **Smt. Chameli Devi vs. VIth Addl. District Judge, Pilibhit and another, 2004 All LJ 1945 and Smt. Siddheshwari Dixit and another vs. Hasina Begum and others, 2019 (3) ALJ 725.**

27. The learned Counsel for the landlady, on the other hand, has refuted the aforesaid submissions and contended that the tenant has not remitted rent to the landlady except upon the service of a demand notice. And whenever he has remitted, it has been irregular and short. Likewise, the deposit made in the case under Section 30 shows periods of time when the rent was not deposited. These periods of non-deposit of rent in proceedings under Section 30 of the Act have been specifically recorded in the findings returned by the Revisional Court, based upon a perusal of record. Those findings are pure findings of fact, not open to scrutiny under Article 227 of the Constitution by this Court. Learned Counsel for the landlord has also invited the attention of the Court to the order dated 10.10.2006 passed by the Court hearing the matter under Section 30(1) of the Act to submit that the said order clearly shows that the tenant, despite an offer by the landlady to accept the entire arrears of rent in lump sum, did not pay. It is also pointed out that the deposit under Section 30 has been rightly regarded as invalid, apart from the period of non-deposit, noticed by the Revisional Court due to the fact that there is no compliance with the provisions of Rule 21 of the U.P. U.B. Rules, which are mandatory. Both Courts below have consistently held that it is a case of non-compliance with Rule 21 of the U.P. U.B. Rules, rendering the deposit made under Section 30 of the Act, inconsequential.

28. The principal issues are about the actionable default under Section 20(2) (a) of the Act and whether deposits made under Section 30 of the Act are valid in law, which enure to the tenant's benefit. It is not in issue that the default alleged is for the period 01.01.2000 to July, 2000. The evidence shows that there were bickerings between parties over the tender and acceptance of rent, which led the landlady to issue a notice of demand on 17.07.2000 as well. After January, 2002 the landlady alleges complete non-payment and default, but the notice of demand and quit was issued to the tenant on 11.07.2007 and served upon him on 15.07.2007. Much before that, the tenant had taken steps to deposit under Section 30(1) of the Act by presenting an application to the Civil Judge (Jr. Div.), Ghaziabad on 01.05.2002 for the purpose.

29. The basis to deposit rent in Court under Section 30 of the Act is said to be the landlady's refusal to accept rent by hand in the first instance and then by money order. The Trial Court has disbelieved this part of the tenant's case with the remark that no money order receipt has been produced in evidence, bearing an endorsement by the Postal Department that the landlady has refused to accept rent, when tendered by money order. This part of the finding recorded by the Trial Court is not correct. There are on record money order receipts, numbered as paper Nos. 34-Ga, 35-Ga, 36-Ga, 37-Ga, 38-Ga and 39-Ga, which do not bear out with the Trial Court's findings, that no money order receipt has been filed on record. The money order receipts, that are on record, also bear endorsement of refusal by the Postal Department, at the instance of the landlady. But, that is not the end of the matter. The money order receipts, bearing Paper Nos. 34-Ga, 35-Ga and 36-Ga, show

that rent for the same months, when refused, was sent over and over again, that is to say, for the months of January, February and March, 2002 and then January to April, 2002. Paper No. 34-Ga shows that rent for the months of January, February and March, 2002 was sent by money order on 01.04.2002 and refused by the landlady. It was then sent again on 26.04.2002 by money order, bearing paper No. 35-Ga, for four months from January, 2002 to 30th April, 2002, being a sum of Rs.120/-, which was also refused. In between, on 18.03.2002, vide Paper No. 36-Ga, rent was remitted to the landlady for the period January, February and March, 2002. This was also refused. Again, on 11.03.2002, there is another money order remittance, evidenced by Paper No. 37-Ga, which shows that on that day, rent for the months of January and February, 2002 was sent, but refused. About these money order receipts, the Revisional Court has remarked that a perusal of all these receipts show that rent for the period January, 2002 to April, 2002 was sent by the tenant time and again, which was either refused or returned, because no one was available. It is remarked by the Revisional Court that these receipts do not show that what was the outstanding rent prior to these money order receipts and how much of the rent earlier due has been paid up by the tenant. Since the position of arrears, according to the Revisional Court, prior to the money order receipts is not clear, the Revisional Court has not found justification for the tenant to deposit in Court, under Section 30 of the Act. This finding does not appear to be much justified, because there is no clear case on behalf of the landlady pleaded as to what was the precise period of arrears of rent and the amount due, when she was declining the money orders. It is also not endorsed on the money orders why these were being refused or indicating that a greater amount of rent for a longer period was due, but the money order remittance was short and, therefore, refused. Had that been the case, it might have been a good ground to refuse acceptance of a part of the rent due.

30. Nevertheless, the remittance by money order does show that it is not regular and month by month. The earliest the remittance was made was in the month of March, 2002 and it was for the months of January and February; not March. Rent is normally, and in this case also, payable on the beginning of the calendar month and not the end of it. Therefore, remittance on 11th March, 2002 ought to have included rent for the month of March; not just January and February. The next remittance was made on 18th March, 2002. This is for the months of January, February and March, which, like the earlier one, met with refusal. The third one vide paper No. 34-Ga was made on 1st April, 2002, but this again is for the months of January, February and March and does not include April, when rent for April appears to have fallen due. It is only on 26th April, 2002 and with the earlier money order refused that vide paper No. 35-Ga, rent from January to April, 2002 was remitted. Of course, as said earlier, this too was refused. This shows that the tenant is not a regular paymaster and has been paying rent accumulated for a period of three months and may be more. If the tenant had been remitting in this fashion, this Court is inclined to agree with the Revisional Court, may be for slightly different reasons, that deposit under Section 30 of the Act was not open to the tenant. The deposit, that has been made under Section 30, is also not month by month.

31. In a monthly tenancy after all, rent falls due on first day of every calendar

month and if the tenant pleads a case of the landlord refusing rent, and seeks to deposit in Court, he must regularly deposit on the first of each month, or may be soon thereafter. However, the tender of rent before the learned Civil Judge under Section 30 of the Act would show that the first deposit was made on 28.05.2002 vide paper No. 10-Ga, annexed as Annexure No. SA-3 to the supplementary affidavit for the period January, 2002 to June, 2002. If one were to assume that the application under Section 30 was filed in May and deposit was made for an extra month after the refusal of the four earlier money orders in the months of March and April, 2002, the subsequent deposits of rent in Court do not show any regularity.

32. The next deposit, that has been made vide paper No. 34-Ga on 27.07.2002, is for the months of July to September, 2002. This is an advance deposit of rent made in July upto September, 2002. But the subsequent deposit that was made was in December, 2002 vide deposit challan bearing paper No. 35-Ga dated 24.12.2002 and it is for the period of October, November and December, 2002. Thus, it is a case of delay, default and irregular deposit. Again, there is an advance deposit made on 10.01.2003 for the period 1st January to 31st March, 2002 vide challan bearing Paper No. 36-Ga. The next deposit was made on 02.04.2003 for the months of April and May, 2003. This is followed by the deposit made on 8th October, 2003 and it is for the period 1st October, 2003 to 30th November, 2003. This is evidenced by the challan bearing paper No. 38-Ga. Between the deposits made on 2nd April, 2003 and 8th October, 2003 vide paper No. 37-Ga and 38-Ga, there is no deposit of rent for the months of June, July, August and September. This is a clear period of default of four months, even in the deposit of rent in Court. In the following month i.e. the month of December, deposit was made by the tenant for whole of the next year and an extra month, that is to say, from December, 2003 to 31st January, 2004.

33. The next deposit of rent was made on 25th March, 2004 for the months of February, 2004 to April, 2004. This was followed by the deposit made on 1st June, 2004 for the period 1st May, 2004 to 31st July. The next deposit of rent was made on 29th September, 2004 for the period 1st August, 2004 to 30th August, 2004, followed by a further deposit on 14th December, 2004 for the period 1st November, 2004 to 31st January, 2005. The next deposit was made on 16th May, 2005 for the period 1st February to 31st May, 2005. On 27th September, 2005, the tenant made deposit of rent again for the period 1st June, 2005 to 30th September, 2005. The next deposit appears to have been made, though the acknowledgment is a bit too dim, on 22.02.2006 for the period 1st October, 2005 to 31st March, 2006, followed by the deposit made on 11th May, 2007 for the period 10th April, 2007 to 9th April, 2008.

34. The finding of the Revisional Court, therefore, that the tenant did not deposit rent for the period 01.06.2003 to 30.09.2003 in proceedings under Section 30 of the Act is correct on facts. It is also true that no rent has been deposited for the period 01.04.2006 to 09.04.2007 in proceedings under Section 30 of the Act, as held by the Revisional Court. The finding about the deposit made on 30th May, 2008 towards rent from 1st June, 2003 to 31st July, 2003 is incorrect, because that appears to be an aberration of stamping and the date is 30th May, 2003, as entries on the relative

tender would elsewhere indicate. It is on this basis that the Revisional Court has concluded that the tenant has not deposited rent regularly in Court under Section 30 or paid it to the landlady, regularly.

35. It is but salutary that before deposit of rent under Section 30 of the Act may enure to the benefit of the tenant in a suit for eviction based on actionable default, deposit of rent should be validly made under Section 30, covering the period of default. Here, the records of the case clearly indicate that rent deposited in proceedings under Section 30, antedating the institution of the suit and whereof the tenant seeks to claim benefit in the matter of actionable default, is neither regular deposit nor the complete deposit of rent for the entire period of time, commencing the proceedings under Section 30 and until institution of the suit. The order passed by the Court under Section 30 of the Act on 06.04.2007 permits the tenant to deposit at his own risk, after noticing the landlady's stand that she never refused to accept the entire rent due. Therefore, the order passed under Section 30 would, by itself, not save the tenant from the consequences of default in payment of rent, if established on record and actionable. In any case, the deposit under Section 30 of the Act made by the tenant is not valid, because it is not for the relative period of time the deposit of due rent, as the Revisional Court has found. There are clear shortfalls for at least two periods of time, one stretching about a year. On this ground alone, this Court is of opinion that the deposit made by the tenant under Section 30 is not a valid deposit, of which the tenant may be given benefit in the suit brought on the ground of default.

36. The other matter, which derogates from the validity of deposit made under Section 30 of the Act, are the concurrent findings of the two Courts below that the tenant has not complied with the provisions of Rule 21 of the U.P. U.B. Rules. Rule 21 reads:

"21. Deposit of rent.-(1) Any person desirous of depositing rent under Section 30 shall apply in Form E. The application shall be accompanied by as many copies thereof as there are opposite-parties, and also the process fee and notices in Form F.

(2) The deposit shall be made under the Head "P-Deposits and Advances II-Deposits not bearing interest-C-Other Deposit Accounts-(b) Departmental and Judicial Deposits-Civil Deposits-Civil Court's Deposits"

(3) On such deposit being made, the Court shall cause notice of the deposit to be served on the opposite-party along with a copy of the application.

4) Where a notice of the deposit is returned unserved, the Court shall fix a date on or before which the applicant shall deposit fresh process fee and notice in Form F. If within the time so allowed or within such extended time, as the Court may grant, the applicant fails to take steps as above, the application shall be rejected and the amount deposited shall be refunded to the applicant.

(5) In the case of continuance of deposit of rent for any subsequent period, fresh application shall not be necessary. But process fee and the notice in Form F shall accompany every deposit."

37. The Trial Court as well as the Revisional Court have recorded concurrent findings of fact, the Trial Court relying on the evidence of the tenant-DW-1 himself, that along with the deposit of rent, process fee and Form-F were not supplied, which the tenant is obliged to supply under sub-

Rule (1) and sub-Rule (5) of Rule 21 of the U.P. U.B. Rules. The aforesaid supply of process fee and notice in Form-F has to accompany each deposit made under Section 30 of the Act and both the Courts of fact below have found that none of the deposits made by the tenant have complied with the aforesaid requirement, which is mandatory in order to make valid deposit of rent under Section 30 of the Act. In fact, sub-Section (4) of Section 30 of the Act makes the requirement mandatory, to which Rule 21 gives effect. The question of validity of deposit under Section 30 of the Act, being dependent upon strict compliance with sub-Rules (3) and (5) of Rule 21 of the U.P. U.B. Rules, fell for consideration of this Court in **Shekhar Bahuguna v. Suresh Chandra Kapoor, 2010 SCC OnLine All 1891**, where it was held:

"42. The learned senior counsel for the tenant submits that the above order is indicative of the fact that necessary steps were taken by the tenant for issuance of notice which is being disputed by the learned counsel for the landlord. The trial Court has found that Rule 21 has not been complied with in as much as there is no material to show that various requisite steps such as filing of process fee and notice in Form F accompanying every deposit as provided by clause (5) of Rule 21, were filed. A bare perusal of the order sheet of the aforesaid misc. case no. 403 of 1990 does not show that a notice of the case was ever served or tendered or refused by the landlord. Also there is no material to show that with every deposit process fee and notice in Form F meant for service on landlord were filed by the tenant In Chhotey Lal v. 14th Additional District Judge, Kanpur, 1994 (1) ARC 289 it has been held by this Court that mere deposit of amount under section 30 of the Act is not sufficient for treating the deposit as due compliance of law and availability of sum to the landlord. The provisions of sub-rules (3) and (5) of the Rule 21 of the Act have been interpreted in the following manner:--

"The provision of sub-rules (3)(5) of the said Rule are important. For the first deposit under Section 30, the tenant was required to take steps so that a notice about the deposit could have been served to the landlord. In subsequent deposit for continuation of depositing the amount of rent, fresh application was not necessary but process fee and the notice in Form "F' was necessary and it is a mandatory requirement. The Courts below concurrently held that petitioner had not taken steps to serve the plaintiff-landlords after the deposit under Section 30 was made by him. The finding recorded by the Courts below on this point is conclusive as finding of fact and learned Counsel for the petitioner could not assail the said finding that it suffered with any such irregularity which could have necessitated interference under Article 226 of the Constitution. Thus, this point alone is sufficient to affirm the judgment of the Courts below that the petitioner was a defaulter and failed to pay the amount due after receipt of the notice under Section 106 of T.P. Act, according to law."

43. Pashupati Singh v. First Additional District Judge, 1981 ARC 222 is an authority for the proposition that a notice of the application filed under section 30 (1) has to be given to all the opposite parties mentioned in the application and if an application has been dismissed for default then the amount which is deposited by the applicant has to be refunded to the applicant tenant.

44. In Jagat Prasad v. District Judge, Kanpur, 1995 (2) 360, relied upon by the

landlord, the Apex Court has held though in a slightly different context under Order 15 Rule 5 C.P.C that the law prescribes the procedure as to deposit under the U.P. Act No. 13 of 1972. Such a procedure if complied with alone will be valid defence to a petition for eviction on the ground of arrears of rent. The relevant portion is reproduced below:--

"Law prescribes the procedure as to the deposit under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. Such a procedure if complied with alone will be a valid defence to a petition for eviction on ultimate order of eviction passed against the tenant will have to be upheld. This means the order of eviction is sustained."

45. The other decisions Narain Prasad v. Ixth Addl. District Judge, 2004 (2) ARC 211 and Panna Lal v. XIIIth Addl. District Judge, Meerut, 1991 (1) ARC 473, relied upon by the landlord reiterates the above views.

38. More recently in **Rani Devi v. Addl. Distt. & Sessions Judge, 2018 SCC OnLine All 6406**, it has been observed in the context of the mandatory requirement of compliance with Rule 21 of the U.P. U.B. Rules, framed under Section 30 of the Act, thus:

"25. Thus, mere deposit of the amount under section 30 is not sufficient. For treating the deposit as valid, due compliance of law and availability of the same to landlord is also necessary. The manner in which the rent is to be deposited under section 30 of the Act has been laid down in Rule 21 of the Rules. The deposit made under section 30 of the Act is deemed to be a deposit in favour of the landlord. For treating the deposit as valid, the requirements under Rule 21 of the Rules have to be complied with strictly.

26. In the case at hand, on 26.2.1981, Sri Ram Kumar Vaish deposited a sum of Rs 882/- under section 30(1) of the Act towards rent for the period 1.1.1977 to 31.1.1981. Subsequently, he deposited rent from 1.2.1981 to 31.3.1992 and after his death his wife Smt. Rani Devi, the petitioner No. 1 deposited Rs. 1,098/- towards rent for the period 1.4.1992 to 30.4.1997 and again a sum of Rs 738/- towards rent for the period 1.5.1997 to 30.4.2000. Both the Courts below have returned a concurrent finding of fact that the deposits made subsequent to the deposit made on 26.2.1981 were not accompanied by process fee and notice in Form F as required under Rule 21(5) of the Rules. This fact is not disputed by the learned Counsel for the petitioners."

39. The learned Counsel for the tenant has submitted that compliance with the requirement of Rule 21 of the U.P. U.B. Rules becomes redundant, because the landlady appeared in Misc. Case No. 35 of 2002, under Section 30 of the Act, which was allowed by the learned Civil Judge on 06.04.2007 after contest. In support of this submission of his, Mr. Ashish Kumar Singh has relied upon the decision in **Siddheshwari Dixit (supra)**, where it has been held:

"20. The revisional court also rightly observed that the plaintiff had full knowledge of pendency of Misc. Case No. 82/83 as he had been withdrawing rent deposited in the said proceeding, therefore even if notice in Form-F was not issued, it would be a mere irregularity, but would not invalidate the deposits made by the tenant. The Supreme Court in Mam Chandra Pal v. Smt. Shanti Agarwal, 2002 (1) ARC 370

has held that a very technical and pedantic view with regard to a beneficial provision should not be taken by court. The observation came to be made in context of Section 20(4) of the Act, the benefit of which was being claimed by the defendant. It has been held that:--

11. After the suit was filed the tenant was too willing and ready to clear all the dues so much so that he did it before the first date of hearing and made subsequent deposits as well to make it up to date. We feel that the whole purpose of enacting sub-section (4) of Section 20 of the Act is to do substantial justice between he parties. It covers those cases alone where the ground for eviction is default in payment of rent still the Legislature intended to provide an opportunity to a tenant for payment of rent. On availing of such an opportunity, equities between the parties are levelled as the landlord gets the amounts of arrears of rent and damages along with legal expenses and interest on the defaulted amount and the tenant is saved of liability of being thrown out of the premises. While considering the import of such provisions, it may have to be seen that the requirement of law is substantially and virtually stands satisfied. A highly technical view of the matter will have no place in construing compliance of such a provision. We may however, hasten to add that it is not intended to lay down that non compliance of any of the requirements of the provision in question is permissible. All the dues and amounts liable to be paid have undoubtedly to be paid or deposited on the date of first hearing but within that framework virtual and substantial compliance may suffice without sticking to mere technicalities of law."

21. This Court, does not find infraction of any provision of law or any prejudice having been caused to the plaintiff in case defendant continued to deposit rent, after refusal by the landlord, in Misc. Case No. 82/83. The revisional court was right in holding the said deposit as valid."

40. It must be said at once that **Siddheshwari Dixit** does not derogate from the principle that in order to take benefit of Section 30 of the Act, the tenant has to comply with Rule 21 of the U.P. U.B. Rules strictly and that with every deposit of rent made in Court, having seisin of the Section 30 proceedings, the necessary process fee and notice in Form-F have to be supplied in order to make the deposit valid. This is the principle laid down consistently in **Shekhar Bahuguna (supra)** and **Rani Devi (supra)**. **Siddheshwari Dixit** is a case where the landlord not only had full knowledge of the case under Section 30, but also had been withdrawing rent deposited in the said proceedings. It was in that context that it was opined that compliance with the requirements of supplying Form-F with the process fee would be a merely formality and cannot derogate from the extension of benefit under the provision to the tenant. In the present case by contrast, the landlady appeared in the case under Section 30 of the Act and objected to it on the ground that she never refused to accept rent. Upon the tenant making an application in the case under Section 30 that he had deposited rent up to 31.03.2006, and ready to deposit further rent up to 31.10.2006, and that the landlady may be directed to accept the said rent before the Court due until 31.10.2006, amounting to Rs.240/-, the landlady responded by saying that if the tenant pays the entire rent due up-to-date in cash, she would consider accepting it. The Court, seized of the Section 30 proceedings, opined that rent under Section 30 is

deposited to be paid to the landlord, which the landlord has a right to withdraw. It was remarked that since the landlady does not want to withdraw the rent, the Court cannot compel her to do so. In this connection, the order dated 23.02.2007 passed by the Civil Judge (Jr. Div.) in Misc. Case No. 35 of 2002 may be quoted:

"23.2.2007

प्रा०पत्र 24ग का निस्तारण

प्रार्थी की ओर से प्रार्थना पत्र 24ग इस आशय का प्रस्तुत हुआ कि उसने दिनांक 31.3.06 तक का किराया चालान से न्यायालय के आदेश पर जमा किया है और 31.10.06 तक का किराया जमा करने को तैयार है और इसी आधार पर विपक्षी को दिनांक 31.10.06 तक का किराया 240 रूपये न्यायालय के समक्ष लेने के लिए आदेश पारित करने की प्रार्थना की गयी है। जिस पर विपक्षी द्वारा यह अंकित किया गया कि यदि पिछला समस्त किराया एक मुश्त नगद देता है तभी विचार किया जा सकता है। अर्थात विपक्षी के अनुसार यदि प्रार्थी उसे पिछला समस्त किराया एक मुश्त नगद देता तभी वह इस पर विचार करेगा। उल्लेखनीय है कि धारा-30 किराया अधि० के तहत प्रार्थी को न्यायालय में किराया जमा करने की अनुमति तब दी जाती है, जब उसके अनुसार भवन स्वामी/लैण्डलोर्ड किराया लेने से इंकार करता है और हस्तगत वाद में प्रार्थी द्वारा जो किराया जमा किया गया है वह विपक्षी के लिए ही है, जिसे उठाने का अधिकार विपक्षी का है। यदि विपक्षी उसे नहीं उठाना चाहता तो उसके लिए बाध्य नहीं किया जा सकता है। इन परिस्थितियों में प्रार्थना पत्र स्वीकार किये जाने योग्य नहीं है।

आदेश

प्रार्थना पत्र 24ग निरस्त किया जाता है। पत्रावली वास्ते निस्तारण 4ग दिनांक 23.3.2007 को पेश हो।"

41. The aforesaid stand of the landlady before the Court hearing the Section 30 matter makes it evident that this is not a case where the landlady, after knowledge of the proceedings, had accepted the position or acquiesced to it that she did not accept rent and further that it was being deposited by the tenant in Court, which she was minded to withdraw. The landlady never accepted the position that she refused to receive rent ever. Rather, she took a specific stand that she was willing to accept the entire rent due up to time in lump sum, in cash. It is also not in dispute on facts that the tenant has not complied with each deposit made with the provisions of Rule 21, supplying the requisite process fee and the notice in Form-F. Therefore, the decision in **Siddheshwari Dixit** is of no assistance to the tenant and it is a case where the tenant, who desired to take benefit of the provision of the provisions of Section 30, had to punctiliously comply with Rule 21 of the U.P. U.B. Rules. But, he did not.

42. This brings us to fore the other question relating to the validity of deposit under Section 30 of the Act, to wit, if the grant of an application under Section 30 by the Court permitting the tenant to deposit at his own risk, would lead to the deposited rent ipso facto enuring to the tenant's benefit? The Courts below have held otherwise on facts and law. This Court is in agreement with the above opinion.

43. The essence of a valid deposit under Section 30(1) of the Act is based on a case of tender of rent by the tenant of a building to the landlord governed by the Act and refusal by the landlord. Unless the refusal is proved or a supervening willingness of the landlord dispelled, the right to deposit under Section 30 would either not be there in the absence of established refusal, or in the face of a

supervening acceptance from the point of time that the landlord is willing to accept the rent, the right to deposit would cease. If the refusal is there and so long that it continues, the deposit has to be made strictly in accordance with the provisions of Section 30 of the Act read with Rule 21 of the U.P. U.B. Rules, in order to make the deposit valid in the sense that it may be taken to be deposited with the Court, acting on the landlord's behalf. It is only in that situation that the deposit made would enure to the tenant's benefits; not otherwise.

44. It is also of utmost importance to acknowledge the legal position that whether deposit of rent under Section 30 has been validly made or not, is not decided by the Court seized of the Section 30 proceedings. It is to be decided by the Court that subsequently hears the landlord's action for ejectment etc. Therefore, the submission of the learned Counsel for the tenant that the application under Section 30 being allowed by the learned Civil Judge, permitting him to deposit at his own risk, has to be considered as valid deposit of rent, cannot be accepted. Whether the deposit was validly made under Section 30 or not, is to be decided by the Courts of competent jurisdiction trying the suit. Both the Courts, on a correct appreciation of facts, evidence and law, have held that the deposit was not validly made. The deposit has been held to be invalid, because it was short, irregular and for certain periods of time, not made at all. It has also been held to be invalid, because there was no compliance of the provisions of Section 30 of the Act read with Rule 21 of the U.P. U.B. Rules.

45. There are again some pertinent observations of this Court to be found in **Shekhar Bahuguna** (supra), where it was observed:

"**37.** Section 30 of the U.P. Act No. 13 of 1972 provides for deposit of rent in Court in certain circumstances. If any person claiming to be tenant of a building tenders any amount as rent in respect of the building to its landlord and the landlord refused to accept the rent the same may be deposited in Court in the prescribed manner and the tenant shall continue to deposit the rent which he alleges to be due for any subsequent period until the landlord, in the meantime, signifies by notice in writing to the tenant his willingness to accept it, vide sub-section (1) of section 30 of the Act. Interpreting the said provision, it has been held, time and again, by this Court that there should be a refusal by the landlord to accept the rent which is the sine qua non for a valid deposit under section 30 (1) of the Act. The said legal proposition was not disputed by the learned senior counsel for the tenant and the arguments proceeding on that footing. On the facts situation as existed in the case and discussed above, it has been found that as a matter of fact, the alleged two money orders were not even tendered to the landlord and therefore, the question of their refusal does not arise. This being so, the very foundation of making the deposit under sub-section (1) of section 30 of the Act goes. It is unthinkable that in absence of any refusal by the landlord as the present case is, a tenant could make a valid deposit under section 30 (1) of the Act. This is one aspect of the case but the matter does not end here."

46. It must be added here that on the facts of the case in **Shekhar Bahuguna**, the remarks of the Court in Paragraph No. 53 of the report, almost bring the law laid

down there to bear on all fours on the case here, which read:

"53. The upshot of the above discussion is that the deposit made by the tenant under section 30 of the Act is not a valid deposit. Firstly, there was no refusal by the landlord to accept the rent allegedly tendered through money order, secondly the provisions of Rule 21 have not been complied with as notice was never tendered or served or refused by the landlord and thirdly that no rent was deposited for the month of March, 1989."

47. This Court is, therefore, in agreement with the Courts below that the deposit made by the tenant under Section 30 is not valid and cannot enure to the tenant's benefit while judging the plea of default.

48. It cannot be gainsaid that when the notice of demand for arrears of rent and to quit dated 11.07.2007 was served, there were arrears of rent far beyond four months, outstanding against the tenant. There are short deposits of rent by much more than four months made by the tenant in Section 30 proceedings, as already recorded hereinabove, and which he has not otherwise tendered to the landlady. It is also not in dispute that upon receipt of the notice of demand and quit, the tenant did not remit the entire outstandings of rent to the landlady. Thus, on the date of institution of the suit, there being arrears of rent exceeding four months, that were not paid by the tenant within 30 days of the service of the notice of demand, a case of actionable default under Section 20(2)(a) of the Act is clearly made out. This is what the two Courts of fact below have consistently concluded. Upon institution of the suit, it is not in dispute that on the date of first hearing, the tenant has not unconditionally paid, tendered to the landlord or deposited in Court the entire amount of rent and damages for use and occupation for the demised shop, together with interest at the specified rate and the landlord's costs of the suit. The tenant did not deposit on the date of first hearing, believing perhaps that he had deposited the entire rent validly under Section 30(1) of the Act, which he is entitled to deduct/ set off effacing all the outstandings. The tenant's belief is not vindicated, and, therefore, irrelevant. This being the undisputed position, which has also been specifically held by the Trial Court on its findings on Issue No. 4, the tenant cannot claim any relief from his liability for eviction.

49. In all fairness, the learned Counsel for the tenant has not raised an issue about benefit of Section 20(4) of the Act. The conclusion, therefore, would be that the tenant has committed actionable default under Section 20(2)(a) of the Act and the deposit of rent made by him under Section 30(1), does not enure to his benefit. The concurrent findings of fact recorded by the two Courts below, except to the extent of there being a few inconsequential infirmities noticed in this judgment, do not suffer from any such fallacy as may warrant interference in the exercise of our jurisdiction under Article 227 of the Constitution.

50. In the result, this petition **fails** and is **dismissed**.

51. The interim order granted in this case is hereby **vacated**.

52. However, considering the facts and circumstances, the tenant is allowed six months time to handover peaceful and

vacant possession of the shop in dispute provided he execute an undertaking before the Prescribed Authority, Ghaziabad, embodying the following terms within one month of the date of receipt of a certified copy of this judgment by either party and its production before the Trial Court:

(1) The tenant shall handover peaceful and vacant possession of the demised shop to the landlord on or before 10.05.2023.

(2) During the period of six months that the tenant remains in occupation, he will not sublet the shop, damage or disfigure it in any manner whatsoever.

53. In the event, an undertaking, as above directed, is not filed before the Prescribed Authority by the tenant within the time allowed or the undertaking violated, the release order shall become executable **forthwith**.

(2022) 12 ILRA 895
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matter Under Article 227 No. 5522 of 2021

Smt. Ashoka Devi & Ors. ...Petitioners
Versus
Smt. Prkashni Sharma & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar Trivedi

Counsel for the Respondents:
Sri Akash Chandra Maurya

Civil Law - Code of Civil Procedure,1908 - Order VI Rule 17-Second amendment application by defendant to amend the Written Statement allowed-challenged-by amendment seeking to change his character of tenant which was otherwise an admission-amendment would amount to withdraw of admission-amendment application was dismissed -another filed without recalling the order-orders allowing subsequent amendment application cannot be sustained.

Petition allowed. (E-9)

List of Cases cited:

1 Modi Spinning & Weaving Mills Co. Vs Ladha Ram & Co.,1977 AIR 680

2 Shamim Akhtar Vs Iqbal Ahmad & anr., AIR 2001 (SC) 1

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

1. Heard Sri A. K.Trivedi, learned counsel for the petitioners and Sri Akash Chandra Maurya, learned counsel appearing for the contesting respondent.

2. By means of present petition filed under Article 227 of the Constitution, the petitioner has invoked supervisory jurisdiction of this Court seeking to set aside the order dated 14.12.2017 passed by the Trial Judge in SCC Suit No. 72 of 2003 and that of the Court sitting in revision dated 25.8.2021 passed by Additional District Judge, Court No. 12, Kanpur Nagar in SCC Revision No. 06 of 2018, whereby second amendment application of the defendant to amend written statement has come to be allowed.

3. The submission advanced by learned counsel for the petitioner is that the amendment application that was moved by the defendant under Order VI Rule 17 of the Code of Civil Procedure, 1908 on 31st July, 2004 seeking to change his character of a tenant which was otherwise an admission vide paragraphs 8 and 9 of the

original written statement. It is argued that the manner in which amendment was sought to be incorporated in the original proceedings amounted to withdrawal of admission. This application bearing paper no. 24-C came to be rejected by Trial Court on 25.10.2008 in absence of counsel for the defendant and matter was posted for evidence and no application for recall was filed in respect of order dated 15.10.2008 and yet again an another amendment application came to be filed by the defendants respondents on 25th January, 2017 to incorporate certain more paragraphs after paragraph 8.

4. Learned counsel for the petitioner has next submitted that petitioner vide new paragraphs 8-A to 8-D wanted to incorporate that subsequently he having obtained knowledge came to know that there was serious dispute of ownership amongst the owners and so defendant would not be a tenant of the plaintiff and as such not liable to pay rent.

5. It is thus argued by learned counsel for the petitioner that tenant in fact wanted to withdraw the admission again and has camouflaged the withdrawal of admission originally made in paragraphs 8 and 9 of the written statement, by twisting the facts. It is also argued that second amendment application was hit by Section 11 of the Code of Civil Procedure, 1908.

6. Per contra, it is argued by learned counsel for the contesting respondent that merely because earlier application was dismissed on the ground of non appearance of party seeking the amendment, it would not operate as res judicata to hold that subsequent application was not maintainable. Moreover, as he argued, subsequently certain fresh facts came to the knowledge petitioners were only sought to be incorporated. However, learned counsel for the petitioner would not dispute that whatever has been stated in paragraph 8, if amendment is allowed would certainly be countering those averments and may amount to withdrawal.

7. The Supreme Court in the case of **Modi Spinning & Weaving Mills Co. v. Ladha Ram & Co.,1977 AIR 680** has very clearly held that admission made in the written statement cannot be permitted to be withdrawn. Vide paragraph 10 of the judgment (supra), it was held thus:

"It is true that inconsistent pleas can be made in plead- ings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irre- trievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court."

8. In so far dispute amongst the parties having right to the property in question is concerned and as to whether landlord would be entitled to maintain suit for recovery of rent or ejectment or not, this aspect can be incidentally gone into by the court hearing SCC suit even. Supreme Court in the case of **Shamim Akhtar v. Iqbal Ahmad and Another, AIR 2001 (SC) 1**, held that *the question of title of the plaintiff to the suit house could be considered by the Small Causes Court in the proceedings as an incidental question and final determination of the title could be*

left for decision of the competent Court. In such circumstances, it could not be said that for the purpose of granting the relief claimed by the plaintiff it was absolutely necessary for the Small Causes Court to determine finally the title to the property. The tenant-respondent by merely denying the relationship of landlord and tenant between himself and the plaintiff could not avoid the eviction proceeding under the Rent Control Act. That is neither the language nor the purpose of the provisions in Section 23(1) of the Small Causes Court Act.

9. In view of above, therefore, I am not able to sustain the orders passed by the Trial Judge as well as court sitting in revision allowing subsequent amendment application moved by the defendant respondent. However, since, it is always open for the Trial Judge to go incidentally into the question of title of the landlord so as to determine his entitlement to recover the rent from the defendant tenant, it will be open for the defendant to lead such evidence as may be permissible and admissible in law and in the event any such evidence is led, that may be examined to determine a point of title of the land lord even whiling going incidentally into that question by the Trial Judge .

10. Subject to aforesaid liberty granted to the defendant , the orders passed by the Trial Court dated 14.12.2017 and that of Court sitting in revision dated 25th August, 2021 are hereby set aside.

11. With the aforesaid observations and directions, this petition stands allowed.

(2022) 12 ILRA 897
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.12.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Matter Under Article 227 No. 23974 of 2021

Bhanu Gandotra ...Petitioner
Versus
Addl. Principal Judge Family Court, Lko. & Anr. ...Respondents

Counsel for the Petitioner:
Aishwarya Pratap Singh, Sandeep Kumar (Trivedi)

Counsel for the Respondents:
Ram Raj, Risabh Raj

Civil Law - Family Court Act, 1984-Section 19 (1)-Opportunity for filing of written statement by Petitioner closed-impugned order-said order effected the right of the Petitioner-is an interlocutory judgment-section 19 (1) of the Act, 1984 provides remedy of Appeal-impugned order is an intermediary or interlocutory Judgment-remedy of Appeal-petition under Article 227 not maintainable.

Petition dismissed. (E-9)

List of Cases cited:

1. Smt. Kiran Bala Srivastava Vs Jai Prakash Srivastava, 2005 (23) LCD 1

2. Yogesh Arora Vs Smt. Jennette Yogish Arora reported in (2018) 9 ADJ 379

3. Shah Babu Lal Khimji Vs Jayabein Kania,AIR 1981 SC 1786

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Sri Ram Raj, learned counsel appearing for the respondent.

2. Under challenge is the order dated 23.02.2021 passed by the learned Additional Principal Judge, Family Court-

10, Lucknow by which opportunity for filing of written statement by the petitioner has been closed.

3. A preliminary objection has been raised by Sri Ram Ram, learned counsel appearing for the respondent that the petition filed under Article 227 of Constitution of India would not be maintainable inasmuch as the order challenged is an order passed by the learned Family Court dated 23.02.2021 whereby the right of the petitioner to file a written statement has been closed. He contends that taking into consideration Section 19 of the Family Court Act, 1984 (hereinafter referred to as 'Act, 1984') the order impugned has got the trappings of a final order as such, the petitioner has a statutory remedy of filing of an appeal and consequently, the petition filed under Article 227 of Constitution of India is not maintainable. Reliance has been placed on a full bench judgment of this Court in the case of **Smt. Kiran Bala Srivastava Vs. Jai Prakash Srivastava** reported in **2005 (23) LCD** 1 as well as the judgment of this Court in the case of **Yogesh Arora Vs. Smt. Jennette Yogish Arora reported in (2018) 9 ADJ 379.**

4. It is argued that the Full Bench of this Court has set forth as to what order would have the trappings of a final order and accordingly, considering the aforesaid judgment of the Full Bench and the order impugned having the trappings of the final order, the petitioner has a remedy of filing of an appeal against the said order.

5. On the other hand, learned counsel for the petitioner states that the right of filing of written statement has been closed by means of the impugned order and consequently, the same would not fall within the ambit of having the trapping of a final order and as such, the instant petition would not be maintainable.

6. Having heard the learned counsel appearing for the contesting parties and having perused the records what emerges is that the full bench of this Court in the case of **Smt. Kiran Bala Srivastava (supra)** has held as under:-

"19. Interpreting the word "judgment" appearing in clause 15 of Letters Patent "Bombay" in Shah Babulal Khimji v. Jayaben, AIR 1981 SC 1786, their lordships of the Apex Court held that those orders which decided matters of moment or which affected vital and valuable rights of the party or which tended to work serious injustice to the party concerned, fell within he expression "judgment" appearing in relevant clause of Letters Patent. Their lordships said that there could be following three kinds of judgments:

1. "A final Judgment: *A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves, nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.*

2. A preliminary judgment: *this kind of a judgment may take two forms (a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not*

maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to the larger Bench, (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g. bar of jurisdiction, res-judicata, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial' which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

3. Intermediary or interlocutory judgment: *Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43, Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43, Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a Judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote "*

7. From a perusal of the aforesaid judgment it emerges that the Full Bench while placing reliance on the judgment of the Apex Court in the case of **Shah Babu Lal Khimji Vs. Jayabein Kania** reported in **AIR 1981 SC 1786** has held that there could be three kinds of judgments namely (a) final judgment (b) a preliminary judgment and (c) intermediary or interlocutory judgment. In the instant case, admittedly the order impugned is neither a final judgment nor a preliminary judgment and as such, this Court would have to consider as to whether the forfeiture of right of filing of written statement of the respondent before the learned Family Court could be said to an intermediary or interlocutory judgment.

8. From a perusal of the Full Bench judgment as passed on the basis of the judgment of the Apex Court in the case of **Shah Babu Lal Khimji (supra)** it emerges that there can be interlocutory orders which are not covered by Order 43 Rule 1 CPC but which also possess the characteristic and trapping of finality in the sense that the orders may adversely effect a valuable right of the party or decide an important aspect of the trial in ancillary proceedings. Before such an order can be considered to be an intermediary or interlocutory judgment, the adverse effect on the party concerned must be direct and immediate rather than indirect or remote.

9. From a perusal of order impugned it emerges that the learned Family Court has closed the right of the respondent therein/ petitioner herein of filing of a written statement. Thus, from the said order it is apparent that the said order has

effected the right of the petitioner of filing of his written statement and the same has a direct effect on the petitioner inasmuch as his reply is not to be considered. Thus, keeping in view the law laid down by the Full Bench judgment in the case of **Smt. Kiran Bala Srivastava (supra)** along with the judgment of Apex Court in the case of **Shah Babu Lal Khimji (supra)** it clearly emerges that the order impugned can be termed to be an intermediary or interlocutory judgment. Learned counsel for the petitioner has failed to produce any judgment which has laid law to the contrary.

10. Section 19 (1) of the Family Court Act, 1984 (hereinafter referred to as "Act, 1984") provides a remedy of an appeal. The said provision provides that an appeal shall lie from every judgment or order not being an interlocutory order of a family Court to the High Court both on facts and law.

11. As this Court has already held that the order impugned is an intermediary or interlocutory judgment consequently, it would not fall within the ambit of being an interlocutory order and as such, the petitioner has a remedy of filing of an appeal under Section 19 (1) of the Act, 1984.

12. Accordingly, once the petitioner has a statutory remedy of filing of an appeal, the instant petition filed under Article 227 of Constitution of India would not be maintainable. The petition is dismissed leaving it open to the petitioner to pursue the remedy as available to him.

(2022) 12 ILRA 900
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 9605 of 2014

Girish Kumar Garg ...Petitioner
Versus
Kali Charan & Anr. ...Respondents

Counsel for the Petitioner:
Sri Kshitij Shailendra

Counsel for the Respondents:
Sri Ram Kishor Pandey

Tenancy law-Landlord wanted the shop facing the market on the road to settle his second son-as he was doing business by placing material in corridor/passage in between the shop and building-aggrieved against impugned order-rejecting release application of landlord-on ground of sufficient alternative accommodation-5th shop-on the back of the building of the landlord in assessment register-its not a shop but an open entry in the back room-both courts have concurred on the bona fide need-thereafter landlord cannot be suggested to run business in the backyard area in order to accommodate tenant.

W.P. allowed. (E-9)

List of Cases cited:

1. Shiv Sarup Gupta Vs Dr. Mahesh Chand Gupta (1999) 6 SCC 222

2. Damodar Sharma Vs Nandram Deviram, AIR 1960 MP 345 (FB)

3. Ragavendra Kumar Vs Firm Prem Machinery & Co (2000) 1 SCC 679

4. Prativa Devi Vs T.V. Krishnan (1996) 5 SCC 353

5. Sait Nagjee Purushotham & Co. Ltd. Vs Vimalabai Prabhulal (2005) 8 SCC 252

6. G.C. Kapoor Vs Nand Kumar Bhasin (2002) 1 SCC 610

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

1. Heard Sri Kshitij Shailendra, learned counsel for the petitioner and Sri Ram Kishore Pandey, learned counsel for the respondents.

2. The landlord petitioner is aggrieved against the order passed by the appellate court in rent appeal rejecting release application of the landlord-petitioner for release of shop in question on the point of sufficient alternative accommodation already available with him and thus reversing the judgment of the Prescribed Authority.

3. Learned counsel for the petitioner has argued that while on the point of bona fide need both the courts below have concurred but since there was a mention of 5th shop on the back of the building of the landlord in the assessment register, the appellate court erred in directing the landlord to utilize that accommodation of 5th shop for his personal need. Learned counsel for the petitioner has argued that 5th shop is not a shop itself but an open entry in the back room through that shutter which is there. It is further submitted that once bona fide need is established of the landlord to get the release application granted, the court cannot direct the landlord to adjust himself in another shop to permit continuance of tenancy of the shop in question in favour of the tenant. It is also submitted that landlord is the sole person to determine his need and decide as to how he wants his son to be settled. It is argued that none of the shops have been found to be vacant one except the accommodation which is allegedly called as 5th shop.

4. Learned counsel for the petitioner has relied upon a number of judgments on the question of *bona fide* need and the discretion of the court in granting release application on the plea of bona fide need.

5. *Per contra*, it is argued by learned counsel appearing for the tenant respondent that concealment of the 5th shop in release application itself was sufficient enough to hold that the petitioner had the enough vacant accommodation to settle his second son and, therefore, need was not bona fide one and so the findings returned by the appellate court cannot be faulted with.

6. Having heard learned counsel for the respective parties and their argument raised across the bar and having gone through the pleadings raised and judgments of the courts below, I find that the petitioner's *bona fide* need to settle his second son into business has not been doubted either by the prescribed authority or by the appellate court.

7. The prescribed authority while deciding the point of *bona fide* need in favour of the petitioner landlord also considered the comparative hardships and according to the court it weighed more in favour of the landlord-petitioner than the tenant. The court below while hearing the rent appeal has gone on to rely upon the document of assessment filed by the tenant in which 5th shop was also shown as a shop backside of the building, whereas it was case of the landlord that alleged 5th shop opened in the room of the house from the back side of building and was being used as a go-down.

8. It was further submitted by learned counsel for the petitioner that for the purposes of running business and to settle

his second son he wanted shop facing the market on the main road and he cannot be asked to accommodate his son in a shop which was on the back side of the building. This argument appeals to reason. Landlord of the house is the person to decide and determine as to which accommodation he needs to settle his son to run business. It is not in the domain of the tenant to suggest that which side of the building he should utilize as an alternative to the shop for which the release application has been filed.

9. In the case of **Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta (1999) 6 SCC 222**, the Supreme Court relied upon the judgment of Madhya Pradesh High Court in the case of **Damodar Sharma v. Nandram Deviram, AIR 1960 MP 345 (FB)** with approval wherein it was held that the landlord was a sole arbiter of his own requirements and what was required on his part was to prove that he wanted the accommodation genuinely.

10. In the case of **Ragavendra Kumar v. Firm Prem Machinery & Co (2000) 1 SCC 679**, the Court reiterated its earlier decision in the case of **Prativa Devi v. T.V. Krishnan (1996) 5 SCC 353** in holding that landlord is the best judge of his requirement for residential or business purpose and he had got complete freedom in the matter. Again in another case **Sait Nagjee Purushotham and Co. Ltd. v. Vimalabai Prabhulal (2005) 8 SCC 252**, wherein High Court had accepted the plea of the tenant that one of the applicants had settled down in the America so there was no such bona fide need inasmuch as the sons were already in multifarious activities and therefore, the need of the landlord to be not bona fide, the Supreme Court while setting aside the order of the High Court observed *"we fail to appreciate that when two sons are there and if they want to expand their business for the landlords and their sons to wait till the disposal of the case. They have to do something in life and they cannot wait till the appellant is evicted from the premises in question".*

11. In the case of **Prativa Devi (supra)** the Supreme Court held that bona fide personal need is a question of fact and, therefore, such finding should not be normally interfered with. The only question is that the need set up must be honest and not tainted with any oblique motive as held in the case of **G.C. Kapoor v. Nand Kumar Bhasin (2002) 1 SCC 610.**

12. In the case in hand I find that landlord wanted the shop facing the market on the road to settle his second son and it has come that his son was doing business with him by placing material in the corridor/ passage in between the shop and the building. This being the factual situation, in my considered view, the requirement of the shop in question as set-up by way of bona fide need by the petitioner was a genuine need and requirement.

13. No one should and, nor can anyone suggest owner of the property to run business in the backyard area in order to accommodate tenant in the shop facing market area. Exception apart where it can be demonstrated that in an identically placed situation landlord has sufficient accommodation and wants release of the tenanted premises for the purpose of release only with an intention to accommodate any other tenant or new tenant, it would be quite immoral and unethical to guide the landlord to adjust himself with available alternative

accommodation to accommodate tenant at a prime part of the building or at a prime location.

14. In such above view of the matter, I am not able to sustain the order of the appellate court and, accordingly, writ petition succeeds and is allowed.

15. The order passed by the appellate court is set aside and the order passed by the prescribed authority is confirmed.

(2022) 12 ILRA 903
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

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

Writ-A No. 21951 of 2018

Mohd. Ahmad & Ors ...Petitioners
Versus
Noor Mohammad ...Respondent

Counsel for the Petitioners:
Sri Manish Tandon, Sri Shailendra Singh

Counsel for the Respondents:
Sri Atul Dayal, Sr. Advocate, Sri Ayush Khanna, Sri Mushir Khan

The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972-section 21(1)-Tenant Petitioner-against order of release -Landlord purchased the premises-tenants were in occupation since time of former owner and landlord- landlord moved release application after 29 years-non compliance of section 21 of the Act-impugned order did not refer to non compliance-total absence of finding vitiate the judgment.Appeal to be re-heard.

Petition allowed partly. (E-9)

List of Cases cited:

1. Anwar Hasan Khan Vs Mohd. Shafi & ors., (2001) 8 SCC 540

2. Nirbhai Kumar Vs. Maya Devi & ors., (2009) 5 SCC 399

3. Martin & ors. Harris Ltd. Vs VIth Additional Distt. Judge & ors., (1998) 1 SCC 732

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

1. This tenants' writ petition is directed against an order of release passed by the Prescribed Authority, under Section 21(1)(a) of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) (for short, "the Act'), that has been affirmed in appeal.

2. An application for release was moved by Noor Mohammad, the sole respondent to this writ petition, under Section 21(1)(a) of the Act, seeking release of House No. 10/254-J, Heeraman Kaa Purwa, Kanpur Nagar, admeasuring 80 square yards, details of which are mentioned in Schedule A at the foot of the release application. It was registered on the file of the Prescribed Authority/ Additional Civil Judge (Sr. Div.), Court No.5, Kanpur Nagar as Rent Case No. 14 of 2013.

3. Noor Mohammad claimed that he is the owner of the aforesaid premises. The premises were said to be 100 years old with an arched roof and in a dilapidated condition. The back portion on the eastern side had already fallen down. The house is constructed on a plot of land in two equal parts. The northern half has two rooms, a kitchen and a courtyard, which is residential and in Noor Mohammad's occupation. The remainder half part of the premises on the southern side has three arched roof rooms, oriented from west to

east, where-after there is a courtyard, another room and a gallery. However, the eastern room of this part was dilapidated and collapsed quite a long time ago. In its place, Mohd. Ahmad (since deceased), whose heirs and LRs are the petitioners here, constructed a tin-shed worked room and also enclosed a part of the courtyard with a tin-shed, giving it the shape of a room, converting it illegally.

4. It is this part of Noor Mohammad's house, which is disputed and shown in the map accompanying the application by letters A B C D and fully described at the foot of the application in Schedule B. Mohd. Ahmad is a tenant in the part of the house shown in Schedule B at the foot of the release application at the rate of Rs.100/- per month, apart from water and sewerage tax. Pending the application for release before the Prescribed Authority, Mohd. Ahmad passed away on 15.08.2014 and his heirs and LRs, who are the writ petitioners here, to wit, Mohd. Akram, Mohd. Arshad and Mohd. Niyaz, all sons of the late Mohd. Ahmad were substituted as opposite parties nos. 1/1, 1/2 and 1/3. The three heirs and LRs of Mohd. Ahmad shall hereinafter be referred to as 'the tenants', unless the context requires individual reference. Noor Mohammad shall hereinafter be called 'the landlord'.

5. It is the landlord's case further in the release application that he has a family comprising 23 members, all of whom reside with him in the half portion of the house shown in Schedule A, that is in his occupation, suffering great inconvenience. The landlord says that on account of shortage of space, his family members have to live in subhuman conditions. One of his sons, Akil Ahmad could not be married because of shortage of space and a younger son, who has married himself, is staying in a rented accommodation in House No. 90/254-J at the rate of Rs.1500/- per month.

6. The tenants contested the application by filing a written statement saying that the demised premises no doubt have an arched roof, but the premises are not dilapidated. The demised premises comprise two rooms, a courtyard and a tin-shed. The demised premises, in the condition it exists, has been that way for the past 50 years. It is then said that Ali Ahmad does not stay with his father. He stays along with his wife and children at Chunniganj. Likewise, Mohd. Arif and Mohd. Akil stay elsewhere and have their families. It is the tenants' case that Shakil Ahmad and Wali Ahmad do not get along with the landlord and for the said reason, stay away. The landlord does not need any residential accommodation.

7. The plot of land he has got vacated from an old tenant, Mohd. Sharif, has three rooms, making it a total of six rooms in the landlord's possession. Mohd. Ahmad, who was alive at the time, further pleaded that he is 80 years old and his family comprises besides himself, his son Mohd. Akram, his wife and two children, two other sons Mohd. Arshad and Mohd. Niyaz, both of whom are unmarried. The landlord has purchased the demised premises, including the part in his occupation on 20.07.1984, but in compliance with the first proviso to Section 21 of the Act, has not served a notice giving the tenants six months' time to vacate. As such, the release application is not maintainable.

8. It is also the tenants' case that Rent Case No. 5 of 2010, Noor Mohd. vs. Mohd. Shahid and others was brought against the tenant there, pleading the same grounds as

those here to establish the landlord's bona fide need and release of that premises was granted in the landlord's favour. Some of the named sons of the landlord were pleaded to be living away from him and it was urged that their need cannot be looked into.

9. Both sides led evidence in support of their case and the Prescribed Authority after considering the case on the issues, amongst others, of bona fide need and comparative hardship, allowed the release application vide judgment and order dated 25.11.2015. The tenants were ordered to vacate the demised premises and handover vacant possession to the landlord within two months.

10. The tenants appealed the said judgment to the District Judge, Kanpur Nagar, sitting as the Appellate Authority under the Act. The tenants' appeal under Section 22 of the Act was registered on the file of the Appellate Authority as Rent Appeal No. 86 of 2015. The appeal was assigned to the Additional District Judge, Court No.14, Kanpur Nagar and came up for determination before him on 31.05.2018. The order of the Appellate Authority records that it was heard in the absence of the tenants (that is to say the writ petitioners).

11. At the hearing of the appeal, the Appellate Authority has recorded that the tenants did not appear in support of the appeal and to all appearances by one part of the record of the proceedings mentioned in the judgment, judgment was reserved, without hearing the tenants. However, the judgment of the Appellate Authority in the next following paragraph would show that learned Counsel for both parties were heard and records perused, including written argument. The judgment passed by the Appellate Authority shows a rather unfaithful record of proceedings in the appeal. More would be said about it later in this judgment.

12. The Appellate Authority by his judgment and order dated 31.05.2018 dismissed the appeal and affirmed the order of release.

13. Aggrieved, this writ petition has been filed.

14. Heard Mr. Manish Tandon, learned Counsel for the tenants and Mr. Atul Dayal, learned Senior Advocate assisted by Mr. Ayush Khanna, learned Counsel appearing for the landlord.

15. Looking to the course of proceedings and the issue of maintainability of the application for want of notice under the first proviso to Section 21 of the Act, this Court does not propose to examine the findings, at least of the Appellate Authority, on the issues of bona finde need and comparative hardship. It is of utmost importance to these proceedings that there is no quarrel about the fact that the landlord purchased the demised premises through the registered sale deed dated 20.07.1984. The tenants were in occupation since the time of the former owner and landlord. The landlord moved the application for release on 27.02.2013, that is to say, after a period of about 29 years. The tenants, in answer to the application, raised a specific plea about non-compliance of the mandatory provisions carried in the first proviso to Section 21 of the Act. The plea was raised in Paragraph No. 11 of the written statement. It was raised in the following words:

"यह कि प्रार्थी गृहस्वामी ने विवादित मकान 20/07/1984 को खरीदा है परन्तु उसने धारा 21 के वैधानिक प्रावधानों का पालन नही किया है। अतः नोटिस न देने के कारण निर्मुक्ति प्रार्थनापत्र पोषणीय नही है और निरस्त होने योग्य है।"

16. In the replication, that was filed, the aforesaid plea was responded to in Paragraph No. 5, pleading a case that no notice is required to be given after passage of 30 years from the date of purchase of the demised premises by the landlord. The relevant part of the replication carried in Paragraph No. 5 at Page 43 of the paper-book read:

"यहां यह लिखना सुसंगत है कि चूंकि वर्तमान वाद खरीद की तिथि दिनांक 20.07.84 के तीस वर्ष के बाद प्रस्तुत किया गया है इसलिये पूर्व नोटिस देने की कोई आवश्यकता नहीं थी।"

17. The Prescribed Authority dealt with the aforesaid plea answering it against the tenants by holding that in view of the decision of the Supreme Court in **Anwar Hasan Khan v. Mohd. Shafi and others, (2001) 8 SCC 540,** there was no necessity of serving the notice of six months envisaged under the first proviso to Section 21 to maintain an application under Section 21(1)(a) of the Act. The findings of the Prescribed Authority in this regard is extracted below:

"इस सम्बन्ध में विपक्षी द्वारा स्वीकृत तथ्य है कि उक्त मकान सन १९८४ में याची / लैण्ड लार्ड द्वारा खरीदा गया था जैसा कि उसने अपनी आपत्ति / जवाबदावा प्रपत्र संख्या ११ के अतिरिक्त कथन के पैरा १३ में स्वीकार किया है। अतः इस बिन्दु पर न्यायालय का यह अभिमत है कि याची ने प्रश्नगत सम्पत्ति को जरिए क्रय जब सन १९८४ में प्राप्त किया तत्पश्चात वर्तमान अवमुक्त प्रार्थना-पत्र सन २०१३ में प्रस्तुत किया ऐसी स्थित में नोटिस दिए जाने की कोई बाध्यता नहीं है। **विधि व्यवस्था- कफील अहमद - बनाम - सतविन्द्र कौर २००६ (१) ए. आर. सी. पेज ४५९** में माननीय उच्च न्यायालय द्वारा निर्णीत किया गया हैं कि यदि अवमुक्त प्रार्थना-पत्र मकान क्रय करने के पांच वर्ष से अधिक समय के पशचात प्रस्तुत किया गया, इस प्रकार नोटिस की आवश्यकता नहीं है। इसी प्रकार एक अन्य विधि व्यवस्था - अनवार हसन खान - बनाम मोहम्मद शफी तथा अन्य २००१ (२) इलाहाबाद रेन्ट केसेज़ पेज ५५४ में भी यह अभिनिर्धारित किया गया है कि क्रय के 3 वर्ष के पशचात नोटिस की आवश्यकता नहीं होती है।"

18. The appeal that the tenants preferred raises specific grounds in the memorandum, numbered Ground Nos. 1, 2 and 3, that read to the following effect:

"1. Because the Learned Lower Court has not considered that the notice for six months in view of the provision of section 21(1) of proviso i is mandatory which was not complied by the opposite party / land lord and this law has been wrongly considered by Learned Lower Court in view of the law held in ARC 2006 (1) page 459 & ARC 2001 (2) page 554 and passed impugned order.

2. Because the Learned Lower Court has not considered. the latest law of Hon'ble Supreme Court which was held in ARC 2011 (1) page 513.

3. Because the Learned Lower Court has also not considered properly that the notice was not waived by the appellant and the mandatory provision has been wrongly ignored in the impugned order and passed impugned order."

19. It is argued by the learned Counsel for the tenants that the Appellate Authority has incorrectly recorded the fact that they did not appear at the hearing to press their appeal or that the appeal was heard in their absence with the Appellate Authority hearing the respondent alone and perusing records. Normally, this kind of a submission would not at all be entertained by this Court. This submission in normal course is one which had to be agitated by way of a review before the Appellate Authority; in fact, before the same Judge, who passed the impugned judgment in appeal. Here, however, there are very startling features that impel this Court to doubt the correctness of the record of proceedings by the Appellate Authority. The Appellate Authority while writing the impugned judgment has recorded in Paragraph Nos. 8 and 9 as follows:

"8. अपीलार्थी के विद्वान अधिवक्ता को बार-बार अवसर देने के उपरान्त भी अपीलार्थी द्वारा बहस नहीं की गयी व उसे लिखित बहस दाखिल करने की स्वतंत्रता देते हुए पत्रावली निर्णय हेतु सुरक्षित की गयी।

9. मैने उभयपक्षों के विद्वान अधिवक्तागण के कथन को सुना एवं सम्पूर्ण पत्रावली का सम्यक परिशीलन किया तथा लिखित बहस का अवलोकन किया।"

20. It is indeed beyond understanding how the Appellate Authority could say in Paragraph No. 8 with so much of emphasis that the learned Counsel for the tenants (appellants before him), despite being given repeat opportunity, did not appear and argue the appeal and, therefore, giving him liberty to file written submissions, judgment was reserved; and, then say in the following paragraph that the learned Judge has heard learned Counsel for both parties, perused the entire records etc. The manner, in which the appeal was heard by the Appellate Authority, casts a grave doubt about the the hearing before him. The record betrays a hurried disposition, where a fair hearing for the tenants appears to have been a causality.

21. This conclusion of ours is buttressed by the fact that the most import point that the tenants had canvassed in support of their case, that is to say, non-compliance with the first proviso to Section 21 of the Act, does not find the slightest mention by the Appellate Authority in the judgment impugned. The memorandum of appeal raises the issue through three well drafted grounds and the Prescribed Authority has dealt with the issue. If the appeal had indeed been heard with the learned Counsel addressing the Appellate Authority, there is no reason why the most crucial point that the tenant had raised about the mandatory compliance of six months' notice envisaged under the first proviso to Section 21 of the Act, would not have been dealt with. The total absence of a finding regarding this issue, in the opinion of this Court, would vitiate the judgment of the Appellate Authority. It would require the appeal to be re-heard, granting opportunity to the tenants.

22. The course of hearing of the appeal seems to have been for some reason hurried and slipshod before the Appellate Authority. This Court is of opinion that the Prescribed Authority dealt with issue of the mandatory notice envisaged under the first proviso to Section 21 of the Act, guided by the law laid down by the Supreme Court in **Anwar Hasan Khan (supra)**, which was later on reconsidered by a three Judge Bench in **Nirbhai Kumar v. Maya Devi and others, (2009) 5 SCC 399**, where the

earlier decision of the Supreme Court in **Martin & Harris Ltd. v. VIth Additional Distt. Judge and others, (1998) 1 SCC 732** was approved as the correct view. In **Nirbhai Kumar**, it was remarked that Martin & Harris Ltd. was not brought to the notice of the Bench hearing **Anwar Hasan Khan.** In **Nirbhai Kumar,** the relevant part of the holding bearing on the issue of mandatory character of the notice under the first proviso to Section 21 of the Act, reads:

"4. .....

A three years' period becomes relevant when there is a change of ownership. This three years' period is a sort of moratorium intended for the tenant's protection. It is to be noted that the crucial expression in the proviso is "and such notice may be given even before the expiration of the aforesaid period of three years". In other words, notice can be given either before or after the three years' period. After expiry of the three years' period the protection given to the tenant from being evicted has no further relevance. Thereafter it is only the question of notice.

5. Above being the position the decision in Martin & Harris Ltd. case [(1998) 1 SCC 732] expressed the correct view. Unfortunately, the said decision does not appear to have been placed before the Bench which heard Anwar Hasan Khan case [(2001) 8 SCC 540] ."

23. It has been argued by the learned Counsel for the landlord that a notice under the first proviso to Section 21 of the Act was indeed served and was part of the record of the Prescribed Authority vide list, Paper No. 65. This Court does not wish to comment on the said issue, because we are of opinion that the matter requires to be re-determined by the Appellate Authority after hearing the parties afresh, bearing in mind the correct position of the law. The fact whether a notice under the first proviso to Section 21 of the Act was served is an issue, which the Appellate Authority ought to go into, carefully examining the records. This is all the more so because the Prescribed Authority has not at all adverted to any notice served under the first proviso to Section 21 of the Act.

24. Since the hearing of the appeal has been noticed to be slipshod and irregular, where the tenants do not seem to have been heard either at all or in an irregular fashion, it would be apposite that the appeal we propose to remand for hearing afresh be heard in the manner that the issue of mandatory compliance with the requirement of notice, under the first proviso to Section 21 of the Act, be determined in the first instance. If the said issue is answered in favour of the landlord, the other two issues of bona fide need and comparative hardship be also heard and determined afresh. Needless to say that in the event the issue of notice under the proviso to Section 21 of the Act is answered against the landlord and in favour of the tenants, the other issues would not require determination.

25. In view of what has been said above, this petition **succeeds** and is **allowed in part.** The impugned order passed by the Appellate Authority in Rent Appeal No. 86 of 2015 is hereby **quashed**. The appeal is restored to the file of the Appellate Authority, who will proceed to hear the appeal afresh, affording opportunity of hearing to both parties. The appeal shall be decided bearing in mind the guidance in this judgment. There shall be no order as to costs.

(2022) 12 ILRA 909
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

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

Writ A No. 25479 of 2018

Prem Singh ...Petitioner
Versus
The A.D.J. Gorakhpur & Ors.
...Respondents

Counsel for the Petitioner:
Sri Adya Prasad Tewari, Sri Sheo Shankar Tripathi

Counsel for the Respondents:
Sri Arvind Srivastava

Civil Law - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972-Section 21 (1)-Impugned order - order of release -on ground of bona fide need-Appeal -affirmation-Writ-landlady purchased the demised premise and instituted proceedings after three years-did not waited for period of six months after service of notice upon tenant-to vacate-if proceeding is against a sitting tenant from time of the former landlord's ownership u/s 21-irrespective of the fact whether three years moratorium u/s 21 has expired or not-mandatory notice can be waived by the tenant-belated plea about want of notice through an amended ground in Appeal by tenant-rightly not accepted by Appellate Authority.

Petition dismissed. (E-9)

List of Cases cited:

1 Smt. Kalpana Gulati & ors. Vs 8th Addl. D.J. Allahabad & ors., (1999) 2 AWC 1656

2 Izhaar Ali & anr. Vs Prescribed Authority/ J.S.C.C., Sitapur & ors., (2014) 107 ALR 88

3 Martin & Harris Ltd. Vs VIth Additional Distt. Judge & ors., (1998) 1 SCC 732

4 Anwar Hasan Khan Vs Mohd. Shafi & ors., (2001) 8 SCC 540

5. Nirbhai Kumar Vs Maya Devi & ors., (2009) 5 SCC 399

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

This writ petition has been filed by Prem Singh, now deceased and represented by his heirs and LRs, assailing two orders of release, passed under Section 21(1)(a) of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) (for short, "the Act'), relating to two distinct tenements in House No. C/105/119, Tehsil Sadar, District Gorakhpur. The orders of release passed separately by the Prescribed Authority relating to both the tenements in House No. 105/119 (supra), for short, 'the house in question', have been affirmed in two separate appeals by the Appellate Authority, under Section 22 of the Act, both the appeals being preferred by Prem Singh.

2. The facts leading to this writ petition are these: Smt. Uma Shukla, mentioned in the cause title of the writ petition as Smt. Uma Devi Shukla, wife of Basant Shukla, instituted two separate proceedings under Section 21(1)(a) of the Act against two different tenants, occupying different parts of the house in question. P.A. Case No. 37 of 2013 was instituted by Smt. Uma Shukla (for short, 'the landlady') against Smt. Prabhawati Devi widow of the late Seeta, Shrawan and Gopal, both sons of the late Seeta, seeking release of the part of the house in question

in their tenancy, on the ground of her bona fide need.

3. The tenement, that Smt. Prabhawati and her sons held, is described at the foot of the application giving rise to P.A. Case No. 37 of 2013. The boundaries given at the foot of the application show the tenement in the occupation of Smt. Prabhawati and her sons as that portion of the house in question, which was located to the east of the part of the said house that Prem Singh occupies, and has well defined boundaries, discernible from the application under reference.

4. Similarly, the other application for release that was instituted against Prem Singh, also on the ground of bona fide need, by the landlady, describes the tenement in his occupation with reference to its boundaries detailed at the foot of the application, registered on the file of the Prescribed Authority as P.A. Case No. 38 of 2013. The tenement in the occupation of Prem Singh is also shown as part of the house in question with its own distinct and different boundaries, as already mentioned.

5. The landlady, thus, came up with a case against the two tenants, to wit, Smt. Prabhawati Devi and her sons being one and Prem Singh the other, showing them to be the occupants of two distinct tenements, both part of the house in question, but with their distinct and well defined identities. Looking to the course of action that proceedings arising out of the two applications for release took, it would be apposite to dispose of one part of the objection that Prem Singh has raised against the release order first, before considering the others that involve conventional issues arising in proceedings under Section 21(1)(a) of the Act, between the landlord and tenant. This course of action is necessitated by the rather ingenuous stand taken by Prem Singh after the Prescribed Authority had passed the order of release relating to the demised premises, subject matter of P.A. Case No. 37 of 2013, founded on compromise between the landlady and the tenants in that case, that is to say, Smt. Prabhawati and her sons.

6. Since both the release orders were passed by the Prescribed Authority together in terms of a common judgment and order, Prem Singh, the tenant in P.A. Case No. 38 of 2013 carried an appeal against the release order passed in P.A. Case No. 37 of 2013, also. A look at the proceedings in P.A. Case No. 37 of 2013 brought by the landlady against Smt. Prabhawati Devi and her sons would show that the parties in that case filed a memorandum of compromise, bearing Paper No. 26-Ga, in terms of which the tenant in the said case agreed to deliver possession of the demised premises, subject matter of proceedings to the landlady. The said compromise was verified by the Court.

7. After verification of the compromise, Prem Singh moved an application before the Prescribed Authority in P.A. Case No. 37 of 2017, which had nothing to do with him on the face of the proceedings, seeking impleadment. The impleadment was granted on 15.09.2015 by the Prescribed Authority. Prem Singh then filed objections to the compromise, already verified, bearing Paper No. 32-Ga, supported by an affidavit dated 18.12.2014. The Prescribed Authority, however, proceeded to decide P.A. Case No. 37 of 2013 on the basis of compromise between parties to that case, that is to say, the landlady and the tenant, against whom those proceedings were brought and

granted release in terms of a judgment passed on compromise, scripted together in a single document, also carrying the judgment and order dated 15.04.2017 passed in P.A. Case No. 38 of 2013 against Prem Singh, the tenant in the other part of the premises.

8. An appeal was filed from the order passed in P.A. Case No. 37 of 2013 as well, by Prem Singh with a case that the compromise was fraudulent proceeding and he was the tenant of the other part of the house in question, falsely shown to be in the occupation of Smt. Prabhawati and her sons by the landlady. The compromise was assailed as an outcome of fraud and the order of release a nullity, that could not be enforced against Prem Singh. Prem Singh, thus, in effect said that he was the tenant in the part of the house in question, that was subject matter of P.A. Case No. 37 of 2013. Smt. Prabhawati and her sons were merely parties, who were put up as sham to obtain a release order against him for one part of the demised premises that he also had in his tenancy occupation.

9. The Appellate Court did not accept Prem Singh's contention as aforesaid for the reason that was dealt with by the Appellate Authority, after the learned Judge had disposed of the issues regarding bona fide need and comparative hardship against Prem Singh, in agreement with the Prescribed Authority. The appellate Authority, therefore, reasoned that even if Prem Singh were to be accepted as a tenant in the other part of the house in question, regarding which proceedings in P.A. Case No. 37 of 2013 were decided in terms of the compromise between the landlady and Smt. Prabhawati Devi, it would make no difference because the release order in that case too would be upheld; the part or extent of the accommodation in Prem Singh's tenancy being what it was shown in P.A. Case No. 38 of 2013 filed against him or also that accommodation, which was made subject matter of proceedings by the landlady in P.A. Case No. 37 of 2013.

10. This Court upon a consideration of the matter is minded to think that the objection that Prem Singh came up with is indeed specious. He did not make any move to seek impleadment in Case No. 37 of 2013 until Smt. Prabhawati and her sons, who were the tenants, against whom the said proceedings were instituted, decided to compromise with the landlady and give up possession of the premises, subject matter of the said case. Rather, as it appears, after impleadment in P.A. Case No. 37 of 2013 and objections to the compromise, Prem Singh did not press his objections before the Prescribed Authority questioning the compromise or led evidence in support of his case to show that, in fact, it was he (Prem Singh), who was the tenant of the premises, subject matter of P.A. Case No. 37 of 2013 and not Smt. Prabhawati Devi and her sons. This is the inescapable conclusion from the order passed by the Prescribed Authority, who has said nothing about Prem Singh's case in challenge to the compromise, though Prem Singh was a party to P.A. Case No. 37 of 2013. Both the cases also appear to have been heard together.

11. If Prem Singh had come up with evidence to support his case that he was indeed the tenant in the demised premises, part of the house in question and subject matter of P.A. Case No. 37 of 2013, the Prescribed Authority would have dealt with the challenge and decide it one way or the other. In the event, Prem Singh did lead evidence in support of the case that he was

the tenant in the demised premises, subject matter of P.A. Case No. 37 of 2013 and that the proceedings against Smt. Prabhawati and the compromise were fraudulent, which the Prescribed Authority did not decide, Prem Singh ought to have filed for review inviting the Prescribed Authority's attention to the case that he had set up through his objections and the evidence that he led to support it. Nothing of the kind was done by Prem Singh before the Prescribed Authority, which may lend support to the case that Prem Singh, after his impleadment in P.A. Case No. 37 of 2013 and objections to the compromise entered into between the landlady on one hand and Smt. Prabhawati and her sons on the other, took steps to establish his rights to the demised shop, subject matter of the aforesaid case.

12. The Appellate Authority also has not noticed any evidence led by Prem Singh to establish that he was indeed the tenant in the demised premises, subject matter of P.A. Case No. 37 of 2013 and that the compromise was indeed a sham. The Appellate Authority refused to accept Prem Singh's case on different grounds, which have already been noticed hereinabove.

13. Before this Court also, there is not the slightest evidence annexed to the writ petition that might have formed part of the record to establish that Prem Singh was the tenant of the demised premises, subject matter of P.A. Case No. 37 of 2013 or that the compromise filed in that case inter partes was indeed a sham. The challenge, therefore, raised by Prem Singh to the release order passed in P.A. Case No. 37 of 2013 is absolutely without substance. The orders impugned, insofar as these dispose of P.A. Case No. 37 of 2013 and Rent Appeal No. 8 of 2017, arising from the release order passed in the said case do not merit interference.

14. This confronts the Court with the proceedings arising out of P.A. Case No. 38 of 2013, where Prem Singh is admittedly the tenant in the demised premises, part of the house in question, subject matter of the proceedings for release under Section 21(1)(a) of the Act.

15. As would appear from the facts relevant here, P.A. Case No. 38 of 2013 was instituted by the landlady against Prem Singh with allegations that she is the owner and landlady of the demised premises, part of the house in question, as detailed at the foot of the application. The demised premises were purchased by the landlady from its former owners and landlords, Amrit Singh and Bhanu Pratap vide registered sale deed dated 20.05.2010. It is landlady's case that her vendors inherited the demised premises from their mother, Smt. Amrawati Devi widow of the late Yogendra Singh, who died on 05.02.2003. Prem Singh was in occupation of the demised shop as the tenant since the time of Smt. Amrawati Devi. Upon her demise, the title devolved upon her sons, Amrit Singh and Bhanu Pratap, who stepped into Smt. Amrawati Devi's shoes. Amrit Singh and Bhanu Pratap on one hand and Prem Singh on the other, therefore, stood in the relationship of landlord and tenant. Prem Singh would pay rent of Rs.50/- to the previous owner and landlady, Amrawati Devi and after her, to her successors and heirs, Amrit Singh and Bhanu Pratap at the same rate. The landlady purchased the demised premises vide registered sale deed dated 20.05.2010 for her personal need for accommodation and gave information orally to Prem Singh on the following day i.e. 21.05.2010.

16. It is the landlady's further case that after intimating Prem Singh on 21.05.2010 about the acquisition of title by her relating to the demised premises, she offered to accept the rent of Rs.50/- payable by Prem Singh. Prem Singh, despite demand and information about the sale deed in the landlady's favour, did not remit rent to her, though a period of one month expired when rent, reckoned from the date of the sale deed, fell due. The landlady's name in accordance with the registered sale deed dated 20.05.2010, has been mutated in the house tax records of the Nagar Nigam as the owner of the demised premises. The landlady is depositing the house tax and water tax on the basis of the demands raised by the Nagar Nigam. Prem Singh is well aware of the fact that the landlady has purchased the demised premises (including the rest of the house in question) in order to satisfy her requirements for a residence, inasmuch as the landlady does not own in the city of Gorakhpur or in the rural areas of the District any house or open piece of land.

17. The landlady's husband has an ancestral house, located in the commercial area at Reti Chowk, Main Road, Urdu Bazar. The area of location of the house last mentioned is entirely commercial, which cannot be utilized by the landlady or the members of her family for the purpose of their residence. Also, the ancestral house, that the landlady's husband has a share in, is the subject of an ongoing litigation between the landlady's husband and his sister-in-law (Bhabhi) Nirmla Shukla. The landlady's husband carries on his business of manufacturing drinking water in a part of his ancestral house under the name and style of Akanksha Drinking Water. This makes the said house not at all available for the landlady or her family to live in.

18. The landlady stays in a rented accommodation, along with her family, belonging to the owner of Gokul Mishthan, Anil Kumar Gupta, situate at Mohalla Hasanganj, Lal Diggi at a monthly rent of Rs.8000/-. The rented accommodation, wherein the landlady along with her family stays is located on the first floor. It has two rooms, a kitchen, a bathroom and a lobby. The landlady's family comprises besides herself, her husband and two children, a daughter Km. Shipra aged about 24 years and a son Shashank Shukla aged about 22 years, a student of M.B.A. The rented accommodation is used by the landlady in the manner that her two children, who are studying, occupy the two rooms available, whereas the landlady and her husband stay in the lobby. There is no other room in the rented accommodation, where the landlady and her husband can live nor is there a drawing room where they can entertain guests. The house in question, including the demised premises, was purchased by the landlady, because it is located in a residential area and close by to the commercial area.

19. It is also the landlady's case that she and her husband have gathered information that Prem Singh has immovable property at several places. The demised premises are part of the old house with a tile-worked roof. Prem Singh is planning, according to the landlady's information, in the near future to vacate the demised premises and move to his own house. This fact was conveyed to the landlady and her husband by her vendor as well. On further inquiries, the landlady discovered that Prem Singh has two residential plots located within the Nagar Nigam area at Mohalla Mahadeo Jharkhandi, Ward No. 1. These plots stand in the name of members of his family. One

of these plots has had construction of a house up to the plinth level. The complete location and description of these two plots has been pleaded by the landlady. It is also said that Prem Singh is a native of Tehsil Bansgaon, an old resident and a Zamindar, who has in his native village big houses, groves and fields, which are an index of his high economic status. The landlady requires the demised premises for her personal occupation and that of her family members, so as to solve their problem of short accommodation. The landlady has to shunt about places in search of rented accommodation and spend a hafty sum of money on rent. In the event, the demised premises are released, the crisis on account of want of residential accommodation would end for the landlady. Prem Singh has three sons in his family and one of them lives in Gorakhpur City. Two of Prem Singh's sons stay with him and both are economically independent. .

20. By contrast, the landlady's family survives on her husband's income from business. The landlady is a housewife, who has no source of income of her own. The two children and the landlady are, therefore, dependent upon her husband. The shortage of accommodation for the family is a big crisis and, therefore, the landlady's need is bona fide. It is pleaded that the landlady repeatedly requested Prem Singh to vacate the demised shop, but he did not. Upon expiry of the statutory period for a transferee landlord to bring an application for release under Section 21(1)(a) of the Act, the landlady demanded of Prem Singh for the last time on 25.06.2013 to vacate the demised premises, which he refused. In consequence, the proceedings for release were instituted.

21. Prem Singh filed a written statement in answer to the release application. He took a stand that no information was given to him about the sale deed dated 20.05.2010 on 21.05.2010 by the landlady, as alleged. Prem Singh also asserted that for the demised premises, of which boundaries he has disclosed at the foot of his written statement, he went to pay rent to Amrit Singh up to the month of October, 2003, which Amrit Singh refused. Therefore, Prem Singh was depositing rent in Court through Misc. Case No. 21 of 2004 under Section 30(1) of the Act. There are averments to the effect that the landlady's house (which the landlady has described her husband's ancestral house) is in two parts. There are co-sharers occupying the same for residential purposes on the first floor and carrying on a shop at the ground floor. It is pleaded with reference to named individuals, who are residents in the locality in the immediate neighbourhood of the landlady's house that innumerable families are residing in the area.

22. It is also Prem Singh's case that the landlady's co-sharer Nirmla Shukla is not engaged in any kind of litigation with her husband. The landlady has in the house under reference three rooms, a lavatory and a bathroom, where here family can comfortably live. She is not staying as a tenant at Mohalla Hasanganj. There is also a suit for injunction pending *inter partes.* The plots of land, which are said to be owned by Prem Singh, belong to Sudha Sanjay Singh, that she has purchased out of her *Istridhan*. It has nothing to do with Prem Singh. The other plot too, Prem Singh has no interest in. It is owned by Chhotey Lal and Manti Devi. The tenant has attempted to scout and secure another accommodation on rent, but failed. The tenant, therefore, has no other roof and shelter within the city of Gorakhpur. In the

event, the release application were allowed, he would be without a house. The tenant would suffer greater hardship in the event of release than what the landlady would suffer in the event of refusal of the application.

23. The parties have filed affidavits in support of their respective cases and some documents, details whereof are elaborately listed in the judgments of the two Authorities below. These need not be recapitulated.

24. The Prescribed Authority framed the following issues (translated into English from Hindi):

(1) Whether the parties stand in the relationship of landlady and tenant? If yes, this P.A. Case is maintainable under Section 21 of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972?

(2) Whether this P.A. Case has been presented on the basis of a bona fide need?

(3) Whether allowing this P.A. Case would result in greater hardship to the opposite party in comparison to what the applicant would suffer, if the application is rejected?

25. The Prescribed Authority answered all the issues for the landlady and against the tenant, and, accordingly, allowed the release application giving rise to P.A. Case No. 38 of 2013. The tenant was ordered to vacate the demised premises and deliver vacant possession within within 30 days of judgment. In event of default, the landlady was given the right to recover possession through process of Court.

26. Aggrieved by the judgment of the Prescribed Authority, Rent Appeal No. 7 of 2017 was preferred by the tenant to the District Judge of Gorakhpur.

27. It may be clarified here for the sake of record that connected P.A. Case No. 37 of 2013, that had been brought by the landlady against another tenant was disposed of by the Prescribed Authority by a common judgment, along with P.A. Case No. 38 of 2013. But, unlike P.A. Case No. 38 of 2013, it was decided on the basis of compromise between parties to that case. It was also appealed by the tenant (Prem Singh) alleging that the compromise between the landlady and the tenant in P.A. Case No. 37 of 2013 was fraudulent and to his prejudice. It was the tenant, who was in occupation of the premises, subject matter of P.A. Case No. 37 of 2013, and not the tenants, against whom that case was instituted, compromised and disposed of. The appeal from the aforesaid order being Rent Appeal No. 8 of 2017 was also heard along with the appeal preferred by the tenant from the judgment in P.A. Case No. 38 of 2013. Rent Appeal No. 8 of 2017 was dismissed by the Appellate Authority for reasons that this Court has already approved in the earlier part of this judgment. As such, nothing more requires to be said about the proceedings or judgment in appeal relating to Rent Appeal No. 8 of 2017.

28. The Appellate Authority, that is to say, the District Judge, Gorakhpur proceeded to formulate the following points for determination (relating to Rent Appeal No. 7 of 2017, translated into English from Hindi):

(1) Whether the release application instituted by the respondent/ landlady under Section 21(1)(a) of U.P. Act No. 13 of 1972 is not maintainable?

(2) Whether the respondent/ landlord has a bona fide need for the house in question?

(3) Comparative hardship in relation to the house in question?

29. It must be recorded here that the fourth point, that was formulated by the Appellate Authority relates to Rent Appeal No. 8 of 2017, arising out of P.A. Case No. 37 of 2013, which we have already disposed of in the earlier part of this judgment.

30. Heard Mr. Adya Prasad Tewari, learned Counsel for the tenant and Mr. Arvind Srivastava, learned Counsel for the landlady. No one has appeared for Smt. Prabhawati Devi, Shrawan and Gopal, respondent nos. 4, 5 and 6.

31. It is argued by Mr. Adya Prasad Tewari, learned Counsel for tenant on the issue of maintainability of the proceedings for release that the application by the landlady under Section 21(1)(a) of the Act did not lie for non-compliance with the first proviso to Section 21. He submits that the first proviso to Section 21 of the Act is mandatory in nature. It postulates that a tenant, who is in occupation of a building before another purchases it from the former owner and becomes the landlord, no application at the instance of the new landlord under Clause (a) of sub-Section (1) of Section 21 of the Act can be entertained, until before the expiry of a period of three years from the date of purchase. In addition, the landlord is required to serve a notice upon the tenant giving him/ her not less than six months' time to vacate, before an application under Section 21(1)(a) can be instituted.

32. The learned Counsel for the tenant argues that the first proviso to Section 21 of the Act is mandatory in nature, which would be evident from the words therein to the effect, *"no application shall be entertained on the grounds, mentioned in clause (a), unless a period of three years has elapsed ..... and the landlord has given a notice in that behalf to the tenant not less than six months before such application*, ...'. Mr. Tewari submits that the words predicate an exclusion of the Prescribed Authority's jurisdiction to entertain an application, either before the expiry of three years from the date of purchase by a new landlord, or before the expiry of six months' notice, given for the purpose to the tenant by such landlord.

33. The first proviso engrafts a rule of ouster of jurisdiction for the period of time and the period of notice specified. Unless the period of time after purchase by a successor-landlord has elapsed and also the period of notice, which the landlord has to serve upon the sitting tenant, who has been in occupation before he purchased, the Prescribed Authority has no jurisdiction to act on an application made by the landlord. It is submitted, therefore, that in the absence of service of a notice under the first proviso to Section 21, the application for release instituted by the tenant is not maintainable.

34. The learned Counsel for the tenant points out that a reading of the application for release makes it clear that the landlady has not served a notice upon the tenant, giving him six months' time to vacate before the institution of proceedings. It is pointed out that a reading of the application shows that no notice in writing was ever served upon the tenant and all that was done was the pleading about an oral request or demand to the tenant by the landlord to vacate the demised premises.

35. The learned Counsel for the landlady, on the other hand, urges that service of notice by the landlady giving the tenant six months to vacate, may be mandatory, but the tenant has to plead the bar at the earliest. A failure to plead the bar of want of notice under the first proviso to Section 21 of the Act, would amount to waiver on the tenant's part and an estoppel against him in the landlady's favour. It is pointed out that in the written statement, there is no plea by the tenant saying that the proceedings for release brought by the landlady are barred for want of the six months' notice, envisaged under the first proviso to Section 21 of the Act.

36. Upon hearing learned Counsel for parties, this Court finds for a fact that the tenant never raised a plea about the application under Section 21(1)(a) of the Act being premature for want of the six months' notice envisaged under the first proviso. It is for the said reason that the Prescribed Authority has not at all dealt with the said issue. Instead, the Prescribed Authority has dealt with the issue of relationship of landlord and tenant between parties, which too was questioned by the tenant.

37. The Prescribed Authority in returning findings on Issue No. 1 has held that the relationship of landlord and tenant proved between parties, because the tenant has acknowledged the landlady as the transferee from his landlord. Apart from the said finding, there is not a whisper in the Prescribed Authority's judgment about the issue of prematurity, because apparently the tenant never raised it.

38. The Appellate Authority has noticed and dealt with the plea for the first time and remarked, like this Court finds, that in the written statement the tenant never raised the plea of the bar under the first proviso to Section 21 of the Act. He has raised this plea, according to the Appellate Authority for the first time in appeal by seeking an amendment to the grounds of appeal and adding Para 1(a). The Appellate Authority has also recorded it for a fact, which has not been disputed or demonstrably proved before this Court to be contrary to record that the landlady issued a notice to the tenant on 29.05.2013, that was served upon him on 30.05.2013. The proceedings under Section 21(1)(a) commenced on the application, which is dated 06.07.2013. Apparently, therefore, the period of six months did not elapse, but the tenant never raised a plea about prematurity of the release proceedings before the Court of first instance. It was raised for the first time before the Appellate Authority after the proceedings had run their full course before the Prescribed Authority and culminated in the order of release impugned.

39. The Appellate Authority has opined that in the absence of a plea being raised about prematurity of the release proceedings before the Authority of first instance, the plea is no longer open to the tenant to urge in appeal as it would amount to approbation and reprobation. It is further remarked that in case the plea had been raised before the Authority of first instance, it would be open to the landlady to withdraw the application instead of running through the entire course of proceedings and institute the proceedings afresh after expiry of the six months' period. The Appellate Authority has, therefore, held that it is a case where the tenant has waived the plea of prematurity before the Prescribed Authority.

40. In the opinion of this Court, the Appellate Authoritiy's finding on the

question of maintainability of the release proceedings is flawless and unassailable. There is no quarrel about the fact that the landlady purchased the demised premises through the registered sale deed dated 20.05.2010 and instituted proceedings in the month of July, 2013. Thus, the period of three years had clearly elapsed after purchase of the demised premises from its former owner by the landlady when she asserted her right to evict the tenant. It is true that the landlady did not wait for the period of six months after service of notice upon the tenant to vacate the demised premises, but it has to be seen whether that renders the application premature. It is one thing to say that the requirement of service of six months' notice before proceedings for release can be instituted is mandatory under the first proviso to Section 21 of the Act, and quite another to infer the requirement as a rule of ouster, where the Prescribed Authority's has no jurisdiction to act before the expiry of the period of six months, envisaged under the said proviso.

41. The rule under the first proviso to Section 21 of the Act mandating six months' notice by the landlord is a personal right given to the tenant, that is in the nature of a time period for facility and convenience to relocate, finding alternative accommodation before the new landlord commences proceedings for release on the ground of his bona fide need. The right to six months' notice being a personal right that the tenant enjoys can always be waived. The waiver is certainly inferrable from the inaction of the tenant in not pleading the bar of want of six months' notice at the earliest stage when the proceedings commenced before the Prescribed Authority. A right or advantage, that is given by law solely for the benefit and protection of an individual, can be waived unless it is in the nature of a bar to protect a public right or public policy.

42. The bar to the commencement of proceedings for release by a successor or new landlord against an existing tenant that the first proviso to Section 21 envisages, is by no means a bar to action or so to speak postponement of action for the period of notice to serve public interest, protect a public right or advance public policy. It is a right given to protect nothing more than a personal interest of the old tenant, who gets a new landlord. This kind of a right, providing for postponement of action for the period of the mandatory notice of six months, can certainly be waived by the tenant. The distinction about the nature of the bar or right for the protection of a public interest, as distinguished from one that the Statute provides to protect a purely private or personal right or benefit, finds eloquent statement about the principle in Maxwell on The Interpretation of Statutes, Twelfth Edition By P. St. J. Langan. In Maxwell at Pages 328 to 329, the learned Commentator exposits:

"Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Cuilibet licet renuntiare juri pro se introducto.

So a person may agree to waive the benefit of the Limitation Act.

The trustees of a turnpike road may, in demising the tolls, waive a statutory requirement that the demise should be signed by the sureties of the lessee.

A railway passenger may waive the benefit of an enactment which entitles him to carry with him so many pounds of luggage, and he does so by taking a ticket

with the express condition that he shall carry no luggage.70 The only person intended to be benefited by such an enactment is the passenger himself, and no consideration of public policy is involved.

In Corporation of Toronto v. Russell, the Judicial Committee held that where a notice in writing of intention to purchase compulsorily was required to be given to the owner of lands, the provision being entirely for his benefit, he might waive it.

The regulations governing the practice and procedure of civil courts may in the same way, when not going to the jurisdiction, be waived by those for whose protection they were intended."

43. The principle also finds eloquent statement in **Craies On Statute Law Seventh Edition By S. G. G. Edgar** at Page 269:

"If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not con- sidered as being indispensable. This rule is expressed by the maxim of law, Quilibet potest renuntiare juri pro se introducto. As a general rule, the conditions imposed by statutes which authorise legal pro- ceedings are treated as being indispensable to giving the court juris- diction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court. Where a statute deprives a person of a legal remedy, but does not deny him a cause of action (e.g. the Statute of Frauds and its replacements 59 or a Statute of Limitation), courts of justice, whether under the specific rules of procedure or under their general course of practice, treat the right of the defendant to bar the remedy as waived if he does not plead the statute which bars it."It is evident," said Alderson B., "that a party who has a benefit given him by statute may waive it if he thinks fit.""

44. The principle was considered by this Court in **Smt. Kalpana Gulati and others v. 8th Addl. D.J. Allahabad and others, (1999) 2 AWC 1656** and it was held that the notice under the first proviso to Section 21 of the Act, though mandatory, can be waived by the tenant. In **Smt. Kalpana Gulati** (supra), it was observed:

"10. Section 21(1)(a) of the Act permits the landlord to file an application for eviction of tenant from a building for his personal need or for the need of his family members. The first proviso has been added to Section 21(1) of the Act to save the tenants from unnecessary harassment [The Relevant part of Section 21 is as follows:--Section 21-Proceedings for release of building under occupation of tenant. (1) The Prescribed Authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists namely:--(a) that the building is bonafide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the

objects of the trust;Proviso: Provided that where the building was in the occupation of tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds, mentioned in clause (a), unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before the expiration of the aforesaid period of three years.] . It is for their protection and benefit. The proviso says that a purchaser of a premises can not file an application under Section 21(1)(a) of the Act unless three years have elapsed from the date of purchase and the purchaser (the new landlord) has given six months notice to the tenant. It is true that the application under Section 21(1)(a) of the Act can not be allowed unless and until three years have elapsed from the date of the purchase. It is also true that six months notice is mandatory. These are the rights given to the tenant so that a premises may not be sold merely for evicting him. These provisions are for his benefit and are mandatory. But like other rights can always be waived."

45. In **Izhaar Ali and another v. Prescribed Authority/ J.S.C.C., Sitapur and others, (2014) 107 ALR 88**, it was observed:

"5. Supreme Court in Nirbhai Kumar's case (supra) held that although Proviso to section 21(1)(a) of U.P. Act No. 13 of 1972, which contemplates of six months previous notice, is mandatory for initiation of proceeding under section 21(1)(a) of the Act, but the tenant has right to waive it. The petitioners filed his written statement and has not raised the plea regarding six months' previous notice. Thus the petitioners waived their right as contemplated under the proviso to section 21(1)(a). Proposed amendment amounts to withdrawal of the waiver of the petitioner which cannot be permitted to be withdrawn by way of amendment. Supreme Court in Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram and Company [(1976) 4 SCC 320.] , Heera lal v. Kalyan Mal [1998 (32) ALR 442 (SC); 1998 RD 140.] , Gautam Swaroop v. Leela Jetly [(2008) 7 SCC 85.] , Sumesh Singh v. Phoolan Devi [2009 (75) ALR 789 (SC).] and Vishwanath Agrawal v. Savitri Bera [(2009) 15 SCC 693.] held that an admission cannot be permitted to be withdrawn by amendment. Same principle will apply in this case also."

46. The issue was subject matter of consideration before the Supreme Court in **Martin & Harris Ltd. v. VIth Additional Distt. Judge and others, (1998) 1 SCC 732. In Martin & Harris Ltd**. (supra), it was held:

"13. It is not possible to agree with the contention of the learned Senior Counsel for the appellant that the provision containing the proviso to Section 21(1) of the Act was for public benefit and could not be waived. It is, of course, true that it is enacted to cover a class of tenants who are sitting tenants and whose premises are subsequently purchased by landlords who seek to evict the sitting tenants on the ground of bona fide requirement as envisaged by Section 21(1)(a) of the Act, still the protection available to such tenants as found in the proviso would give the tenants concerned a locus poenitentiae to avail of it or not. It is easy to visualise that proceedings under Section 21(1)(a) of the Act would be between the landlord on the one hand and the tenant on the other. These

proceedings are not of any public nature. Nor any public interest is involved therein. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and call for adjudication by the prescribed authority. The ground raised by the landlord under Section 21(1)(a) would be personal to him and similarly the defence taken by the tenant would also be personal to him. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived. In this connection we may profitably refer to a decision of this Court in the case of Krishan Lal v. State of J&K [(1994) 4 SCC 422 : 1994 SCC (L&S) 885 : (1994) 27 ATC 590] wherein Hansaria, J., speaking for a Bench of two learned Judges has made the pertinent observations concerning the question of waiver of a mandatory provision providing for issuance of notice to the parties sought to be proceeded against by the person giving the notice, in paragraphs 16 and 17 of the Report as under: (SCC p. 430)

"16. ... As to when violation of a mandatory provision makes an order a nullity has been the subject-matter of various decisions of this Court as well as of courts beyond the seven seas. This apart, there are views of reputed text writers. Let us start from our own one-time Highest Court, which used to be Privy Council. This question came up for examination by that body in Vellayan Chettiar v. Govt. of the Province of Madras [AIR 1947 PC 197 : 74 IA 223] in which while accepting that Section 80 of the Code of Civil Procedure is mandatory, which was the view taken in Bhagchand Dagadusa v. Secy. of State for India-in-Council [(1927) 54 IA 338] it was held that even if a notice under Section 80 be defective, the same would not per se render the suit requiring issuance of such a notice as a precondition for instituting the same as bad in the eye of law, as such a defect can be waived. This view was taken by pointing out that the protection provided by Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right. A distinction was made in this regard where the benefit conferred was to serve "an important purpose', in which case there would not be waiver, (see paragraph 14).

17. This point had come up for examination by this Court in Dhirendra Nath Gorai v. Sudhir Chandra Ghosh [AIR 1964 SC 1300 : (1964) 6 SCR 1001] and a question was posed in paragraph 7 whether an act done in breach of a mandatory provision is per force a nullity. This Court referred to what was stated in this regard by Mookherjee, J. in Ashutosh Sikdar v. Behari Lal Kirtania [ILR 35 Cal 61 : 11 CWN 1011] ILR at p. 72 and some other decisions of the Calcutta High Court along with one of the Patna High Court and it was held that if a judgment-debtor, despite having received notice of proclamation of sale, did not object to the non-compliance of the required provision, he must be deemed to have waived his right conferred by that provision. It was observed that a mandatory provision can be waived if the same be aimed to safeguard the interest of an individual and has not been conceived in the public interest."

Consequently it must be held that the provision for six months' notice before initiation of proceedings under Section 21(1) of the Act, though is mandatory and confers protection on the tenant concerned, it can be waived by him. ....."

47. In **Anwar Hasan Khan v. Mohd. Shafi and others, (2001) 8 SCC 540**, the question about the mandatory nature of the notice contemplated under the first proviso to Section 21 of the Act was considered for the proposition that if proceedings were initiated after expiry of the period of three years from the date of purchase by the successor-landlord, the notice of six months was still mandatory. In **Anwar Hasan Khan (supra)**, the aforesaid question was answered, thus:

"10. Keeping in mind the object of the Act to provide safeguards to the tenant, the first proviso to Section 21 of the Act was added to ensure that the unscrupulous litigants do not transfer properties only for the purposes of creating grounds for eviction of the tenant in occupation thereof. The aforesaid proviso, however, was not intended to put any restriction upon the owners of the property not to transfer it under any circumstances. To ensure that the sale transaction was valid and not mala fide, a statutory bar was created vide the aforesaid proviso for the transferee to seek the eviction of the tenant with respect to such purchased property. The proviso mandates that no application shall be entertained by the prescribed authority on the grounds mentioned in clause (a) of sub-section (1) of Section 21 of the Act unless a period of three years had elapsed since the date of such purchase. It further provides that no application under the said clause shall be entertained unless the landlord had given a notice to the tenant not less than six months before the filing of such application and such notice may be given even before the expiration of a period of three years. The object of the service of the notice is to furnish information to the tenant about the requirement of the landlord in order to enable him to search for an alternative accommodation or to find out as to whether the sale made by his erstwhile owner was genuine and bona fide or not. The proviso and the notice contemplated under it was never intended to be permanent clog on the rights of the purchaser. The period contemplated for not initiating the eviction against the tenant on the ground as specified in clause (a) of sub-section (1) of Section 21 of the Act was intended to be for a period of three years and in no case for more than three years and six months. Any proceedings initiated for release of building under occupation of tenant on the aforesaid ground after the period contemplated under the aforesaid proviso does not require the service of the aforesaid notice of six months."

48. The decision in **Anwar Hasan Khan** was referred to a Larger Bench of their Lordships noticing the conflicting decisions in **Martin & Harris Ltd. and Anwar Hasan Khan**, both of which were two Judge Bench decisions, which came to be decided in **Nirbhai Kumar v. Maya Devi and others, (2009) 5 SCC 399**. In **Nirbhai Kumar**, it was held:

"2. .....

Consequently it must be held that the provision for six months' notice before initiation of proceedings under Section 21(1) of the Act, though is mandatory and confers protection on the tenant concerned, it can be waived by him. On the facts of the present case there is no escape from the conclusion that the appellant, for reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on that ground prior to the expiry of six months' notice, did not think it fit to pursue that point any further and on the contrary joined issues on merits expecting a favourable decision in the suit

and having lost therein and got an adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an afterthought at the stage of writ petition in the High Court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the appellant had waived that contention about the suit being premature having been filed before the expiry of six months from the date of the suit notice.

4. .....

A three years' period becomes relevant when there is a change of ownership. This three years' period is a sort of moratorium intended for the tenant's protection. It is to be noted that the crucial expression in the proviso is "and such notice may be given even before the expiration of the aforesaid period of three years". In other words, notice can be given either before or after the three years' period. After expiry of the three years' period the protection given to the tenant from being evicted has no further relevance. Thereafter it is only the question of notice.

5. Above being the position the decision in Martin & Harris Ltd. case [(1998) 1 SCC 732] expressed the correct view. Unfortunately, the said decision does not appear to have been placed before the Bench which heard Anwar Hasan Khan case [(2001) 8 SCC 540]."

49. It would, thus, be seen that while notice of six months to the tenant by the new landlord is necessary, if he chooses to proceed against a sitting tenant from time of the former landlord's ownership, under Section 21 of the Act, irrespective of the fact whether three years moratorium under the first proviso to Section 21 has expired or not, the mandatory notice can be waived by the tenant. The waiver can come about in consequence of the tenant not raising the plea at the earliest opportunity, which comes by when he files his written statement before the Prescribed Authority. In the instant case since no objection about prematurity of the proceedings instituted under Section 21 was taken on account of the landlady's failure to serve the six months' notice envisaged under the first proviso to Section 21 aforesaid, the bar must be held to have been waived. The very belated introduction of the plea about want of notice through an amended ground in the memorandum of appeal by the tenant has rightly not been accepted by the Appellate Authority. In the clear opinion of this Court, no exception can be taken to the said view.

50. This Court is, therefore, of opinion that the tenant has unequivocally by his inaction in failing to raise the plea of a bar to the proceedings for want of six months' notice before the Prescribed Authority while filing his written statement, waived the bar. The Authority below, which bears reference merely to the Appellate Authority in this case, has rightly held the application under Section 21(1)(a) of the Act, maintainable.

51. Turning to the question of *bona fide* need, there are concurrent findings of fact recorded by the two Authorities below that the landlady is living in a rented accommodation on the first floor owned by one Anil Kumar Gupta, situate at Mohalla Hasanganj, Lal Diggi at a monthly rent of Rs.8000/-. The accommodation comprises two rooms, a kitchen, a bathroom and a lobby. The landlady's children are aged 24 years and 22 years-both students. The

children are in occupation of the two rooms, properly so called in order to facilitate their studies. The landlady and her husband stay in the lobby and have no place to entertain guests. The landlady, who has to live in a rented accommodation, in the opinion of this Court, certainly has a bona fide need, which cannot be doubted. The Authorities below have accepted the evidence and returned a finding about the landlady's bona fide need based on the case that she has pleaded and evidence produced. There is no warrant for this Court to interfere with the said findings of fact recorded by the two Authorities below concurrently upon an appraisal of the parties' case, taking a plausible view of the evidence on record, in the exercise of our jurisdiction under Article 226 of the Constitution.

52. Likewise, both the Authorities below have held for the landlady on the issue of comparative hardship. It has been opined by the two Authorities below that there is no evidence produced to show that in fact the tenant made efforts to search alternative accommodation, which attracts the principle that at tenant who does not search for alternative accommodation and prove the fact that he did, must have the issue of comparative hardship answered against him. Even otherwise, given the circumstances of the landlady and her family and the fact that they are themselves staying in a rented accommodation, it would be quite irrelevant if the tenant is put to some inconvenience on account of eviction to accommodate the landlord as it is said, that eviction must entail some inconvenience to the tenant. In this case too, it will be so as well. But, for the inconvenience that the tenant would suffer, the landlady cannot be asked to stay in a tenanted accommodation or told how she should satisfy her need in some manner other than what the landlady has thought to be the way to do it. The comparative hardship unequivocally lies in favour of the landlady on the facts found by the two Authorities below.

53. There is no warrant for this Court to differ on the said issue with the view that the Authorities below have taken.

54. In the circumstances, this petition **fails** and is **dismissed**.

55. The interim order is hereby vacated.

56. However, considering the facts that the tenant has been in occupation of the demised shop for a considerable period of time, he is allowed **six months** time to handover peaceful and vacant possession of the shop in dispute provided he executes an undertaking before the Prescribed Authority, Gorakhpur, embodying the following terms within one month of the date of receipt of a certified copy of this order:

(1) The tenant shall handover peaceful and vacant possession of the demised shop to the landlord on or before 21.05.2023.

(2) During the period of six months that the tenant remains in occupation, he will not sublet the shop, damage or disfigure it in any manner whatsoever.

57. In the event, an undertaking, as above directed, is not filed before the Prescribed Authority by the tenant within the time allowed or the undertaking violated, the release order shall become executable **forthwith**.

(2022) 12 ILRA 925
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 35525 of 2016

Mohd. Siddique & Anr. ...Petitioner
Versus
Mohd. Nafees ...Respondent

Counsel for the Petitioner:
Sri Pradeep Kumar Sinha, Sri Iqbal Ahmad, Sri Atul Dayal (Sr. Advocate)

Counsel for the Respondent:
Sri Pavan Kumar

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972-Section 21 (1)-Landlord-Petitioner-who is subsequent purchaser-Tenant admitted the Petitioner as his Landlord-inspite release application by Petitioner- no plea of six months' notice taken in objection-Tenant would be taken to waive his right of protection objection-Tenant waived his right of protection u/s 21(1)**.**

W.P. allowed. (E-9)

List of Cases cited:

1 Martin & Harris Ltd. Vs VIth Additional District Judge & ors., (1998) 1 SCC 732

2 Mahesh Kumar Agarwal (Dead) By LRs. Vs Naresh Chandra & ors., 2022 (1) CRC 662 SC

3 Pradeep Kumar @ Pradeep & anr. Vs Smt. Meena Devi Sahu & anr., 2019 (3) ARC 408

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

1. Heard Sri Atul Dayal, learned Senior Advocate assisted by Iqbal Ahmad, learned counsel for the petitioner and Sri Pavan Kumar, learned counsel for the respondent.

2. The short question involved in the present case is as to whether in the event of not taking an objection qua maintainability of release application under Section 21(1)(a) for the reasons that six months period had not expired after service of notice by the landlord who is admittedly subsequent purchaser of the rented property, the tenant would be taken to have waived his right of protection prescribed under first proviso to sub-section (1) of Section 21 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972').

3. The proposition of law in respect of the above legal issue is well settled. In the case of **Martin & Harris Ltd. v. VIth Additional District Judge and others, (1998) 1 SCC 732**; the Supreme Court had an occasion to interpret the provision and in paragraph 9 of the said judgment it has been held that application may not be entertained but would certainly be maintainable even if it has been pre-maturely filed i.e. before expiry of six months' notice. Paragraph 9 of the judgment runs as under:

"9. Even that apart there is an internal indication in the first proviso to Section 21(1) that the legislature has made a clear distinction between 'entertaining of an application for possession under Section 21(1) (a) of the Act and `filing' of such application. so far as the filling of such application is concerned it is clearly indicated by the Legislature that such application cannot be filled before expiry of six months form the date on which notice is given by the landlord to the tenant seeking

eviction under Section 21(1) (a) of the Act. The words, `the landlord has given a notice in that behalf to the tenant not less than six months before such application', would naturally mean that before filing of such application or moving of such application before the prescribed authority notice must have preceded by at least six months. similar terminology is not employed by the Legislature in the very same proviso so far as three years' period for entertaining such application by the prescribed authority is concerned. Therefore, it must necessarily mean that when the prescribed authority is required to entertain an application on the grounds mentioned in Clause (a) of Section 21(1) a stage must be reached when the Court applies its judicial mind and takes up the case for decision on merits concerning the grounds for possession mentioned in clause (a) of Section 21(1) of the Act. Consequently on the very scheme of this Act it cannot be said that the word 'entertain' as employed by the Legislature in the firs proviso to Section 21(1) of the Act would mean 'Institution' of such proceedings before the prescribed authority or would at least mean taking cognizance of such an application by the prescribed authority by issuing summons for appearance to the tenant- defendant. It must be half that on the contrary the term 'entertain' would only show that by the time the application for possession on the grounds mentioned in clause (a)) of Section 21(1) is taken up by the prescribed authority for consideration on merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord."

4. On the question whether a decree being passed by a prescribed authority granting release in favour of the landlord even in case an application for release was filed pre-maturely would be a nullity, the court vide paragraph 10 of the judgment held that decree of the trial court having been passed much after three years' period created as a moratorium in respect of the right of the landlord to get tenanted property released, would not be nullity for want of jurisdiction.

5. Interpreting the law on the point qua entertainability/ maintainability of the application for release the court observed that *it must be held that when the Legislature has provided that no application under Section 21(1) (a) of the Act shall be entertained by the prescribed authority on grounds mentioned in clause (a) of Section 21(1) of the Act before expiry of three years from date of purchase of property by the landlord it must necessarily mean consideration by the prescribed authority of the grounds mentioned in clause (a) of Section 21(1) of the Act of merits. On the facts of the present case, as we have seen earlier, that stage was reached after 1988 when the prescribed authority on the basis of the affidavit evidence led before it took up the plaintiff's case for consideration on merits of the grounds under Section 21(1) (a) of the Act and at that stage more than three years had expired. from the date on which the respondent-landlord had purchased the property. Consequently no fault can be found with the decision of the High Court to the effect that the prescribed authority was justified in entertaining the consideration of the grounds under Section 21(1) (a) of the Act at that stage and the decree passed on the said ground, therefore, cannot be said to be a nullity, nor can the entertaining of such application on the ground under Section 21(1) (a) of the Act be said to be illegal. The first point for consideration is, therefore, answered in the*

negative, in favour of the respondent landlord and against the appellant.

6. On the question of waiver of protection by a tenant in the event objection was not raised as to entertainability of the application before expiry of six months period, the court held that the tenant has to raise objection at the very threshold when the notice of the case was served upon him and then he is faced with the release application , he should take the objection but in the event he failed to do so, in such an event it would be taken as lost opportunity of the respondent-tenant as he failed to pursue this objection any further. The court observed, looking to the facts of that case where instead of taking objection to the entertainability of the application, the tenant joined the issues on merits seeking permission to cross-examine the plaintiffs on merit of the case. So, ultimately the court held that *the provision for six months' notice before initiation of proceedings under Section 21 (1) of the Act, though is mandatory and confers protection to the tenant concerned, it can be waived by him. On the facts of the present case there is no escape from the conclusion that the appellant, for the reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on the ground prior to the expiry of six months' notice, did not think it fit to pursue that point any further and on the contrary joined issues on merits expecting a favorable decision in the suit and having lost therein and got an adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an afterthought at the stage of writ petition in the High Court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the appellant had waived that contention about the suit being premature having been filed before the expiry of six months from the date of the suit notice.*

7. The case of **Martin Harris (supra)** came to be considered subsequently in the case of **Mahesh Kumar Agarwal (Dead) By LRs. v. Naresh Chandra and others, 2022 (1) CRC 662 SC**; and the view was reiterated vide paragraph 8 of the judgment. In the case of **Mahesh Kumar (supra)** the landlord had purchased the property 4th January, 1997 from the previous landlord and moved an application under Section 21(1)(a) in the year 2008, which was preceded by a legal notice dated 22nd December, 2007.

8. The argument advanced on behalf of the landlord in the said case that even if the notice fell foul of the mandate of the *proviso* the conduct in that case of the tenant would be taken to have waived his right of protection. In that case also neither in reply to the notice nor, in the written statement any such objection was taken. The court followed the earlier judgment of **Martin Harris** *(supra*) and vide paragraph 9 held thus:

"(9) In view of the judgment of this Court in Martin & Harris Ltd.(supra), where this Court has taken the view interpreting the very same provision with which we are concerned, that the objection relating to defective notice is capable of being waived, we are of the view that the appellant should not be denied the benefit of the said view. We further notice that, on facts, the present case stands on a more sturdier footing. In Martin & Harris Ltd. (supra), the tenant had, in fact, raised

objection, which he did not press, whereas, in the facts of this case, the tenant has not raised any objection in not only the reply notice, but even in the written statement before the Rent Controller. What fortifies us further is that even in the appeal before the appellate Court, the tenant did not urge the ground. If at all there is a case for waiver, this would be one."

9. In the case of **Pradeep Kumar @ Pradeep and another v. Smt. Meena Devi Sahu and another, 2019 (3) ARC 408**; a concurrent Bench of this Court followed the judgment in the case of **Martin Harris** (supra). In the said case the purchaser of the property vide registered sale deed dated 22nd January, 2010 became the landlady. The intimation of the same was sent to him to the tenant same day but he did not pay the rent. On 3rd August, 2010 the defendant-landlady terminated the tenancy and demanded arrears of rent and ultimately she filed release application on 28th October, 2010 and Section 21(1)(a) of the Act No.- 13 of 1972 setting up a bona fide need and also for default in payment of rent.

10. Written statement was filed in the said case by the tenant denying the ownership of the landlady. However, an objection was taken in the written statement vide paragraph 21 that the release application was pre-mature one as three years period had not expired. The court in the aforesaid case framed three questions vide paragraph 10 which runs as under:

"10. (a) Whether under the facts and circumstances of the case the release application filed by the plaintiff-landlady/respondent No.1 before expiry of three years from the date of purchase of the house was barred by the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972?

(b) Whether under the facts and circumstance of the case, the defendant-tenant/petitioner has waived the condition of six months notice required under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972?

(c) Whether under the facts and circumstance of the case the comparative hardship of the disputed house has been rightly held to be in favour of the plaintiff-landlady/respondent No.1?"

11. Question Nos. (a) and (b) are relevant for the purpose of the present case. Vide paragraphs 14 and 17 the court answered the question Nos.(a) and (b) against the tenant. Paragraphs 14 and 17 run as under:

"14. From the bare reading of 1st proviso to Section 21(1) of U.P. Act No.13 of 1972 and principles of law laid down by Hon'ble Supreme Court in the case of Martin & Harris Ltd.(supra) and Vithalbhai Pvt. Ltd.(supra), it can be safely concluded that the phrase "entertain" used in the 1st proviso to Section 21(1)(a) of U.P. Act No.13 of 1972 would mean that the period of three years since the date of purchase by the landlord must have expired when the Prescribed Authority is required to entertain the release application on the grounds mentioned in Clause (a) of Section 21(1) of U.P. Act 13 of 1972. This would be a stage reached when the Court applies its judicial mind and takes up the case for decision on merits concerning the grounds mentioned in clause (a) of Section 21(1) of the Act. The word "entertained" mentioned in the first proviso to Section 21(1) in connection with the grounds mentioned in Clause (a) would necessarily mean entertain the grounds for consideration for the purpose of adjudication of merits and not at any stage prior thereto i.e. neither at

the stage at which the application is filed in the office of the Prescribed Authority nor at the stage when summons is issued to the tenant. The crux of the conclusion is that by the time the application for possession on the grounds mentioned in Clause (a) of Section 21(1) is taken up by the Prescribed Authority for consideration on merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord/landlady. In the present set of facts, the disputed house was purchased by the plaintiff-landlady/respondent no.1 on 21.01.2010 and the case has been taken up for consideration on merit and was decided by the Prescribed Authority on 16.04.2016. Therefore, the 1st proviso to Section 21(1) of the Act stood complied with. Question No.(a) is answered accordingly.

"17. From the discussion made above and the law laid down by Hon'ble Supreme Court as aforequoted, it can be safely concluded that requirement of six months notice under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972, is mandatory but it can be waived by the tenant. These proceedings under Section 21(1)(a) of the Act are neither of public nature nor it involves any public interest. It would be between landlord and tenant. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and called for adjudication by the Prescribed Authority. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived. In the present set of facts the defendant-tenant/petitioner neither raised any objection nor filed an application under Order VII Rule 11(d) of the Civil Procedure Code for dismissal of the release application on the ground that it is premature or barred by the proviso to Section 21(a) of the Act. This clearly established that the defendant-tenant/petitioner has waived the protection of six months' notice as provided in the proviso to Section 21(1) of the Act. Therefore, the submission of learned counsel for the defendant-tenant/petitioner deserves rejection and is hereby rejected. If an objection would have been raised before the Prescribed Authority in the very beginning then the plaintiff-landlady/respondent would have an opportunity to take leave of the Court to withdraw the release application and to file a fresh release application after expiry of six months period."

12. The court then vide paragraph 20 summarized the legal position on the provision as contained in the first proviso to Section 21(1)(a) vide paragraph 20 thus:

"20. The legal position and conclusions stated above are briefly summarized as under:-

(i) The phrase "entertained" used in the 1st proviso to Section 21(1)(a) of U.P. Act No.13 of 1972 would mean that the period of three years since the date of purchase by the landlord must have expired when the Prescribed Authority is required to entertain the release application on the grounds mentioned in Clause (a) of Section 21(1) of U.P. Act 13 of 1972. This would be a stage reached when the Court applies its judicial mind and takes up the case for decision on merits concerning the grounds mentioned in clause (a) of Section 21(1) of the Act. The word "entertained" would necessarily mean entertain the grounds for

consideration for the purpose of adjudication of merits and not at any stage prior thereto i.e. neither at the stage at which the application is filed in the office of the Prescribed Authority nor at the stage when summons is issued to the tenant. The crux of the conclusion is that by the time the application for possession on the grounds mentioned in Clause (a) of Section 21(1) is taken up by the Prescribed Authority for consideration on merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord/landlady. In the present set of facts, the disputed house was purchased by the plaintiff-landlady/respondent no.1 on 21.01.2010 and the case has been taken up for consideration on merit and was decided by the Prescribed Authority on 16.04.2016. Therefore, the 1st proviso to Section 21(1) of the Act stood complied with. Question No.(a) is answered accordingly.

(ii) requirement of six months notice under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972, is mandatory but it can be waived by the tenant. These proceedings under Section 21(1)(a) of the Act are neither of public nature nor it involves any public interest. It would be between landlord and tenant. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and called for adjudication by the Prescribed Authority. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived.

(iii) In the present set of facts the defendant-tenant/petitioner neither raised any objection nor filed an application under Order VII Rule 11(d) of the Civil Procedure Code for dismissal of the release application on the ground that it is premature or barred by the proviso to Section 21(a) of the Act. This clearly established that the defendant-tenant/petitioner has waived the protection of six months' notice as provided in the proviso to Section 21(1) of the Act."

13. Now coming to the facts of the case in hand, I find that premises in question was purchased by the petitioner on 5th July, 2001 from the erstwhile owner and landlord. It was pleaded in the release application by the petitioner that the son of the petitioner No.- 2 was jobless person and, therefore, landlord needed the shop to settle him in some business of phone and mobile repair works. On different occasions the request was made to the tenant to vacate the shop but he refused to do the same and instead demanded Rs.1 lac for vacating the shop. Although more than three years had already expired and the tenant was admitting the petitioner to be landlord yet landlord issued notice on 8th March, 2011 to the opposite party to release the shop and respondent having not done so in spite of service of notice, release application was filed. In the written statement filed by the tenant respondent he admitted himself to be tenant of Mohd. Siddique and Mohd. Zubair, namely, the landlord - petitioners.

14. He disputed the bona fide need set up by the landlord and claimed that release application was filed only with an intention to get the rent further increased. An additional written statement was also filed stating therein that he had never been served with notice dated 8th March, 2011. However, in the entire affidavit, written

statement and additional written statement, he has not taken any plea that the release application was not entertainable in view of non compliance of provision of six months' advance notice. This plea was not even taken in appeal. As per the recitals made in the body of the judgment by the appellate court wherein it is clearly recorded that main ground taken in appeal to assail the order of the prescribed authority is that prescribed authority has not appropriately appreciated the evidence on record and that the order passed by the prescribed authority was against the law inasmuch as the prescribed authority has not referred to various provisions of the Act, 1972 which were cited by the tenant appellant and had those provisions being considered the landlord was liable to be non-suited. It was also further pleaded that the order was not well reasoned one and was absolutely contrary to the facts pleaded. The judgment was also assailed on the point that the comparative hardships were not correctly evaluated.

15. The recitals in the judgment do not indicate as to what provisions of law were pleaded in defence and were not considered as per the memo of appeal which was summarized in the judgment by the appellate court. However, the appellate court had proceeded to decide that since six months' notice did not precede to release application, therefore, there was non compliance of statutory provision and hence the release application was barred.

16. It is worth noticing that respondent is duly represented by Sri Pawan Kumar, learned Advocate, who has filed vakalatnama on 26th July, 2019 but no counter affidavit has been filed in the matter.

17. Applying the legal principle on the point of maintainability of release application beyond the period of three years of purchase of the property by the landlord inasmuch as the requirement of law to have six months' notice before presenting the release application, I find that this case is fully covered by the judgments that have been referred to hereinabove in this judgment.

18. It is a case where the property was purchased by the present landlord much much ago and the tenant in his written statement has admitted the present landlords to be his landlords, the notice I find to have been issued to the tenant respondent on 8th March, 2011 by the landlord to the tenant by registered post and the Central Information Officer of Postal Department, Kanpur Division, Kanpur certified that notice stood delivered on 10th March, 2011 upon the noticee.

19. The above certificate of the postal department has been issued on 14th March, 2013, which has been brought on record by means of supplementary affidavit which has not been disputed by filing any counter affidavit. The RTI information (information obtained under Right to Information Act, 2005) was also placed before the prescribed authority which has been discussed. The release application was filed in April, 2012 whereas the notice was sent by the registered post on 8th March, 2011 delivered on 10th March, 2011.

20. I, therefore, do not find any fault with the findings of the trial court regarding service of notice, inasmuch as no plea of six months' notice as such having been taken in the objection/ written statement filed to the release application, the tenant

would be taken to have waived his right of protection under the proviso.

21. The moratorium of three years period having already expired because the property was purchased by the present landlord way back in the year 2001, and the fact that the tenant respondent was admittedly paying the rent to landlord-respondents, tenant by his own and statement made in the written statement, the release application was maintainable. So, judgment granting release application having been passed on 23rd December, 2014, it would not got rendered as *null* and *void* or bad for *corum non judis* as the prescribed authority concerned had the jurisdiction to entertain the release application and pass order thereupon.

22. In view of the above, therefore, the judgment passed by the court of appeal dated 31st May, 2016 holding that release application was barred by proviso to Section 21 (1) of the Act, 1972, cannot be sustained in law both on facts and legal premise, and the same is hereby set aside.

23. Accordingly, writ petition succeeds and is allowed and the order passed by the Prescribed Authority is hereby confirmed. No order as to cost.

(2022) 12 ILRA 932
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matter under Article 227 No. 7364 of 2015 (CIVIL)

Ram Babu ...Petitioner
Versus
Raj Kumar Singh ...Respondent

Counsel for the Petitioner:
Smt. Anita Tripathi, Sri Tripathi B.G. Bhai

Counsel for the Respondent:
Sri Pankaj Agarwal, Sri Pankaj Agarwal

Tenant Petitioner -aggrieved against order-where landlord has been non suited on the ground that the service of notice was not effected upon the tenant-as to determine the tenancy-as Petitioner was not found to be in default of payment of rent-and entitled to protection u/s 20(4) of the Act, 1972-only duty of the landlord to ensure that a registered notice is duly sent at the correct address and then if it is refused or returned for non availability of the notice-deemed sufficient-findings of revisional court legal.

W.P. dismissed. (E-9)

List of Cases cited:

1. Balloo Ram Bookseller Vs Chhedi Lal, 1968 ALJ

2. Shri Ram Mittal Vs XIth A.D.J., Meerut & ors.

3. Rajendra Vs Sanatan Dharam Intermediate College, 2008(70) AIR 61 (MANU/ UP/ 1308/ 2007)

4.Green View Radio Service Vs Laxmibai Ramji & ors., AIR 1990 (SC) 2156 (MANU/SC/ 0378/1990)

5. Gujarat Electricity Board & ors. Vs Atmaram Sungomal Poshani, AIR 1989 (SC) 1433 (MANU/SC/0200/1989)

6. Ganga Ram Vs Phulwati, AIR 1970 ALL. 446 (MANU/UP/0071/1970)

7. Gokaran Singh & ors. Vs 1st Additional District and Session Judge, Hardoi & ors., 2000 SCFRC 193 (MANU/UP/1528/2000)

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

1. Heard Sri Tripathi B.G. Bhai, learned counsel for the petitioner and Sri

Pankaj Agrawal, learned counsel for the respondent.

2. The tenant petitioner has sought to invoke supervisory jurisdiction of this Court under Article 227 of the Constitution questioning the judgment and order passed by the revisional court in SCC Revision under Section 25 of Provincial Small Cause Courts Act, 1887.

3. The petitioner is aggrieved against the order for there being no justification to reverse the judgment and order of the Trial Judge in SCC Suit No. 32 of 2005, wherein land lord respondent has been non suited on the ground that the service of notice was not effected upon the tenant so as to determine the tenancy, inasmuch as, the petitioner was not found to be in default of payment of rent and if he continued to deposit the rent in time, may be under Section 30 of U.P. Urban Buildings (Regulation of Letting and Eviction) Act, 1972, he would be entitled to protection under Section 20(4) of the said Act. So the bone of the contention between the parties qua maintainability of the suit and consequential entitlement of land to get the suit for ejectment decreed and on sufficiency of service of notice.

4. Learned counsel for the petitioner submitted that notice to determine tenancy was required to be personally served upon the tenant. He submitted that no body knew who was receipient woman, named Sapna. A mere acknowledgement with signature of the alleged receipient of notice would not suffice the need of service of notice. He submitted that once the acknowledgment was received by the land lord, he ought to have enquired as to who was woman named Sapna and whether she was member of the family or a resident of the place of address. Sapna, it was argued, having not been identified , the service would not be taken to be due service of notice personally upon the tenant petitioner.

5. Yet another argument advanced is that once the landlord refused rent, tenant was left with no other option but to deposit rent under Section 30 of Act No. 13 of 1972 and alleged notice having not been served upon him, he was not liable to offer any rent to the landlord respondent and considering the continued deposit even at the time of filing suit and even thereafter, he cannot be held to have default in payment of rent.

6. Learned counsel for the petitioner has relied upon the judgments in support of his arguments firstly in the case o**f Balloo Ram Bookseller v. Chhedi Lal, 1968 ALJ** to assail that there has to be personal service of notice upon tenant and service upon a third party would do needful and then in the case of **Shri Ram Mittal v. XIth Additional District Judge, Meerut and Others,** wherein it was held that if the tenant was in four months default of water tax, does not exceed period of four months under Section 7 of the Act No. 13 of 1972 then petitioner would be entitled to payment under Section 20(4) of the Act No. 13 of 1972, inasmuch as , the deposit made under Section 30 of the Act No. 13 of 1972 will be taken into consideration while calculating the defendant's liability towards rent.

7. *Per contra*, it is submitted by learned counsel for the respondent landlord that the landlord had sent notice by registered post that was duly served upon a lady, named, Sapna at the address of the tenanted premises. The registry receipt in original, the acknowledgement received

back in original and also the copy of the notice was filed before the Trial Court. It was argued before the Trial Court, therefore, that burden to establish service of notice under Section 106 of the Transfer of Property Act, 1882 to determine the tenancy, stood discharged and so onus shifted upon the tenant to prove that notice was not served upon to the member of the family, which he failed to discharge.

8. The further contention advanced by learned counsel for the respondent in defence on the point of default of payment of rent, is that after service of notice upon tenant, the tenant was required to again ask the land lord to accept the rent at a revised rate and if the land lord refused , he ought to have made the deposit under Section 20(4) of the Act No. 13 of 1972 in the Court itself. In this regard, he has relied upon the judgment of Full Bench in the case Gokaran Singh and Others (supra).

9. In support of this above argument, learned counsel for the respondent land lord has relied upon the judgment of this Court and the Supreme Court in the case of **Rajendra v. Sanatan Dharam Intermediate College, 2008(70) AIR 61 (MANU/UP/1308/2007), Green View Radio Service v. Laxmibai Ramji and Others, AIR 1990 (SC) 2156 (MANU/SC/0378/1990, Gujarat Electricity Board and Others v. Atmaram Sungomal Poshani, AIR 1989 (SC) 1433 (MANU/SC/0200/1989, Ganga Ram v. Phulwati, AIR 1970 ALL. 446 (MANU/UP/0071/1970 and Gokaran Singh and Others v. 1st Additional District and Session Judge, Hardoi and Others, 2000 SCFRC 193 (MANU/UP/1528/2000).**

10. Having heard learned counsel for the respective parties, I find that the core issue to be of service of notice to determine tenancy. In the event if the service of notice is held to be valid, it is then only question would crop up about sufficiency of deposit made under Section 30 of the Act No. 13 of 1972 and whether such deposits where to be taken for entitling the tenant to the statutory protection under Section 20(4) of the Act No. 13 of 1972.

11. The learned judge deciding the Small Cause Courts Suit of the land lord respondent held that though from the acknowledgement bearing paper no. 12-C that has been filed it is reflected that notice was served upon some woman, named Sapna, but it did not bear any date, nor plaintiff has explained as to whether Sapna was a member of the family of the tenant defendant and so service of notice was legally affected upon. The Trial Judge held that the defendant D.W.-1 having stated on oath that he has not received notice and that upon perusal of acknowledgement it does not show that it was personally served upon tenant, therefore, presumption would be raised that service of notice was not duly effected upon the defendant and thus non suited the plaintiff .

12. The suit was dismissed on yet another ground that the land lord having refused to accept rent, the tenant defendant rightly deposited the rent in Court and as far as the increased water and house taxes are concerned, he was not informed properly about any such increase by the Cantonment Board. Thus tenant having not received any notice regarding increase in the house and water taxes, petitioner could not be held in arrears of rent for not paying such taxes and would be entitled to protection under Section 20(4) of the Act No. 13 of 1972 for the regular deposit made under Sectin 30 of the Act No. 13 of 1972.

13. The land lord challenged the order before the Court had filed SCC Revision under Section 25 of the Act, 1887, which was allowed raising presumption that there was absolute proof of service of notice and it was duty upon the tenant defendant to have discharged his onus by proving non service of notice by leading cogent and convincing evidence, which he failed. The Court sitting in revision also found that tenant had absolute information about increase in the house and water tax from Rs. 84/- to Rs. 118/- and yet he sent moneyorder of Rs. 548/- only and when it was refused , he deposited rent at the same rate i.e. Rs. 584/- whereas he was required to deposit rent @ Rs. 618 /- w.e.f. 11.4.2002.

14. As far as sufficiency of notice is concerned, it was established before the trial court itself that acknowledgement of service of registered notice and the registry receipt alongwith copy of notice was filed before trial judge and acknowledgement did bear signature of a recipient Sapna, a woman. The question is as to whether burden stood discharged at the end of land lord once he filed registry receipt and acknowledgement along with the copy of the notice that was sent.

15. This controversy about discharge of burden at the end of land lord to raise presumption regarding service of notice may not detain this Court any longer because this controversy has already stood settled in a series of judgment cited by learned counsel for the respondent land lord.

16. The Full Bench judgment in the case of Ganga Ram (Supra) while dealing with service of notice sent under Section 106 of the Transfer of Property Act, 1882 vide paragraph 28 held thus:

"28. It is not the duty of the plaintiff to prove that the defendant, after having received notice, had actually read it and understood its contents. Similarly, where the registered envelope contains a correct address of the tenant and the addressee either cannot be met or refuses to take notice, there appears to be no reason why the notice should not be deemed to have been properly served on the addressees. In the case of Harihar ***Banerji v. Ramshashi Roy, AIR 1918 PC 102 it was held that if a letter properly directed containing notice to quit is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office and was received by the person to whom it was addressed. In the absence of proof to the contrary. It will be presumed that the refusal had been made by the tenant to whom the registered letter was correctly addressed at the time when the letter could be expected to reach him in the ordinary course. With great respect, and for the reasons given by us, we do not find*** *it possible to agree with the views expressed in the abovementioned cases decided by the Bombay, Madhya Bharat and Nagpur High Courts."*

(emphasis added)

17. Finally the Court answered three questions framed as under:

"34. In view of what we have stated above, we proceed to answer as follows the three questions referred to the Full Bench:--

Question Our Reply

1. Whether a notice under S. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, even if combined with a notice under S. 109 of the Transfer of Property Act, has to be served on the tenant personally?

1. The answer is in the negative. Even a notice of demand deemed or presumed to have been served on a tenant will be "service upon him of notice of demand".

2. Whether it is incumbent on the plaintiff to prove the endorsement of refusal on the notice sent by registered post by producing the postman or other evidence in case the defendant denies service on him ?

2. The answer is in the negative.

3. Whether in the circumstances of the present case the Courts below were right in raising the presumtion under S. 114 of the Evidence Act in favour of the landlord ?

3. The answer is In the affirmative. The presumption regarding service of such notice has also to oe made Under S, 27, General Clauses Act."

(emphasis added)

18. In **Green View Radio Service (supra)**, the Court held that service of notice was completed once it was sent by registered post and once the acknowledgement has been received bearing signature of the person receiving notice, then valid presumption shall be raised qua service of notice/ letter sent by registered post and so to be rebutted by tenant/ addressee by appearing as a witness and refusing signature and producing witness to corroborate his stand. This burden lies heavily upon the noticee. Vide paragraph 3, the Court held thus:

"3. ***In this connection, we may also point out that the provisions of Section 106 of the Transfer of Property Act require that notice to quit has to be sent either by post to the party or be tendered or delivered personally to such party or to one of his family members or servants at his residence or if such tender or delivery is not practicable, affixed to a conspicuous part of the property. The service is complete when the notice is sent by post.*** *In the present case, as pointed out earlier, the notice was sent by the plaintiff's advocate by registered post acknowledgment due. The acknowledgment signed by the party was received by the advocate of the plaintiff. Thus in our view the presumption of service of a letter sent by registered post can be rebutted by the addressee by appearing as witness and stating that he never received such letter. If the acknowledgment due receipt contains the signatures of the addressee himself and the addressee as a witness states that he never received such letter and the acknowledgment due does not bear his signature and such statement of the addressee is believed then it would be a sufficient rebuttal of the presumption drawn against him. The burden would then shift on the plaintiff who wants to rely on such presumption to satisfy the court by leading oral or documentary evidence to prove the service of such letter on the addressee.* ***This rebuttal by the defendant of the presumption drawn against him would of course depend on the veracity of his statement. The court in the facts and***

circumstances of a case may not consider such denial by the defendant as truthful and in that case such denial alone would not be sufficient. *But if there is nothing to disbelieve the statement of the defendant then it would be sufficient rebuttal of the presumption of service of such letter or notice sent to him by registered post."*

(emphasis added)

19. This Court in the case of **Rajendra v. Sanatan Dharam** *(supra)* vide paragraph 2 has relied upon the judgment of the Supreme Court wherein it was held that even if there was endorsement "not met" on the registered letter returned service of notice would be deemed sufficient.

20. In the case of **Gujarat Electricity Board and Others** *(supra)*, the Supreme Court held that once presumption has been raised, the duty lies upon noticee to discharge burden regarding factum of service. Vide paragraph 3, the Court held thus:

" There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service. In the instant case the respondent failed to dis- charge this burden as he failed to place material before the Court to show that the endorsement made by the postal au- thorities was wrong and incorrect. Mere denial made by ,the respondent in the circumstances of the case was not suffi- cient to rebut the presumption relating to service of the registered cover. We are, therefore, of the opinion that the letter dated 24.4.1974 was served on the respondent and he refused to accept the same. Consequently,the service was complete and the view taken by the High Court is incorrect. "

21. Thus from the above exposition of law regarding service of notice for determining the tenancy and the presumption being raised thereof, it is clear that the only duty of the landlord is to ensure that a registered notice is duly sent at the correct address and then if it is refused or returned for non availability of the noticee or that it has been served upon another person at the same address and was received on behalf of the noticee, service would be deemed sufficient for the purpose of raising presumption regarding service of notice.

22. This presumption is rebuttable provided of-course the noticee leads evidence to the effect that the person who has received notice was not in any manner related to him, nor such a person who received notice was authorized to receive notice and so if the notice was not handed over to the noticee after service or affixation upon the tenanted premises, then the presumption raised regarding service of notice would stand rebutted.

23. Learned counsel for the respondent submitted that notice was to be served personally under the Act and, therefore, service of notice would not be deemed sufficient and no presumption in

respect of validity of notice could have been raised. The judgment that he has relied upon is of coordinate bench of this Court in the case of case of ***Balloo Ram Bookseller (supra)*** wherein the Court, I find, Court was dealing with the relevant provision as contained under Section 3 of the old Control of Rent and Eviction Act, 1947. It came to be concluded that the words "service upon him' would mean personal service and would exclude the service either on servant or member of the family. The provision as such contained under Section 3(i)(a) of U.P. (Temp.) Control of Rent and Eviction Act, 1947 had used the words and expression notice of "service upon him' but I do not find any such provision qua service of notice under the new Act of 1972. Moreover, it is a case of suit where service of notice has to be looked into with regard to Section 106 of the Transfer of Property Act, 1882 and exposition of law in that regard by series of judgments already referred to hereinabove. Furthere in view of the judgment and the answer to question no. 1 by Full Bench in Ganga Ram (supra) case, the law laid down in Balloo Ram (supra) with utmost respect I observe, is no more a good law.

24. In view of above, therefore, I do not find any fault with the judgment of the Court sitting in revision that looking to the papers of postal receipt and acknowledgement received and corrctness of address of noticee upon notice, a presumption can be validly raised regarding service of notice.

25. On a repeated querry being made to the learned counsel for the petitioner as to whether he led any evidence to dispute the identity of Sapna as a member of the family or as a strange person who could not have received notice in his behalf or whether he took plea that Sapna was not a member of the family or that he did not know who was Sapna who had received notice in his behalf , he has not been able to give any satisfactory reply. Even otherwise, I do not find any paper filed or available on record to show that he has been able to dispute identity of the woman Sapna nor, was he able to get the postman examined who served notice upon the woman, named Sapna.

26. In such above view, therefore, presumption regarding service of notice that validly raised could not be rebutted. Thus, the findings returned on the point of service of notice, returned by the court sitting in revision impugned herein this petition cannot be said to be suffering from any manifest error of law or fact so as to warrant any interference.

27. In view of above, therefore, the suit in question was clearly maintainable at the instance of the respondent land lord .

28. Now, the question arose as to whether deposit under Section 30 of the Act No. 13 of 1972 could have been taken to be sufficient enough to give protection to the petitioner under Section 20(4) of the Act No. 13 of 1972. From the perusal of the pleadings and discussion made both in the judgments of trial court as well as of appellate court, I find that plaintiff never offered any rent to the land lord after he received notice besides the deposits that he had been making under Section 30 of the Act No. 13 of 1972 since prior to the notice. I, further, noticed that even after receipt of service of notice of the suit while he presented his written statement or on any other date to be called as first date of hearing, he did not submit any rent in court as was claimed in the notice or in the plaint

29. In the full bench judgment of this Court in the case of **Gokaran Singh *(supra),*** it has been clearly held that once notice has been sent and the land lord showed his willingness to accept rent while determining tenancy, it was incumbent upon the tenant to pay rent to the land lord directly and if he refused, in that event he would have to deposit rent in Court because in that circumstances, as was held in Indrasani's case, the rent shall be deemed to have been paid to the land lord. Vide paragraph 28, the full bench has held thus:

"In Indrasani's case (supra), it has been held that if the amount of rent at the correct rate is tendered by the tenant and the same is refused by the landlord, which covers to a particular period, tenant can not be held to be defaulter in respect there of. After refusal of the rent by the landlord, tenant is legally entitled to deposit the same in the Court under Section 30, but if thereafter, landlord serves notice of demand again at a higher rate, tenant need not tender the amount which has been deposited under Section 30 again but he will be under obligation to tender the amount of rent due at the correct or admitted rate of rent. Without tendering the said amount, the tenant will have no right to deposit the same under Section 30 of the Act."

30. Thus, legal position that emerges is that even if the tenant has been paying rent under Section 30 of the Act No. 13 of 1972, once he received notice, he should pay over rent to the land lord directly and if he refused, he should send money-order to him and then if the money-order is refused, he must make deposit under Section 20(4) of the Act No. 13 of 1972. To get the stautory protection, the tenant is required to deposit rent directly in Court on the first date of hearing alongwith advocate fee etc. as have been prescribed for under Section 20(4) of the Act No. 13 of 1972. Merely because tenant has been depositing rent under Section 30 of the Act No. 13 of 1972 since prior to the notice and continued to deposit under Section 30 of the Act No. 13 of 1972, such deposit as such would not suffice the requirement of law that is mandated as per relevant provisions nor, deposit made under Section 30 of the Act No. 13 of 1972, itself be a guarantee to the protection under Section 20(4) of the Act No. 13 of 1972. Section 20(4) of the Act No. 13 of 1972 requires deposit to be made in court itself where the case is going on. Nothing is reflected from the findings returned by the trial judge that any such deposit was ever made by the petitioner tenant so as to give him benefit of protection under Section 20(4) of the Act No. 13 of 1972. Thus findings returned by the trial judge was clearly unsustainable and the court below is justified in reversing the same.

31. In view of above, I do not find any merit in this petition. Petition Lacks merit and is accordingly dismissed with no order as to cost. Consigned to records.

(2022) 12 ILRA 939
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ A No. 17977 of 2021
With other cases

Manju Pal ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Navin Kumar Sharma, Sri Lakshmi Kant Singh

Counsel for the Respondents:
C.S.C., Mrs. Archana Singh, Sri Pramesh Dutt Tripathi

Civil Law - Posting Rules, 2008-Section 8(2) (d)-Claim of Inter-District transfer rejected-ground that it is an aspirational district transfer-not permitted under G.O. dated 02.12.2019-Petitioner appointed in Bahraich-seek transfer to Bareily-husband running a business in Bareily-2 children residing there along with their father and grandparents-Petitioner is a cancer patient-treatment going in Bareily-Transfer outside the district can be considered under the Rules in normal circumstances u/R 8 (2) (d) of Rules, 2008-not before 5 years of completing their posting-only in exceptional circumstances-to decide the circumstances-direction issued-**W.P. disposed**. (E-9)

List of Cases cited:

1 Writ (A) No.878 of 2020 (Divya Goswami Vs St. of U.P. & ors.

2 Aradhana & anr. Vs St. of U.P. & ors.-Writ (A) No.9177 of 2021

3. Smt. Ruchi Vs St. of U.P. & ors., Writ (A) No.14395 of 2018

4. Aradhana & anr. Vs St. of U.P. & ors., Writ (A) No.9177 of 2021

5. Smt. Ruchi Vs St. of U.P. & ors. Writ (A) No.14395 of 2018

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

1. All the above referred writ petitions involve identical questions of law and facts. The Writ Petition (A) No.17977 of 2021 is being treated as the leading writ petition and the facts pertaining to the same is being considered for deciding the controversy involved.

2. Heard Sri Navin Kumar Sharma, learned counsel for the petitioner, Sri Pranesh Dutt Tripathi, learned counsel appearing for the Respondents Nos.2 & 4 as also learned Standing Counsel appearing for the State-Respondents.

3. The writ petition (Writ-A No.17977 of 2021) has been filed assailing the order dated 31.12.2020 downloaded from the website of the U.P. Board of Basic Education, Prayagraj, whereby and whereunder the claim of the petitioner for Inter-District Transfer from Bahraich to Bareilly, has been rejected on the ground that the transfer sought was an aspirational district transfer and not permitted under the Government Order dated 02.12.2019.

4. It is contended by learned counsel for the petitioner that the petitioner was appointed as Assistant Teacher in Primary School in District Bahraich vide order dated 31.12.2015 and joined her services on 01.01.2016. In the year 2019 the petitioner was placed in Primary School Ahiraura, Block Chhitaura, District Bahraich under placement order dated 05.12.2019 and joined the said institution on 16.12.2019. The husband of the petitioner is running a business in District Bareilly. The petitioner has two children, 11 years old and 3 years old and both are residing at Bareilly along with their father and grandparents. The petitioner herself is a cancer patient whose treatment is going on at Kishlata Cancer Hospital, Bareilly. The petitioner is stated to be on medical leave and undergoing chemotherapy at Bareilly. The cancer has also affected the lungs of the petitioner and she is also undergoing treatment for her lung ailment at Yashoda Cancer Institute at Ghaziabad. Relevant documents have been filed on record to establish that the petitioner is a cancer patient and is undergoing treatment. The petitioner has sought Inter-District Transfer

on medical grounds considering her ailment to District Bareilly from District Bahraich her present place of posting.

5. It is contended that the U.P. Basic Education (Teachers) (Posting) Rules, 2008 have been framed under Section 19 (1) of the U.P. Basic Education Act, 1972. Rule 8 of the 2008 Rules provides for Inter-District Transfer. Rule 21 of the U.P. Basic Education (Teachers) Service Rules, 1981 also relates to transfer of the teachers. The State Government has issued a Government Order dated 02.12.2019 laying down the policy for the year 2019-20 for Inter-District Transfer. Clause 13 of the Government Order dated 02.12.2019 imposes restriction upon the teachers appointed in the aspirational districts like Siddharth Nagar, Shravasti, Bahraich, Sonebhadra, Chandauli, Fatehpur, Chitrakoot and Balrampur. The Clause 13 of the Government Order dated 2.12.2019 is being reproduced here under:-

"13. *आकांक्षी* (Aspirational) जनपदों यथा-सिद्धार्थनगर, श्रावस्ती, बहराइच, सोनभद्र, चन्दौली, फतेहपुर, चित्रकूट एवं बलरामपुर में से प्रत्येक जनपद से उतने ही अध्यापकों को अन्यत्र जनपदों में स्थानान्तरित किया जायेगा, जितने अध्यापकों द्वारा अन्य जनपदों से सम्बन्धित आकांक्षी जनपद में आने के लिए स्थानान्तरण हेतु अनुरोध किया जायेगा। परन्तु, यह प्रावधान भारतीय सेना/वायु सेना/नौ सेना/अर्ध सैनिक बलों यथा, CRPF/ CISF/ SSB/ASSAM RIFLES/ITBP/NSG/BSF, से सम्बन्धित प्रकरणों पर लागू नही होगा। "

6. The Government Order dated 02.12.2019 came to be challenged in a bunch of writ petitions leading amongst them being **Writ (A) No.878 of 2020 *(Divya Goswami Vs. State of U.P. and others)***. The writ petition was finally decided vide order dated 03.11.2020. The Court concluded that the following observations/directions be necessarily kept in mind before finalizing the list of teachers seeking inter-district transfer:-

"(I) No inter district transfer shall be done in the mid of the academic session.

(II) Transfer application should be entertained strictly in the light of the provisions as contained in Rule 8(2)(a) (b) and (d) of the Posting Rules, 2008.

(III) Once a teacher has successfully exercised the option for inter district transfer, no second opportunity shall be afforded to any teacher of any category except in case of female teacher who has already availed benefit of inter district transfer on the ground of parents dependency, prior to her marriage. However, in case if the marriage has taken place then she will have only one opportunity to exercise option for inter district transfer either on the ground of parents dependency or spouse residence/ in-laws residence.

(IV) In case of grave medical emergency for any incurable or serious disease that may as of necessity, require immediate medical help and sustained medical treatment, either personally or for the spouse, a second time opportunity to apply for inter district transfer should be afforded to such a teacher even if he/she had exercised such option for inter district transfer for any other reason in the past.

(V) Application of differently abled person should have very sympathetic consideration looking to physical disability but they should also have only one time

opportunity to exercise option for inter district transfer. In case of female teachers, such exception would apply, as referable to rule 8(2) (d) of Posting Rules, 2008.

(VI) In case of female teacher's right to seek transfer, relaxation given under Rule 8(2)(d) shall be read with rule 8(2) (b) and relaxation shall, therefore, be subject to rule 8(2) (b).

(VII) Save as observed and directed herein above (Direction Nos.III, IV and V), no second opportunity to exercise option for inter district transfer be made available to any candidate of any category whatsoever.

(VIII) The exercise of inter-district transfer since is exception to the general rule of appointment and posting, every application for transfer has to be addressed to by the competent authority keeping in mind the objectives set forth under the Act, 2009 and Posting Rules, 2008 as amended in the year 2010 and must be acceded to citing a special circumstance specific to the case considered."

7. The order dated 03.11.2020 was modified by the Court vide order dated 03.12.2020 to the extent that and the Direction No.1 in the order dated 03.11.2020 would not be pressed in the cases of medical emergency thus permitting transfers in mid academic session. The medical emergency cases were required to be dealt with by the Government strictly in accordance with its own guidelines and the prescribed procedure to identify such cases which were to be religiously followed.

8. Learned counsel for the petitioner submits that after the decision of this Court in the case of ***Divya Goswami (supra)*** the State Government issued Government Order dated 15.12.2020 and circular dated 17.12.2020. Both the Government Order dated 15.12.2020 and the circular did not contain any restriction with regard to aspirational districts. He submits that Clause 13 of the Government Order dated 02.12.2019 provided that from the aspirational districts only such number of teachers would be transferred as the number of requests for transfer from other districts to the said districts are received. The Government Order dated 02.12.2019 having been struck down by this Court and the State Government having issued the Government Order dated 15.12.2020 and circular dated 17.12.2020 which did not provide anything about the aspirational districts, the inter-district transfer request of the petitioner was required to be considered positively and was not liable to be rejected. Reliance is also placed upon a Government Order dated 29.03.2018 which provides in Clause II(vii) that transfers out of aspirational districts could be considered after two years of the posting by accepting options. Reliance is also placed upon information received under the Right to Information Act from Government of India, Niti Ayog, New Delhi obtained on 18.01.2021 to demonstrate that now no restrictions have been imposed by the Central Government as regards Inter District Transfers of Teachers and the same is within the domain of the State Government. It is thus contended that in the absence of any restrictions imposed by subsequent Government Orders regarding Inter-District Transfers the request of transfer of the petitioner is liable to be considered under Rule 8 of the Rules, 2008 and Rule 21 of the 1981 Rules.

9. Per contra, Smt. Archana Singh, learned counsel for the Respondent No.2 has resisted by the writ petition by filing

counter affidavit sworn by the Block Education Officer District Bahraich and submits that the entire proceedings of Inter-District Transfer of teachers working in Institutions run by the Basic Education Board is done through a software developed by NIC in accordance with the provisions contained in the Government Order issued by the Basic Education Department. For the Academic Session 2019-20, a transfer policy was framed vide Government Order dated 02.12.2019. Clause 13 of the Government Order imposes restriction upon Inter-District Transfers and provides that from the districts Siddharth Nagar, Shravasti, Bahraich, Sonebhadra, Chandauli, Fatehpur, Chitrakoot and Balrampur only such number of teachers would be transferred as the number of requests for transfer from other districts to the said districts are received. The validity of the said clause has been upheld by a Division Bench of this Court in ***Writ (A) No.9177 of 2021 (Aradhana and another vs. State of U.P. & 5 others)*** decided on 05.08.2021. Clause 8 of the Government Order dated 02.12.2019 provides for fixation of preferential points and the transfer requests shall be entertained on the basis of the preferential points obtained by each candidate seeking transfer.

10. It is next contended by learned counsel for the Respondent No.2 that the writ petitioner in her online application (Registration No.50374966) opted for being transferred to district Bareilly, Pilibhit and Budaun. The petitioner has been awarded 4 marks for tenure of service, 10 marks for serious disease of self, 5 marks for being female teacher, total marks 19 but her case has not been considered on account of transfer being sought from aspirational districts as the same has been restricted by Clause 13 of the Government Order dated 02.12.2019. The petitioner, admittedly, does not fall under any of the exempted categories under the said Clause. It is submitted that the claim of transfer from aspirational districts has been laid to rest by a decision this Court dated 13.8.2018 passed in ***Writ (A) No.14395 of 2018 (Smt. Ruchi vs. State of U.P. and others) and 126*** connected writ petitions by holding that the writ petitioners working in aspirational districts have no right for Inter District Transfer. Petitioner does not have any legally protected or judicially enforceable subsisting right to ask for mandamus for transfer from the aspirational district. Therefore her application for Inter-District Transfer have been lawfully rejected in view of the decision of the Board.

11. It is further submitted that the post of Assistant Teacher in Primary School is a district level cadre and Inter-District Transfer is an exceptional measure not to be made routinely except in terms of Rule 21 of the 1981 Rules. It is thus submitted that the writ petition is misconceived and is liable to be dismissed.

12. Learned counsel for the petitioner has refuted the averments made in the counter affidavit by filing rejoinder affidavit. It is submitted that the respondents have been adopting pick and choose policy in affecting the inter-district transfers. At one instance the genuine transfer request of the petitioner has been denied on the ground that the transfer is being sought from an aspirational district and on the other hand several transfers have been affected from aspirational districts of Bahraich to Hapur, Bahraich to Lakhimpur Kheri, Bahraich to Unnao, Bahraich to Barabanki. Documents to substantiate the

plea have been filed as Annexures RA-1 to RA-6. It is further contended that the case of the writ petitioner is liable to be considered in the light of the decision of this Court in the case of ***Divya Goswami (Supra)***.

13. Having heard the respective learned counsels for the parties and having perused the record, the Court finds that the case of the writ petitioner has not be considered only on the ground that the transfer is being sought from an aspirational district and such transfers from aspirational districts have been not permitted by Clause 13 of the Government Order dated 02.12.2019.

14. The Court further finds that the aspirational districts programme was launched by the Prime Minister in January, 2018 which aimed to quickly and effectively transform 112 most under developed districts across the country. The broad contours of the programme are convergence (of Central, State Schemes) Collaboration (of Central, State Level Nodal Officers & District Collectors) and competition among districts through monthly delta ranking; all driven by a mass movement. This programme focuses on the strength of each district, identifying low handing fruits for immediate improvement and measuring progress by ranking districts on a monthly basis. The ranking is based on the incremental progress made across 49 Key Performance Indicators (KPIs) under 5 Broad Socio-Economic Themes i.e. Health and Nutrition, Education, Agriculture & Water Resources, Financial Inclusion & Skill Development and Infrastructure.

15. The Court further finds that a Coordinate Bench of this Court while dealing with the issues of Inter-District Transfers as also the Government Order dated 02.12.2019 laying down the Transfer Policy for 2019-20 in the case of ***Divya Goswami (Supra)*** deliberately did not deal with the Inter-District Transfers from aspirational districts and to the restrictions imposed by Clause 13 of the Government Order dated 02.12.2019 presumably on the ground that the issue of transfer from aspirational districts stood decided by the decisions rendered in ***Writ (A) No.9177 of 2021 (Aradhana and another Vs. State of U.P. & 5 others)*** as also ***Writ (A) No.14395 of 2018 (Smt. Ruchi Vs. State of U.P. & others) and 126*** connected writ petitions holding that candidates working in aspirational districts have no right to seek transfer from aspirational districts. However, the Transfer Policy evolved subsequent to the decision of this Court in the case of ***Divya Goswami (Supra)*** vide Government Order dated 15.12.2020 and Circular dated 17.12.2020 do not impose any restriction for Inter-District Transfer from aspirational districts. In the opinion of the Court, the request of the petitioner for transfer from District Bahraich to District Bareilly is required to be sympathetically considered in the light of the provisions of the U.P. Basic Education Teachers (Posting) Rules 2008, read with Rule 21 of the Basic Education (Teachers) Service Rules, 1981 as also any policy framed by the State Government for Inter-District Transfer. Admittedly, no policy for effecting Inter-District Transfer is in vogue currently.

16. The petitioner was appointed as an Assistant Teacher in the Basic Institution is a Member of District Level Cadre, which has been allotted to her after considering the preference of the teachers concerned. Being a Member of of District Level Cadre, the petitioner is required to remain posted

within the cadre and transfer beyond the cadre/outside the district is ordinarily not concerned under the Rules. A transfer outside the district can be considered in normal circumstances only in accordance with the Rules. Rule 8(2)(d) of the Posting Rules, 2008 provides that in normal circumstances the applications for Inter-District Transfer of Female Teachers will not the entertained before 5 years of completing their posting. However, the Rule contemplates that in exceptional or extra-ordinary circumstances an application for transfer can be considered by the Basic Education Board/Director (Basic Education) even before the expiry of such term. The question whether in a given case the exceptional or extra-ordinary circumstances exists or not has to be examined by the Basic Education Board/Director (Basic Education).

17. In such circumstance, the writ petition stands disposed of by permitting the petitioner to represent the matter before the Director, Basic Education, U.P., annexing all the materials in support of her plea that there exists exceptional circumstances justifying her transfer from district Bahraich to district Bareilly along with certified copy of the order of this Court within two weeks from today.

18. In the eventuality of such a representation being filed within the time allowed, it is expected that the Director, Basic Education, U.P., shall examine as to whether the ground on which the petitioner is seeking her transfer would fall within the exceptional circumstances or not and pass a reasoned and speaking order within further period of four weeks from the date of receipt of the representation of the petitioner along with certified copy of this order.

19. The writ petition stands **disposed of** with the aforesaid observations/ directions.

(2022) 12 ILRA 945
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.11.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Matters Under Article 227 No. 3199 of 2019

Sohan Lal ...Petitioner
Versus
Estate of Late Chunni Lal & Ors. ...Respondents

Counsel for the Petitioner:
Dharmendra Kumar Singh, Ankit Kumar Singh

Counsel for the Respondents:
C.S.C., Dinesh Kr. Raizada, Sarvajeet Dubey

Civil Law - Hindu Adoptions and Maintenance Act, 1956-Section 16- Petitioner claimed to be an adopted son of one employee in Irrigation Department-he died in harness-Application for succession decided exparte in Petitioner's favour-Respondent filed restoration claiming adoption earlier to that of Petitioner-allowed-case was dismissed-Appeal allowed against the Petitioner-impugned order-directed succession in favour of Respondent-adoption deed of the Respondent no.2 is valid-duly recorded in the service book-Petitioner recorded as nephew-adoption of Respondent is valid u/s 16 of the Act, 1956.

W.P. dismissed. (E-9)

List of Cases cited:

1. Lakshman Singh Kothari Vs Smt. Rum Kanwar reported in AIR 1961 SC 1378

2. Atluri Brahmanandam (D) Vs Anne Sai Bapuji reported in (2010) 14 SCC 466

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner, learned Standing counsel appearing for the State-respondents and Sri Sarvjeet Dubey, learned counsel appearing for the respondent no. 3.

2. Instant petition has been filed praying for the following main reliefs:-

"(i) An appropriate order or direction may be passed setting aside the impugned judgment and order dated 19.11.2018 passed by Additional District and Sessions Judge, Court No. 6 Lucknow in Misc. Civil Appeal No. 18/16 (Dheer Singh Vs. Estate of Late Chunni Lal and another) as contained in Annexure No. 1 to this petition.

(ii) An appropriate order or direction may be passed in the nature of Mandamus commanding the opposite party no. 3 to consider the grievance of the petitioner and disburse entire dues of late Chunni Lal to the petitioner and also give him employment on compassionate grounds under the Dying in Harness Rules as the petitioner was made nominee in service record of late Chunni Lal."

3. The case set forth by the petitioner is that one Sri Chunni Lal was an employee in the Irrigation Department and had no heirs of his own, his wife having left him. Sri Chunni Lal adopted the petitioner by means of registered adoption deed dated 23.10.1996, a copy of which is annexure 4 to the petition. It is contended that during his life time, Sri Chunni Lal had give an application in the office of the respondent no. 2 on 20.03.1990 whereby the petitioner was nominated in the service record as his nominee. Sri Chunni Lal died in harness on 06.10.1997. In January, 1998, the petitioner filed an application before the learned Civil Judge (Senior Division), Lucknow under Section 372 of the Indian Succession Act, 1925 (hereinafter referred to as "Act, 1925") for being issued a succession certificate. The said case was decided ex-parte vide order dated 27.08.1998 in favour of the petitioner, a copy of which is annexure 5 to the petition.

4. The respondent no. 2 filed an application for setting the order dated 27.08.1998 and the said case was registered as Case No. 45 of 1998. Both the cases i.e one filed by the petitioner as well as the other filed by the respondent no. 2 i.e the application for recall which was registered as Case No. 45 of 1998 were clubbed together. The application for recall was filed by Dheer Singh, the respondent no. 2 on the ground that it was him who was validly adopted as son vide registered adoption deed dated 26.11.2015 by Sri Chunni Lal, which is prior to the adoption deed of the petitioner. Certain other grounds were also taken. Both the cases were dismissed vide judgment and order dated 26.11.2015, a copy of which is annexure 9 to the petition.

5. Being aggrieved, the respondent no. 2 filed an appeal under Section 384 of the Act, 1925. The Court vide order dated 19.11.2018 has allowed the appeal in favour of the respondent no. 2 and has directed for issue of succession certificate under Section 372 of the Act, 1925 in favour of the respondent no. 2. Simultaneously, the claim of the petitioner has been rejected. Being aggrieved, the instant petition has been filed.

6. The contention of learned counsel for the petitioner is that the appellate Court has patently erred in law in allowing the appeal filed by the respondent no. 2. He contends that the appellate Court has wrongly proceeded to allow the appeal and pass order in favour of respondent no. 2 by considering the registered adoption deed dated 06.11.1995 of the respondent no. 2 inasmuch as once the petitioner was shown as a nominee in the service record of Sri Chunni Lal it is apparent that it was he who was the validly adopted son of the deceased Sri Chunni Lal which fact has not been considered by the learned Court below in its proper perspective while allowing the appeal.

7. It is also argued that the mandatory condition of Section 11 (vi) of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as "Act, 1956") provides that the child to be adopted must be actually given and taken in adoption by the respective parents or guardians concerned but no transfer of the child took place between the adoptive parents and the parents taking in adoption so far as it pertains to respondent no. 2, Dheer Singh and as such, the adoption was not completed and consequently, even if there was a registered adoption deed in favour of the respondent no. 2, the same would not result into his valid adoption. It is also contended that after the death of Sri Chunni Lal, the petitioner had approached the department for some aid for cremation and the department had released a sum of Rs.3000/- for the purpose of cremation and the respondent no. 2 failed to turn up for the cremation as such, it is apparent that the department has itself treated the petitioner to be the legal heir and validly adopted son of Late Chunni Lal and consequently, the order passed by the appellate Court merits to be set aside on this ground also. It is also contended that in the evidence which was led by the respondent no. 2, none of the witnesses in his support ever claimed the respondent no. 2 to be adopted son of deceased Chunni Lal or respondent no. 2 had any information even about the house of Sri Chunni Lal and as such, it is apparent that he cannot be said to be validly adopted son of Late Chunni Lal.

8. It is also argued that there no valid adoption which fact has also been accepted by respondent no. 2 inasmuch as both in the High School and Intermediate examinations which were qualified by respondent no. 2 after the alleged adoption, the name of his actual father namely Sri Pritam Singh continued to be indicated in the educational certificates.

9. Reliance has been placed on the judgment of the Apex Court in the case of **Lakshman Singh Kothari Vs. Smt. Rum Kanwar reported in AIR 1961 SC 1378.**

10. No other ground has been urged.

11. On the other hand, Sri Sarvjeet Singh, learned counsel appearing for the respondent no. 2 states that the respondent no. 2 has got a valid registered adoption deed in his favour which was executed between the natural father of the respondent no. 2 namely Sri Pritam Singh and Chunni Lal on 06.11.1995. Copy of the registered adoption deed has been filed as annexure CA 2 to the counter affidavit filed by him. It is contended that the adoption deed would itself indicate that respondent no. 2 had been adopted about five years prior to the adoption deed being registered i.e somewhere in the year 1990 and the ceremony of adoption was also held. It is also contended that subsequent to the

respondent no. 2 being adopted, Chunni Lal had given an application in his office nominating the respondent no.2 as an adopted son and nominee to receive the post retiral benefits after his death as would be apparent from a perusal of the application which had been given by Chunni Lal along with the endorsement made in the service records, copy of which has been filed as annexure 1 to the counter affidavit. He argues that concealing all the aforesaid facts, the petitioner had filed an application before the competent Court under Section 372 of the Act, 1925 for being issued a succession certificate and the case was decided ex-parte vide order dated 27.07.1998. As soon as the respondent no. 2 came to know about the same, he filed an application for recall of the said order and the said recall application was itself treated as a miscellaneous case, both the cases were clubbed together and were dismissed on merits vide order dated 26.11.2015. Being aggrieved, the respondent no. 2 had filed an appeal under the provisions of the Act, 1925 and the appellate Court vide order dated 19.11.2018 has allowed the appeal and after consideration of the evidence which had been led by the parties, has held the respondent no. 2 as being eligible for being issued a succession certificate.

12. Placing reliance on Section 16 of the Act, 1956, learned counsel for the respondent no. 2 argues that there is a presumption as to the registered document relating to adoption i.e whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

13. It is contended that once there is a mandatory provision under Section 16 of the Act, 1956 whereby in case of a registered adoption deed there is presumption of the adoption having been made in compliance with the provisions of the Act,1956 and the petitioner having failed to disprove the same, consequently, there is no error in the Court having proceeded to pass the order dated 19.11.2018.

14. It is also contended that a perusal of the nomination form of the petitioner viz-a-viz the respondent no. 2 would indicate that so far as the petitioner is concerned, the office of the respondent no. 3 has recorded the petitioner as being a Bhatija (Nephew) of Chunni Lal while the petitioner has been recorded as the adopted son of Chunni Lal which itself is presumptive of the fact that the petitioner is only a Nephew while the respondent no. 2 is in fact the adopted son of Chunni Lal.

15. Heard the learned counsel appearing for the contesting parties and perused the records.

16. From the arguments as raised by the learned counsel appearing for the contesting parties and perusal of the records it emerges that one Sri Chunni Lal was an employee of the Irrigation Department and had adopted the respondent no. 2 by means of registered adoption deed dated 06.11.1995. Subsequent thereto, another adoption deed was executed on 24.10.1996 whereby the petitioner claims to have been taken in adoption. The adoption deed of the petitioner dated 24.10.1996, a copy of

which has been filed as annexure 4 to the petition does not indicate about any earlier adoption having been made by Sri Chunni Lal. That Chunni Lal was issue less, is not disputed by either of the parties. Sri Chunni Lal gave an application in his office in December, 1995 nominating the respondent no. 2 i.e Dheer Singh as his adopted son and a nominee which was duly recorded in the service records and the respondent no. 2 was duly indicated as an adopted son of Sri Chunni Lal. However, prior to the said application, upon an application dated 20.03.1990 being given for recording of the petitioner as a nominee, the office agreed and has recorded the petitioner as Bhatija (Nephew) and not as son, a copy of which is part of annexure 2 to the petition (Page 31). The petitioner filed an application before the competent authority under the Act, 1925 for being issued a succession certificate. The competent Court vide order dated 27.08.1998 passed an order ex-parte in favour of the petitioner. An application for setting aside the said order was filed by the respondent no. 2. The application was registered as a miscellaneous case, both the cases i.e one filed by the petitioner and other filed by the respondent no. 2 were clubbed together and were dismissed vide order dated 26.11.2015.Being aggrieved, the respondent no. 2 filed an appeal under the Act, 1925 and the appellate Court vide order dated 19.11.2018 has allowed the appeal and has directed for issue of a succession certificate under the Act, 1925 in favour of the respondent no.2. Being aggrieved, the instant petition has been filed.

17. The contention of learned counsel for the petitioner is that the appellate Court has patently erred in law in not considering the provisions of Section 11 (vi) of the Act, 1956 which categorically provides for a give and take between the parents giving in adoption and taking in adoption and thus when from the evidence that had been led by the respondent no. 2 before the appellate Court and even from the adoption deed it has not emerged anywhere that the ceremony of give and take took place between the respective parents as such, the appellate Court has patently erred in law in allowing the appeal of respondent no. 2 and for directing to issue the succession certificate.

18. A perusal of the order impugned would indicate that the provisions of Section 16 of the Act, 1956 have been considered by the appellate Court. For the sake of convenience, the provisions of Section 16 of the Act, 1956 are reproduced below:-

"16. Presumption as to registered documents relating to adoption- *Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."*

STATE AMENDMENT

"UTTAR PRADESH.--In the Hindu Adoption and Maintenance Act, 1956, Section 16 shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely:

"(2) In case of an adoption made on or after the first day of January, 1977 no court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of the child in adoption, except a document recording an adoption, made and signed by

the person giving and the person taking the child in adoption, and registered under any law for the time being in force:"

19. From a perusal of Section 16 (1) of the Act, 1956 it emerges that that whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and signed by the person giving and the person taking the child in adoption, the court **shall** presume that the adoption has been made in compliance with the provisions of the Act, 1956 unless and until it is disproved. Section 16 (2) of the Act, 1956 provides that in case of an adoption made on or after the 1st day of January, 1977 no Court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of the child in adoption **except a document recording an adoption made and signed by the person giving and the person taking the child in adoption and registered under any law for the time being in force.**

20. From a perusal of the aforesaid provisions of the Act it is apparent that irrespective of Section 11 (vi) of the Act, 1956 the mandate of the Act, 1956 as given in Section 16 of the Act is that the Court **shall** presume the adoption of a person in case any document registered any law is produced before the Court purporting to record the adoption. Further, in terms of Section 16 (2) of the Act, 1956 the adoption deed in favour of the respondent no. 2 being dated 06.11.1995, no Court in Uttar Pradesh can accept any evidence in proof of the giving and taking of the child in adoption **except** a document recording an adoption. Natural corollary to it would be that the adoption of the respondent no. 2 would have to be considered as valid more particularly when it has been done by registered adoption deed.

21. In the instant case, it is apparent that the respondent no. 2 had produced a valid adoption deed dated 06.11.1995 which was prior to the adoption deed of the petitioner which is dated 24.10.1996.

22. Section 11 of the Act, 1956 reads as under:-

"In every adoption, the following conditions must be complied with:-

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under

their authority with intent to transfer the child from the family of its birth1[or in the case of an abandoned child or child whose parentage is not known, from the place or family where it has been brought up] to the family of its adoption:

Provided that the performance of datta homam shall not be essential to the validity of adoption."

23. From a perusal of sub Section (i) of Section 11 of the Act, 1956 it clear emerges that in an adoption, if the adoption is of a son, the adoptive father by whom the adoption is made must **not** have a Hindu son, whether by legitimate blood relationship or by adoption) living at the time of adoption. In the instant case, it is apparent that the registered adoption of the respondent no. 2 took place on 06.11.1995 while the petitioner alleges to have been adopted on 23.10.1996. Thus, alleged adoption of the petitioner is subsequent to the adoption of the respondent no. 2 and consequently, would run foul to the provisions of sub Section (i) of Section 11 of the Act, 1956 and as such on this ground too the alleged adoption of the petitioner cannot be said to be legally valid.

24. As regards the argument raised by the learned counsel for the petitioner that there was no giving and taking ceremony between the parents of the respondent no. 2 and Chunni Lal, suffice it to state that very first paragraph of the adoption deed of the respondent no. 2 dated 06.11.1995 would indicate that the ceremony of giving and taking in adoption took place five years prior to adoption deed being registered. Thus, the said argument is rejected.

24. Further, the adoption of the respondent no. 2 was duly informed by Sri Chunni Lal to the department and the respondent no. 2 was duly recorded as the adopted son in the service records as would be apparent from a perusal of the service book. Keping in view the earlier adoption deed recording the respondent no. 2, Dheer Singh as having been adopted, the natural corollary to it being that Chunni Lal had a living son and this is also indicative of the fact that in the application moved before the office by Sri Chunni Lal with respect to the petitioner was as nominee and the same having been endorsed in the service record only records the petitioner as being the nephew of Sri Chunni Lal.

25. So far as the alleged adoption of the petitioner is concerned, suffice it to state that keeping in view the provisions of Act, 11 (i) of the Act, 1956, Sri Chunni Lal could not have validly adopted the petitioner.

26. The argument of learned counsel for the petitioner that despite the alleged adoption of the respondent no. 2 being of the year 1995, the name of the father in the High School examination has been recorded as Pritam Singh instead of Chunni Lal may not be very relevant inasmuch as a mere error in a certificate cannot dispute or negate the valid registered adoption deed dated 06.11.1995.

27. Another aspect of the matter is that the adoption deed of the respondent no. 2 has never been challenged by the petitioner and still continues to held good.

28. So far as the judgment of the Apex Court in the case of **Lakshman Singh Kothari (supra)** is concerned, suffice it to state that the Apex Court was never seized of the provisions of Section 16 of the Act, 1956 inasmuch as from a perusal of said judgment it does not emerge

that there was a valid adoption deed before the Apex Court. Thus, the said judgment is distinguishable on its own facts.

29. In this regard, it would also be apt to reproduce the judgment of Apex Court in the case of **Atluri Brahmanandam (D) Vs. Anne Sai Bapuji** reported in **(2010) 14 SCC 466** wherein it has been held as under:-

"12.....On the other hand, the effect and the implication of Section 16 of the Act is that if there is any document purporting to record an adoption made and is signed by the person giving as well the person taking the child in adoption is registered under any law for the time being in force and if it is produced in any Court, the Court would presume that the adoption has been made in compliance of the provisions of the Act unless and until it is disproved. "

30. When the facts of the instant case are seen in the context of the law laid down by the Apex Court in the case of **Atluri Brahmanandam (D) (supra)** it clearly emerges that the respondent no. 2 is having a valid adoption deed in his favour and as such, keeping in view Section 16 of the Act, 1956, the learned Court below presumed that the adoption had been made in pursuance to the provisions of the Act, 1956 and the petitioner failed to disprove the same.

31. Keeping in view the aforesaid discussion, no case for interference is made out. The writ petition is dismissed.

(2022) 12 ILRA 952
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2022

BEFORE

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

Government Appeal No. 1654 of 1992

State of U.P. ...Appellant
Versus
Omvir Singh & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri Ravindra Singh, Sri Ajendra Kumar, Sri R.P.S. Chauhan, Sri Shivam Yadav

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 313 & 378 - Indian Penal Code, 1860 - Sections - 34, 201 - 302 - Government Appeal – Acquittal – offence of murder - *FIR* - accused husband with the help of other accused persons killed his wife (who was suffering from back pain since long) by throwing her in a jute bag in the canal - prosecution has based its case on last seen theory as well as fact of throwing the dead body in to the canal which was seen by two witnesses PW-3 & PW-4, but they have given different versions in their testimony - Although, the evidence of last seen is not at all worth believing as same was not corroborates with evidence of record - court finds that, case is partly based on circumstantial evidence & partly based on destroying the evidence & further, no motive of committing offences is proved - held - no two views are possible in this matter and thus, no other option but to conquer with the findings recorded by the learned trial court - consequently, Government Appeal stands dismissed. (Para –26, 27, 29)

Appeal Dismissed. (E-11)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39,

2. Chandrappa Vs St. of Karn., (2007) 4 S.C.C. 415,

3. St. of Goa Vs Sanjay Thakran & anr., (2007) 3 S.C.C. 75,

4. St. of U.P.h Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553,

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589,

6. Luna Ram Vs Bhupat Singh & ors., (2009) SCC 749,

7. Mookkiah & anr. Vs St., rep. by the Inspector of Police, Tamil Nadu, AIR 2013 SC 321,

8. St. of Raj. Vs Sohan Lal & ors., (2004) 5 SCC 573,

9. St. of Karn. Vs Hemareddy, AIR 1981 SC 1417,

10. Girija Nandini Devi Vs Bigendra Nandini Chaudhary (1967 Vol. 1 SCR 93) (AIR 1967 SC 1124),

11. Shivasharanappa & ors. Vs St. Of Karn., JT 2013 (7) SC 66,

12. St. of Punj. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153,

13. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219,

14. Ramanand Yadav Vs Prabhu Nath Jha & ors.(2003) 12 SCC 606,

15. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750,

16. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161.

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

1. This Government Appeal has been filed by the appellant against the judgment and order dated 28.05.1992 passed by IInd Additional Sessions Judge, Etah in Sessions Trial No. 539 of 1989, arising out of Case Crime no. 46 of 1989, u/s 302/34 & 201 I.P.C., Police Station-Pilua, District Etah.

2. Brief facts of the case as culled out from the record are that a written report was submitted by the informant in police station-Pilua. District Etah with the averments that the marriage of daughter of informant was solemnized with Omveer Singh before 2-3 years of the occurrence. Kamla Devi (deceased) was suffering from back pain and did not get any relief after a long treatment, She was getting treatment at her parental home. On 1st July, 1989, his son-in-law, Omveer Singh and his brother, Subedar Singh, took away Kamla Devi to their house on 05.07.1989. On 05.07. 1989, informant went to the matrimonial home of his daughter, there he was told by mother of Omveer Singh and Subedar Singh that her both the sons are not in the village since last eight days but villagers told him that before two days they were in the village. It is further avert that informant has doubt that Omveer Singh, Subedar Singh, their father namely, Asarfi Lal and mother had taken her daughter, Kamla Devi, somewhere else and she is missing.

3. On the basis of the aforesaid written statement a Case Crime no. 46 of 1989 was registered at police station under section 302 I.P.C. after recovery of dead body of Kamla Devi.

4. Investigation was taken up by the Investigating Officer, who visited the spot and prepared site plan. Dead body of the deceased was sent for post-mortem, where doctor conducted the post-mortem and prepared post-mortem report. Investigating

Officer, who recovered 29 broken bangles and handkerchief on the pointing out of accused-appellant, Asharfi Lal, under the Banyan tree. On 06.07.1989 the dead body of Kamla Devi was found and recovered from the river, which was packed in Jute hag. Recovery memos were prepared by the investigating officer. During investigation, Investigating Officer recorded the statement of witnesses u/s 161 .P.C. After completion of investigation, charge-sheet was submitted by the Investigating Officer against the appellants. Case was triable exclusively by the court of sessions, hence it was committed to the court of sessions by the concerned Magistrate.

5. Trial Court framed charges against the accused persons, Omveer Singh, Subedar Singh, Asharfi Lal and Sri Nivas u/s 302. r/w section 34 & 201 LP.C. Accused persons denied the charges and claimed to be tried.

6. The prosecution produced following witnesses who orally testified namely:-

PW-1 Mahendra Singh
PW-2 Prem Singh
PW-3 Devendra Singh PW-4 Udai Pal Singh
PW-5 Dr. P.B. Verma
PW-6 Jodh Singh PW-7 Kunwar Pal
PW-8 Bakhedi
PW-9 Lakhpati Singh
PW-10 Shyam Sunder Singh
PW-11 Suresh Babu

7. Documentary evidence was also produced by prosecution, which was proved by leading evidence.

8. After conclusion of prosecution evidence, statements of accused persons were recorded u/s 313 Cr.P.C, in which they had stated that false evidence was led against them. No witness in defence was produced.

9. After hearing the arguments of both the sides lower court record did not find any of the accused persons guilty of the offences charged and acquitted all the accused persons.

10. During the course of appeal, appellants Omveer Singh and Asharti Lal have passed away and appeal has already been abated against them.

11. Hence, there is matter with regard to the accused-respondents Subedar Singh and Sri Nivas Singh before us.

12. Heard Sri M.K. Srivastava, learned A.G.A. for the State and learned counsel for the accused-respondents.

13. Learned A.G.A. submitted that deceased Kamla Devi was wife of Omveer Singh, she was residing at her matrimonial home from where she went missing after lodging the report her dead body was found from the river, which was inside the Jute bag.

14. Learned A.G.A. further submitted that there is evidence of last seen in this matter. PW-3-Devender Singh and PW-4-Udai Pal Singh saw the accused-respondents with Kamla Devi on 01.07.1989 and after that she was not seen alive with any other person. It is next submitted that her broken bangles and handkerchief were recovered at the instance of accused Asarfi Lal and her dead body

was recovered from the river. Learned A.G.A. vehemently submitted that prosecution has produced PW-8, Bakhedi, who had stated in his testimony that he had seen all the four accused persons throwing a Jute bag in the canal. When he asked them, he was told that Sri Nivas is a criminal and police is chasing them and there is stolen goods in the Jute bag so they have thrown it in the canal. In the same way, PW-7, Kunwar Pal also stated in his testimony that he saw all the accused persons with a Jute bag on the same day on which PW-8 had seen. PW-5, Dr. P.V. Verma has also confirmed that the death of Kamla Devi was due to drowning. Hence, there is evidence of last seen and additionally there is ample evidence on record that two witnesses had seen throwing the Jute bag into the canal in which there was dead body of deceased Kamla Devi. Hence, the impugned judgment be upturned and surviving accused/respondents should have been convicted.

15. Learned counsel for the surviving respondents, Subedar Singh, and Sri Nivas Singh submitted that there is no infrmity and illegality in that impugned judgment which calls any interference by this court because of the witnesses are planted and there are several material contradictions in their statements which go to the root of the case. There is no eye-witness of the occurrence and there was no motive with the respondents to commit the murder of Kamla Devi.

16. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

17. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another, (2006) 6 S.C.C. 39,*** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the " well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

Further, in the case of ***Chandrappa vs. State of Karnataka, reported in (2007) 4 S.C.C. 415,*** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own

conclusion, both on questions of fact and of law.

[3] Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudencethat every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

13. Even in the case of ***State of Goa vs. Sanjay Thakran and another, reported in (2007) 3 S.C.C. 75***, the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisións, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others, 2007 A.I.R. S.C.W. 5553 and in Girja Prasad (Dead) by L.R.s vs. State of MP, 2007 A.I.R. S.C.W. 5589.*** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

18. In the case of ***Luna Ram vs. Bhupat Singh and others, reported in (2009) SCC 749,*** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye

witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

19. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

20. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in ***AIR 2013 SC 321***, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions ordifferences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide ***State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"***

21. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy, AIR 1981, SC 1417***, wherein it is held as under:

... This Court has observed in ***Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93: (AIR 1967 SC 1124)*** that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

22. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and***

others vs. State of Karnataka, JT 2013 (7) SC 66 has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

23. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma, (2013) 14 SCC 153***, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of propf beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness., In a proper case, the court may look for independent corroboration before convincing the accused person."

24. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts

and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

……..It is relevant to note the observations of this Court in the case of ***Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606***, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

25. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

26. The prosecution has based its case on last seen theory as well as the fact of throwing the dead body of deceased into the canal, which was seen by two of the witnesses.

27. PW-3 Devendra Singh and PW-4, Udaypal Singh, are the witnesses of last seen theory but they have given different versions PW-3, Devendra Singh, says that he saw accused persons with deceased, Kamla Devi, on 01.07.1989 at about 8.00 PM under the Banyan tree while PW-4, Udaypal Singh says that on 01.07.1989 at about 6.30 PM, he saw accused persons with Kamla Devi at the shop of Kanchan Singh. This Kanchan is not produced by the prosecution moreover PW-3 says that he asked the accused regarding their stay under the Banyan tree and they told that we have brought Kamla Devi from her parental home and she has become indisposed then the witness went away. This conduct is very much unnatural in the circumstances in which according to him Kamla Devi was sitting with accused persons. The last seen evidence is dated 01.07.1989 while dead body was recovered on 06.07.1989, Although, the doctor has stated that she had died before five days from the date of post-mortem but even then it cannot be said that there was proximity in time between the last seen and the death of the deceased. Although, the evidence of last seen is not at all worth believing in this matter.

28. As far as, the version of PW-7 & PW-8, is concerned it is alos not believable because as per PW-8, when the Jute bag was thrown into canal, he was told by the accused persons that Sri Nivas is a criminal and they are being chased by the police, there is stolen goods in jute bag, hence it is thrown into the canal. It cannot be believe that any criminal, committing such act, would told anybody that they are criminal and having stolen goods in jute bag, whereas PW-7 has stated that at about 11.00 PM. on same night, he saw all the four accused persons and asked them where they were going then they told that we are going to Etah for handing over the goods of daughter of Kavlendra Singh and in the morning they will come back with their own goods. This is entirely different version given by PW- 7 and PW-8 in their statements.

29. This case is partly based on circumstantial evidence and partly based on destroying the evidence. No motive of committing offences Is proved by prosecution. The evidence of last seen is not worth believing and the evidence with regard to destruction of evidence by throwing the dead body does not inspire evidence. In view of the above, we are of considered opinion that no two views are possible in this matter and we cannot take different view from that taken by the learned trial court. We are also do not find any infirmity in the impugned judgment and order, therefore, we have no other option but to conquer with the findings recorded by the learned trial court judge.

30. The appeal lacks merit and is dismissed, accordingly.

31. The records and proceedings be sent back to the court below.

(2022) 12 ILRA 960
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Capital Cases No. 1 of 2022
with
Reference No. 01 of 2022

Akloo Chauhan & Ors. ...Appellants
Versus
The State of U.P. ...Respondent

Counsel for the Appellants:
Sri Jitendra Kumar, Sri Srinivas Yadav

Counsel for the Respondent:
Sri Ankit Prakash, AGA, Sri Debee Shanker Pandey, Sri Shivendra Nath Singh

Criminal Law- Indian Evidence Act, 1872- Section 3- Circumstantial Evidence-Except the evidence of alleged last seen of P.W.2 Kanhaiya Gupta and P.W.3 Sanjay Gupta, there is no other legally admissible evidence showing the involvement of the appellants in commiting the offence- No FSL report supporting the case of the prosecution that those weapons have been used for causing injuries to the deceased- Suspicion, howsoever strong it may be, cannot take the place of proof beyond reasonable doubt and an accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

Settled law that in a case resting on circumstantial evidence the prosecution has to connect all the links of the incriminating circumstances in a single whole which unerringly establishes the guilt of the accused but where the prosecution fails in the same then the accused cannot be convicted on the basis of suspicion as suspicion cannot take the place of proof.

Criminal Appeal allowed. (E-3) (Para 20, 21, 26)

Case Law/ Judgements relied upon:-

1.Sattatiya @ Satish Rajanna Kartalla Vs St. of Maha., (2008) 3 SCC 210

2. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

3. Ramanand alias Nandlal Bharti Vs St. of U.P, 2022 SCC OnLine SC 1396 dec. on 13.10.2022.

4. Ram Niwas Vs St. of Har., 2022 SCC OnLine SC 1007 dec. on 11.08.2022.

5. Jaikam Khan Vs St. of U.P, 2021 SCC OnLine SC 1256, dec. on 15.12.2021.

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This death reference was made to this Court under Section 366 of the Criminal Procedure Code, 1973 (in short 'Cr PC') for confirmation of death sentence passed against the appellants. The appeal of accused preferred under Section 374 (2) Cr.P.C and the death reference are heard together and this judgment will govern the disposal of both the death reference and the appeal preferred by the appellants.

2. This death reference and the capital case arise out of the judgment and order dated 06.12.2021 passed by the Court of Additional District & Sessions Judge/FTC, Court No.1, Mau in Sessions Trial No. 209/2009 arising out of Crime No. 437 of 2009 & Sessions Trial No. 210 of 2009 arising out of Crime No. 485 of 2009 in which, accused/appellants herein were tried, found guilty, convicted and sentenced to undergo death sentence with a fine of Rs.10,000/-, in default of payment of fine, the same was to be recovered as arrears of land revenue.

3. As per prosecution case, on or about 17.03.2009, some goats belonging to accused appellant Akloo Chauhan, entered the agricultural field of complainant Tulsi Gupta and damaged his crops. Those goats were driven out by the complainant by throwing some stones towards them. It is said that some of the goats got injured and out of them, one died as a result of which accused Akloo Chauhan and his son Jai Chand got annoyed with the complainant and he was held responsible for the death of the said goat. That apart, there was some land dispute also between the two families.

On 17.03.2009 in the evening, when Ram Sanehi father of the was sleeping near the village tube well and the second deceased Pabbar Maurya was also sleeping near his tube well, accused appellant Akloo Chauhan, Jai Chand, Befu Chauhan (since deceased) and Ram Saran Chauhan, who were relatives amongst each others, reached there and caused the death of his father Ram Sanehi and Pabbar Maurya by causing gun shot injuries. A strong suspicion has been shown by the complainant upon accused persons and when he reached to the place of occurrence, he found two dead bodies lying there. Based on this offence, FIR under Sections 302 & 404 of I.P.C. was registered against the accused Akloo Chauhan, Jai Chand, Befu Chauhan and Ram Saran Chauhan.

4. Inquest on the dead body of the deceased was conducted, vide Ex.Ka.6 & Ex.Ka.11 on 18.03.2009 and the bodies were sent for postmortem, which was conducted on the same day, vide Ex.Ka.2 & Ex.Ka.3 by PW-5 Dr. S. P. Yadav.

As per Autopsy Surgeon, deceased Ram Sanehi suffered four injuries vide Ex.Ka.2, whereas other deceased Pabbar Maurya suffered ten injuries vide Ex.Ka.3. As per Autopsy Surgeon, cause of death of the two deceased was coma as a result of ante mortem injuries.

5. While framing charge, trial Judge has framed charge against the accused-appellants under Sections 302/34 & 404 of IPC, whereas separate charge under Section 4/25 of Arms Act has also been framed against the accused Jai Chand.

6. During trial, accused Befu Chauhan had expired and the trial court proceeded with the trial in respect of appellants Akloo Chauhan, Jai Chand and Ram Saran Chauhan.

7. So as to hold accused appellants guilty, prosecution has examined seven witnesses, whereas one Court witness has also been examined. Statement of the accused-appellants were recorded under Section 313 of Cr.P.C. in which, they pleaded their innocence and false implication.

8. By the impugned judgment and order, the trial Judge has convicted the appellants under Sections 302/34 of I.P.C. and has awarded death sentence, as mentioned in paragraph-2 of this judgment, whereas accused appellant Jai Chand has been acquitted of the offence under Section 4/25 of Arms Act. Hence this appeal.

9. Counsel for the appellants submits:

(i) that there is no eyewitness account to the incident and the appellants have been convicted solely on the basis of so called evidence of last seen.

(ii) that disbelieving the recovery part, accused-appellant Jaichand has already been acquitted by the trial court of the offence under Section 4/25 of the Arms Act.

(iii) that there is material contradictions between the ocular evidence and the postmortem reports of the deceased.

(iii) that, at least, no case for death sentence has been made out by the prosecution and the trial court has erred in law in awarding the death sentence to the appellants.

(iv) that the basic principles governing the law of awarding death sentence have been completely ignored by the trial judge.

(v) that during trial, the appellants were on bail and now they are in jail since the date of judgment.

10. On the other hand, supporting the impugned judgment and order of the trial Court, it has been argued by the State Counsel:-

(i) that the conviction of the appellants is in accordance with law and there is no infirmity in the same.

(ii) that the evidence of last seen by PW-2 Kanhaiya Gupta and PW-3 Sanjay Gupta is good enough to uphold the conviction of the appellants as has been done by the trial Judge.

(iii) that after seeing the murder of first deceased Ram Sanehi but for no fault of other deceased Pabbar Maurya, he has been killed.

(iv) that the trial court was justified in awarding the death sentence to the accused persons.

11. We have heard learned counsel for the parties and perused the record.

12. PW-1 Tulsi Gupta, is the son of deceased Ram Sanehi and he is also the informant. He has stated that about a week prior to the date of incident, goat of accused Akloo Chauhan had entered his agricultural field and damaged the crop. He threw sand stones towards the said goat,

resulting its death. On account of this incident, accused Akloo Chauhan and his son Jai Chand were making allegations against him that it is because of his beating, the said goat has died. He states that even prior to this incident also, there was land dispute between his family and accused Akloo, Befu and Ram Saran. He states that it is he who lodged the FIR Ex.Ka.-4. In the cross examination, this witness remained firm and nothing could be elicited from him, which may be of any help to the accused persons.

13. PW-2 Kanhaiya Gupta, is a chance witness, has seen the accused persons near the place of occurrence. However, he had not seen the appellants killing the two deceased.

14. P.W-3 Sanjay Gupta, has stated that when he was returning from his field near tube well, he heard scream and in the light of tube well, he saw the accused persons beating the deceased by knife, club and, rod. He states that on account of fear, he did not interfere and that he was subjected to threat by the accused persons. In the cross examination, this witness has, however, stated that he had not seen the appellants killing the two deceased and merely saw them coming out from the tube well.

15. P.W-4 Indu, wife of the first informant, is a hearsay witness and has admitted the fact that she had not seen anything.

16. P.W-5 Dr. S.P. Yadav, conducted the post mortem on the body of the two deceased vide Ex.Ka-2 and Ex. Ka-3. As per Autopsy Surgeon, cause of death of the two deceased was coma as a result of ante mortem injuries.

17. P.W.6 Dhurendhar Prasad is a scribe of the FIR and G.D. P.W.7 Yashpal Singh, is the Investigating Officer, who has duly supported the prosecution.

18. It is relevant to note that recovery part has been disbelieved by the trial Judge.

19. Court witness No.1 Aadesh Srivastava has been examined to confirm the death of accused Befu Chauhan.

20. Close scrutiny of the evidence makes it clear that in the night invervening 17/18.3.2009, Ram Sanehi and Pabbar Maurya were done to death by some persons, causing various injuries on their body. Though an attempt has been made by the prosecution to establish a case against the appellants for committing the said offence, but except the evidence of alleged last seen of P.W.2 Kanhaiya Gupta and P.W.3 Sanjay Gupta, there is no other legally admissible evidence showing the involvement of the appellants in commiting the offence. Even the statement of P.W.2 and P.W.3 does not make it very clear as to the involvement of the appellants in committing the offence.

21. P.W.2 Kanhaiya Gupta, has been examined as chance witness and his presence at the place of occurrence has not been established by the prosecution beyond all reasonable doubt, whereas P.W.3 Sanjay Gupta, who is said to be an eye witness account to the incident, has categorically denied the fact that he saw the accused persons killing the two deceased, namely, Ram Sanehi and Pabbar Maurya. He says that he merely saw the accused persons coming out from the tube well. He further states that he never informed the family members of Pabbar Maurya that it is the accused appellants, who killed him. Even

the seizer of sabbal and knife has not been proved by the prosecution as per law. This apart, there is no FSL report supporting the case of the prosecution that those weapons have been used for causing injuries to the deceased.

22. Taking cumulative effect of the evidence, we are of the view that the prosecution has failed to prove its case beyond all reasonable doubt that it is the appellants, who committed the murder of Ram Sanehi and Pabbar Maurya.

23. The law in respect of conviction, based on circumstantial evidence, is very clear. In **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra**1, the Supreme Court, while dealing with circumstantial evidence, observed as under:

"11. In *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as under:

"10. ..... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

12. In *Padala Veera Reddy v. State of AP* [(1989) Supp (2) SCC 706], this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

13. In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

24. In **Devi Lal vs. State of Rajasthan**2 the Supreme Court, while dealing with circumstantial evidence, observed as under:

16. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the Court in Sharad Birdhichand Sarda Vs. State of Maharashtra 1984 (4) SCC 116. The relevant excerpts from para 153 of the decision is assuredly apposite:

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra [(1973) 2 SCC 793 where the observations were made: (SC p.807, para 19)

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

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

17. It has further been considered by this Court in *Sujit Biswas Vs. State of Assam* 2013(12) SCC 406 and *Raja alias Rajinder Vs. State of Haryana* 2015(11) SCC 43. It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

18. On an analysis of the overall fact situation in the instant case, and

considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

25. Recently, the Supreme Court in **Ramanand alias Nandlal Bharti Vs. State of Uttar Pradesh**3 while referring to the previous judgements on the question of circumstantial evidence, observed in paras 105, 106 and 117 as under:-

"105. Addressing this aspect, however, is the following extract also from the same treatise "The Law of Evidence" fifth edition by Ian Dennis at page 483:

"Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, fact-finders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure.

The very high standard of proof required in criminal cases minimises the risk of a wrongful conviction. It means that someone whom, on the evidence, the fact-finder believes is "probably" guilty, or "likely" to be guilty will be acquitted, since these judgments of probability necessarily admit that the fact-finder is not "sure". It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by the "beyond reasonable doubt" standard against wrongful conviction."

[Emphasis supplied]

106. We must remind ourselves of what this Court observed in the case of Shankarlal Gyarasilal Dixit v. State of Maharashtra reported in (1981) 2 SCC 35. We quote as under:

"32. .....But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the "shadow of doubt". In the first place, "shadow of doubt", even in

cases which depend on direct evidence is shadow of "reasonable" doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypotheses is far more rigorous than the test of proof beyond reasonable doubt."

[Emphasis supplied]

xxx xxx xxx

117. Thus, none of the pieces of evidence relied on as incriminating by the courts below, can be treated as incriminating pieces of circumstantial evidence against the accused. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Though the offence is gruesome and revolts the human conscience but an accused can be convicted only on legal evidence and if only a chain of circumstantial evidence has been so forged as to rule out the possibility of any other reasonable hypothesis excepting the guilt of the accused. In Shankarlal Gyarasilal (supra), this Court cautioned - "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions". This Court has held time and again that between "may be true" and "must be true" there is a long distance to travel which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned a convict. [See Ashish Batham v. State of M.P., (2002) 7 SCC 317]."

26. Likewise, law in respect of suspicion is also clear. In **Ram Niwas Vs. State of Haryana**4, it has been held by the Supreme Court that suspicion, howsoever strong it may be, cannot take the place of proof beyond reasonable doubt and an accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

27. In **Jaikam Khan Vs. State of Uttar Pradesh**5, the Supreme Court observed as under:

"85. ... ... The law, however, that is fully settled, is that, it is the duty of the prosecution to prove the case beyond reasonable doubt.

86. We may gainfully refer to the following observations of this Court in the case of Anand Ramchandra Chougule v Sidarai Laxman Chougala (2019) 8 SCC 50:

"10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

11. The fact that a defence may not have been taken by an accused under Section 313 CrPC again cannot absolve the proscution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer,

the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In Sunil Kundu v. State of Jharkhand [Sunil Kundu v. State of Jharkhand, (2013) 4 SCC 422 : (2013) 2 SCC (Cri) 427], this Court observed: (SCC pp. 433-34, para 28)

"28. ... When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well setttled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.""

87. We, therefore, find that the prosecution has utterly failed to prove the case beyond reasonable doubt. The conviction and death sentence imposed on the accused is totally unsustainable in law."

28. Considering the above proposition of law and in the facts and circumstances of the present case, we are of the view that the appellants are entitled for the benefit of doubt and, therefore, they are acquitted of all the charges.

29. For the foregoing reasons, we have no hesitation in holding that the prosecution has failed to prove the charges beyond reasonable doubt for which the accused-appellants was tried and, therefore, the judgment and order of the court below is liable to be set aside. As a result whereof, the reference to affirm the death penalty is rejected. The appeal of the appellants is allowed. The judgment and order of the trial court is set aside. The appellants are acquitted of all the charges for which he has been tried and convicted. The appellants shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of 437-A Cr.P.C. to the satisfaction of the trial court below.

30. Let a copy of this order along with the record be sent to the court below for information and compliance.

(2022) 12 ILRA 968
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.12.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 635 of 2009

Lakhan @ Lakhan @ Akash & Ors. ...Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellants:
Sri Aditya Prasad Mishra, Sri Akhilesh Srivastava, Sri Asheesh Mani Tripathi, Ms. Manju Pandey, Sri Ram Chandra Uttam, Sri Vivek Singh, Manu Mishra

Counsel for the Respondent:
Govt. Advocate

Indian Evidence Act, 1872- Section 9- Test Identification Parade- Requirement to identify the alleged culprit at the earliest possible opportunity after the occurrence so as to ensure justice and fair play both to the accused and to the prosecution- The identification proceedings during the police investigation is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court. The identification of the accused in Court constitutes substantive evidence and the test identification parade may lend corroboration to the identification of the witnesses in Court, if so required. As a rule of prudence, the Court would look for

corroboration of the witnesses' identification of the accused in the Court, in the form of earlier identification proceeding. The weight that is attached to such identification is a matter to be determined by the court in the circumstances of that particular case.

Test identification parade can only be used to corroborate the identification of the accused in the court.

Indian Evidence Act, 1872- Section 9- As the accused persons were arrested on 10.1.2006 but time was taken in completion of the test identification parade due to legal formalities as accused persons were arrested in another police station in relation to another crime. The accused persons were given on remand in veil and the suggestion that the witnesses had identified them earlier was refuted. The validity of the test identification parade held on 21.1.2006 had been proved with the deposition of the Magistrate as PW-8 who had conducted the said proceeding. Nothing contrary could be culled out from the deposition of the Magistrate and the procedure for test identification parade as adopted by the investigating agency cannot be said to be faulty.

Where the test identification parade is found to have been conducted in a legal and proper manner and the delay in holding the same is satisfactorily explained by the prosecution, then the same cannot be doubted.

Criminal Appeal rejected. (E-3) (Para 42, 43, 44)

Case Law/ Judgements relied upon:-

1. Hindu Singh & ors. Vs St. of U.P, (1982) 3 SCC 368 (II)

2. Md. Sajjad @ Raju @ Salim Vs St. of W.B, (2017) 11 SCC 150

3. Rajesh @ Sarkari & anr. Vs St. of Har. 1971 (2) SCC 75

4. Matru @ Girish Chandra Vs The St. of U.P, AIR 1961 Alld 153

5. Asharfi Vs St. 1971 (2) SCC 715

6. Rameshwar Singh Vs St. of J & K, (2013) 14 SCC 266

7. Ram Babu Vs St. of U.P, (2010) 5 SCC 63

8. R. Shaji Vs St. of Ker. (2013) 14 SCC 266

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Akhilesh Srivastava learned Amicus for appellant nos. 2 and 3 and Ms. Manju Pandey for appellant no. 1 and Sri Roopak Chaubey learned A.G.A. for the State respondents.

Introduction:-

2. The present appeal is directed against the judgment and order dated 9.1.2009 passed by the Additional District & Sessions Judge, Court No. 9, Bulandshahr in Sessions Trial No. 397 of 2006 arising out of Case Crime No. 292 of 2005 under Sections 394, 302, 307, 412 IPC, Police Station Jahangirabad, District Bulandshahr, whereby three appellants namely Lakhan @ Lakhan @ Akash, Rakesh and Satish @ Ajay have been convicted for the offence under Sections 394 and 302 read with Section 34 IPC and sentenced for life imprisonment for the offence under Section 394 IPC along with fine of Rs. 1 Lakh each, under Section 302 read with Section 34 IPC the appellants have been sentenced with life imprisonment and fine of Rs. 1 Lakh each. The appellants have also been convicted for the offence under Section 323 read with Section 34 IPC and sentenced for one year imprisonment with fine of Rs. 1,000/- each. It is provided that in case of default, the

fine shall be recovered as arrears of land revenue and no arrangement for additional imprisonment was being made in the case of default. The fine was required to be disbursed to the family of the victims and the victims as well. All the punishments are to run concurrently.

The first information report and the investigation:-

3. The first information report of the incident was lodged by Prem Jeet Singh, examined as PW-3 that on 24.10.2005, he along with his wife Mamta @ Bittan and his uncle Mahipal Singh was coming back from the house of his brother-in-law Kalyan Singh from village Bavanpur to his own village. At about 7:30 PM, at Rjapur Bambe ki Puliya ahead of village Chandauk, four miscreants had intercepted his motor cycle on the strength of hockey, country made pistol, rifle and iron rod. One miscreant had attacked the informant with the rifle butt and another on his head and he became unconscious and fell on the ground. The miscreants had looted Rs. 880/- from the pocket of the informant and Rs. 300/- from the purse of his wife and also the earrings, gold chain, silver ornaments of his wife and ran away towards Sikarpur by looting motorcycle of the informant. On getting consciousness, the informant saw a scooter lying on the spot and two persons in injured state were lying there. It is stated in the written report that the informant had identified the miscreants in the light of the motorcycle and he could identify them. On the written report given by the informant, Check FIR was prepared and the report was registered at 8:15 PM on 24.10.2005 itself. The place of the incident indicated in the Check FIR is the Jungle of village Chandauk, 5 kms. South of the police station.

4. The fact of lodging of the first information report was proved with the statement of PW-11, Check writer who was posted in the police station Jahangirabad on 24.10.2005. He stated that he had prepared the Check report on the written report given by the informant Prem Jeet Singh and the Check report had been proved as Exhibit Ka-"13', being in his handwriting and signature. The GD entry at Rapat No. 28, Time 20:15 hours of the FIR made on 24.10.2005 was proved by bringing the original GD in the Court, exhibited as Exhibit Ka-"14'.

Out of two injured lying on the spot of the incident, one injured Sunil Sharma had been examined as PW-2 whereas another injured Dinesh Sharma had died on 24.10.2005 in the hospital. It is proved by PW-1 that on receipt of information of death of injured Dinesh, G.D. entry at Rapat No. 29, Time 22:30 hours of the offence under Section 302 IPC was made, which was proved as Exhibit Ka-"15' by bringing the original GD in the Court.

5. In cross, PW-11 stated that when the informant came to the police station, he was conscious and his wife and one Mohan Lal were accompanying him. The suggestion that the police had brought the informant from the spot and the report was dictated by the police to the informant was denied by PW-11.

6. PW-12 is the first Investigation Officer who deposed that he was posted in the police station Jahangirabad on 24.10.2005 and received investigation of Case Crime No. 292/05 under Section 394 IPC. After recording the statement of the informant in the CD, he inspected the spot of the incident at the pointing out of the informant, the site plan was proved as

Exhibit Ka-"16', being in his handwriting and signature. The recovery memo of Cartridge Shell of 315 Bore recovered from the spot of the incident had been proved as Exhibit Ka-"17', being in the handwriting and signature of PW-13. A sealed bundle was opened in the Court and one Cartridge Shell 315 Bore was taken out from the same, marked as Material Exhibit-"1'. The recovery memo of blood stained and plain earth recovered from the spot was proved as Exhibit Ka-"18'. The sample of the same was proved as Material Exhibit-"3' and Material Exhibit-"4'.

It is stated by PW-12, the Investigating Officer that the inquest of deceased Dinesh was conducted in the District Hospital on 25.10.2005 and the same was proved being in his writing and signature as Exhibit Ka-"19'. The related papers to the inquest were proved as Exhibits Ka-"20' to Ka-"24'. PW-12 deposed that the injury report of injured Sunil Kumar Sharma was entered in the Case Diary on 31.10.2005 and all other papers were also entered therein. The investigation, was, thereafter, transferred under the orders of the Senior Officers.

In cross, PW-12 stated that he had proceeded to the place of the incident at about 8:45 PM along with three police personnel and the informant. It took about two hours in compliance of the proceedings on the spot and, thereafter, he reached at the District Hospital at about 11:00 PM to conduct the inquest. He returned to the police station on the next day, i.e. 25.10.2005 in the evening from the hospital, however, time of arrival at the police station could not be remembered by PW-12. On confrontation, PW-12 categorically stated that the case was registered in his presence and denied the suggestion of conducting the proceeding while sitting at the police station.

7. PW-1 is the witness of inquest. He stated that the inquest of dead body of Dinesh Sharma was prepared at the Mortuary, District Hospital on 25.10.2005 by the police and the witnesses in his presence. The body was sealed and sent for postmortem and the inquest report was prepared on the spot. PW-1 had identified his signatures on the inquest report and stated that it was the same report which was prepared by the Investigating Officer. In cross, the suggestion given to PW-1 that he had signed the inquest report at the police station was refuted by him.

8. Before proceeding further, we may record that a report dated 27.2.2006 was submitted by one Mukesh Kumar, examined as PW-6, about the information of death of Dinesh Chandra Sharma wherein endorsement of Station House Officer could be found.

9. PW-7 is the second Investigating Officer who deposed that the investigation was received by him from PW-12 (Sub-Inspector Satyendra Kumar) on 9.11.2005. PW-7 had also recorded the statement of PW-12 on 10.11.2005 who had prepared the inquest of deceased Dinesh. On 6.1.2006, the statement of son of deceased Dinesh Chandra Sharma was recorded who gave the details of the mobile number and IMEI number of the mobile of the deceased which was looted in the incident.

(i) Arrest and recoveries:-

10. On 10.1.2006, information was received about the arrest of the accused Rakesh and Satish and that accused Satish @ Ajay had confessed the commission of crime in the territorial area of Police Station Jahangirabad. On this information, PW-7 reached at the police station

Raghupura, District Gautam Budha Nagar and interrogated Satish @ Ajay and Rakesh. They admitted their guilty and involvement in the incident occurred on 24.10.2005. It is stated by PW-7 that he recorded the statement of accused Rakesh and Satish whose faces were covered. They made the statement that they could recover motorcycle, mobile phone and the looted jewellery, but in the meantime the report of the arrest of accused Lakhan at P.S. Raghupura was received on 14.1.2006 through telephone. PW-7 also recorded the statement of accused Lakhan in P.S. Raghupura who admitted his guilt and stated that he could recover the looted articles. After completion of the necessary formalities to take remand of three accused persons from the Court, while their faces were under veil, on 10.2.2006, recovery of Nokia mobile had been made at the pointing out of accused Rakesh. The recovery memo was prepared on the spot. On the same day, the recovery of one gold chain with locket and one pair of earring was also made at the instance of accused Rakesh. The recovery memo was prepared on the spot. On 10.2.2006 itself, looted motorcycle was recovered from a house at the instance of accused Lakhan @ Akash at about 17:10 hours and the recovery memo was prepared in that regard.

11. Three recovery memos prepared by S.I. A.M. Chaudhary on the dictation of PW-7 had been proved as Exhibits Ka-"5', Ka-"6' and Ka-"7' being under the signature of PW-7. The recovery memos of the place of recovery being in the handwriting and signature of PW-7 were proved as Exhibit Ka-"8' and Ka-"9'. It is deposed by PW-7 that the process of identification parade of three accused persons was conducted on 21.2.2006 at the District Jail Ghaziabad and identification of the looted article was conducted on 22.2.2006, after giving information to three accused persons about the said process on 14.2.2006. On 5.3.2006, the statements of the Magistrates who had conducted the identification process were recorded and after completion of the investigation, on the basis of evidence on record, the charge sheet was submitted against three persons namely Lakhan, Rakesh and Satish, which was proved as Exhibit Ka-"10' being in the handwriting and signature of PW-7.

12. In cross, PW-7 stated that he had entered the information with regard to the telephone call received from the Police Station Raghupura in the GD. However, telephone number had not been disclosed in the Case Diary. The suggestion that no information was received about the arrest of three accused persons from Police Station Raghupura and the entire proceedings were conducted on the basis of a newspaper report was categorically denied by PW-7. PW-7 was further confronted about the arrest of the accused persons at Police Station Raghupura and that they were not kept in veil. PW-7 categorically stated that two accused persons namely Rakesh and Satish arrested on 10.1.2006 were in veil in the lockup and they were brought in the Court to seek remand while in veil. He stated that he requested for the remand in veil from the Court and he was personally present in the Court along with the Case Diary at the time of remand. The suggestion that the accused persons were shown to the witnesses prior to their identification when they were brought in the Court was categorically refuted by PW-7. Further suggestion that the accused persons were shown to the witnesses in the police station on 9.2.2006 before identification parade was also refuted by PW-7.

The suggestion that recovery memo was not prepared on the spot was refuted by PW-7 and it was stated that the thumb impression of accused Rakesh was also taken in the recovery though it was mentioned therein that the signature of the accused person was obtained. The site plan of the place of recovery was prepared on 10.2.2006 at the pointing out of the informant and recovery at the instance of accused Rakesh and Satish was made from one house. The recovered articles were not in the Court on the date of deposition of PW-7. The manner in which the recovery was conducted by PW-7 was narrated by him and it was added that the people present at the place of recovery were not ready to sign the same. The site plan of the place of recovery was prepared at the pointing out of the accused persons. The suggestion about the recovery being farce was refuted by PW-7.

13. PW-9 is the witness of recovery of looted articles at the instance of three accused persons. Recovery of mobile at the instance of accused Santosh and jewellery at the instance of accused Rakesh from one room which was said to have been taken on rent by them were proved by him. Both the recoveries were made from one Almirah kept in a room. PW-9 deposed that the recovery memo was scribed by him on the dictation of S.H.O., Chandra Pal Singh (PW-7). No witness of public was ready to give testimony and the recoveries were made during day time between 10-11 AM. The recovery memos Exhibits Ka-"5' and K-"6' were shown to this witness and he proved them being in his handwriting. He stated that the signatures of the accused persons were obtained on the spot at the recovery memo. The recovery of motorcycle at the instance of accused Lakhan @ Lakhan was also proved by PW-9 with the statement that the said recovery was made from the house of one Siraj son of Shaki Jaan, resident of Kuleshara, Mulla Colony, Surajpur, District Gautam Budha Nagar at about 17:10 hours.

The recovery memo was scribed by him on the dictation of PW-7 and he had identified his writing on Exhibit Ka-"7' when shown to him in the Court and proved that the signatures of other witnesses were also present on the same.

In cross, PW-9 stated that there were 50-20 people in the crowd collected on the spot at the time of recovery but no one came forward to become a witness. PW-9 was further confronted about the identification of the recovered articles and stated that they were not in the Court at the time of his deposition. The suggestion that the recovery was not made in his presence was refuted by PW-9. A Nokia Mobile-1100 was shown to this witness in the Court in his deposition on 30.4.2008 and he had identified it as the same article recovered from the house at the instance of accused Satish on 10.2.2006, which was marked as Material Exhibit-"4'. He was further confronted about the identification of the mobile and refuted the suggestion that it was not the same article recovered during the investigation. A categorical statement was made by PW-9, in cross, that the informant was not accompanying them at the time of recovery. He also stated that no receipt of purchase of the mobile was given by the family members of the deceased nor any of them had identified the recovered mobile set.

(ii) Supplementary information:-

14. PW-6 is the brother of deceased Dinesh Chandra Sharma. He has proved the report given by him in writing about the

death of Dinesh Chandra Sharma and injury caused to Sunil Sharma (PW-2). The contents of the report filed by him in his handwriting and signature has been proved in his examination-in-chief and the report was marked as Exhibit Ka-"4'. From the endorsement on the report, Exhibit Ka-"4' in the original record, it is found that the S.H.O. had forwarded the said report on 4.11.2005 to the Investigating Officer Satyendra Kumar (PW-12).

PW-6 was confronted about the filing of the said report. In cross, he stated that the said report (Exhibit Ka-4) was scribed by him at the police station and the contents thereof were intimated to him by his nephew. He got the information of the incident at about 08:50 hours and reached at the Bulansdhahr Hospital where he found that his brother was dead. He met his nephew at Bulandshahr Hospital. He further stated that he did not remember as to when exactly he gave the said report, i.e. as to how many days prior to 4.11.2005. However, the suggestion that the said report was given by him on 4.11.2005 at the police station and that the report was dictated by the police was refuted by PW-6.

(iii) Identification of the accused:-

15. PW-8 Sarita Singh is the witness of the identification of the accused persons. She stated that she was posted as Additional City Magistrate in the District Ghaziabad on 22.2.2006 and was deputed for identification. The identification parade of accused persons Rakesh, Lakhan & Satish was conducted on 22.2.2006 at the District Jail, Ghaziabad. Three accused persons were intermingled with 10-10 persons and were made to stand in three rows. The marks of identification of the person of accused were concealed and they were identified one by one by the witnesses Prem Jeet Singh and Smt. Mamta. Both the witnesses had identified three accused persons correctly by pointing towards them. On the identification memo, thumb impressions and signatures of accused persons and witnesses were taken. The identification memo was proved by PW-8 being in her handwriting and signature and having been prepared by her at District Jail, Ghaziabad. It is deposed by PW-8 that before asking the witnesses and accused to put their thumb impressions and signatures, contents of the identification memo were read over to them. PW-8 was confronted about the care taken by her to conceal the visible identification marks of the accused person. She had proved that the exercise was duly conducted and other persons in the test identification parade with accused Lakhan were of the same age, built and complexion. The suggestion that the identification parade was not conducted in her presence and it was not conducted in a proper manner was refuted by PW-8.

(iv) Identification of recovered Articles:-

16. PW-10 is another officer who had proved identification of the looted articles. She stated that she was posted as S.D.M. at Bulandshahr on 21.2.2006 and S.I. R. C. Sharma brought a sealed bundle and the witnesses in the Court. The sealed bundle contained two earrings and one gold chain which were mixed with similar jewelleries (five in number) and were got identified from the witnesses Prem Jeet and Mamta, who had correctly identified the articles taken out from the sealed bundle. The identification memo was prepared on the spot and was read over to the witnesses before their signatures and thumb impressions were obtained. The identification memo was proved in the

handwriting and signature of PW-10 as Exhibit Ka-"12'. On confrontation, PW-10 stated that the jewelleries which were mixed with the looted articles were brought by a government contractor and they were similar to looted articles which had no specific marking. The sealed articles were brought by the police. The suggestion that the identification of looted articles was not conducted in a proper manner and the memo was prepared on the asking of the police was refuted by PW-10. She, however, stated that she did not remember whose seal was on the bundle but stated that the bundle of looted article was sealed and the identified articles were similar to other articles.

(v) Postmortem and Injuries:-

17. Amongst the formal witnesses, PW-4 had proved the postmortem report of deceased Dinesh Kumar Sharma. He stated that the dead body was brought in a sealed state by the police personnel. The sample seal was tallied and the dead body was identified by the police personnel who brought it.

From external examination, the estimated age of deceased was 46 years, it was average built body, rigor mortis was present over the entire body. The ante mortem injuries found on the person of the deceased are:-

"1. A gun shot wound of entry 2cm x 1.5cm x cavity deep present over left side of chest, anterior & lateral aspect of left chest, 5cms away from left nipple at 3 O'clock position margins are lacerated & inverted. B/I is not an exploration, and chest wall, 5th rib (left) fractured, left lacerated left diaphragm lacerated, medial lobe of liver lacerated & large intestine, lacerated & posterior wall of abdomen and abdomen aorta also lacerated. A metallic bullet recovered from posterior abdominal wall of right side."

On internal examination of the wound, the chest membrane was lacerated, fifth rib on the left side was broken. The left lung was lacerated and diaphragm on the left side was fractured. On internal examination, left side of liver, small intestine and large intestine were lacerated. Aorta of abdomen wall were lacerated. One metal bullet was found inside the abdomen. The direction of wound was from front and left to downwards. Heart chamber was empty. The abdominal cavity was filled with blood and 150 m.l. liquid matter was found in the stomach.

All articles recovered during the course of the postmortem were sealed and handed over to the police personnel in sealed state who brought the dead body.

PW-4 stated that the metal bullet which was in two parts kept in a sealed envelop was handed over to the police personnel along with the postmortem report. The cause of the death was shock and hemorrhage. The ante mortem injuries were sufficient to cause death, the estimated time of death was 3/4 days prior to the time of the postmortem. The postmortem report was proved being in handwriting and signature of PW-4 as Exhibit Ka-"2'. He stated in his examination-in-chief that the death could possibly have occurred on 24.10.2005 at about 7:30 PM and injury no. 1 was sufficient to cause death.

In cross, PW-4 was confronted about the time of the injury and the distance from which the deceased was hit by firearm.

18. PW-5 is the witness of injuries of Prem Jeet Singh son of Kunwar Singh, the informant (examined as PW-3). He stated that the injured Prem Jeet Singh (PW-3) was brought to him at the Community Health Center, Jahangirabad, Bulandshahr on 24.10.2005 at about 08:40 PM by police personnel. The injury found on the person of PW-3 were as under:-

"Lacerated wound 4cm x 1 cm muscle deep on the left side face, 2cm below from the left eye. Swelling around whole left side face. Margin irregular. Fresh bleeding present".

The injured had complaint of "Nausea' at the time of investigation. The injuries were kept under observation and X-ray was advised. The medico legal report of injured Prem Jeet Singh (PW-3) had been proved by PW-9, being in his handwriting and signature as Exhibit Ka-"3'. It was stated by PW-9 in the examination-in-chief that the injuries could possibly have occurred on 24.10.2005 at about 7:30 PM, by hard blunt object like 'Danda', 'Butt' and 'Sariya'.

In cross, PW-5 stated that the nature of injuries whether they were simple or serious could have been ascertained only on perusal of the X-ray report which was not placed before him. However, the injuries were not fatal and could have occurred from hard blunt object, not by sharp-edged weapon. Injuries were fresh and could have been caused 2-4 hours prior to the investigation.

(vi) Prosecution witnesses of fact:-

19. After going through the testimony of formal witnesses, we are required to consider the deposition of the witnesses of fact, PW-2 and PW-3 who were produced in the witness box as injured witnesses. PW-2 Sunil Sharma deposed that on 24.10.2005, he and his friend Dinesh Sharma went to the Sugar factory near Pahasu in relation to their business by a Scooter while they were coming back from the factory to Sikarpur via road through Chandauk at about 6:05 PM, they bought petrol at Sikarpur. The Scooter was being driven by his companion Dinesh Sharma. When they reached about 1/2 km away from the village Chadauk, three people came out of ambush. The place of the incident was further clarified being ahead of Jakhaita Canal somewhere near the brick-kiln. Three persons had opened fire on his companion Dinesh Sharma and he (PW-2) was given blow of a hard iron object in his head. Both of them fell from the Scooter and, thereafter, PW-2 was beaten by three persons, he got unconscious on account of the injuries sustained in his head. The miscreants looted his wrist watch, purse, hand bag and mobile, money and wrist watch of his companion. The miscreants were between the age of 20-25 years. Six to seven persons standing in the Court were shown to this witness and he had pointed towards three persons to state that they had committed the offence and assaulted him. When three persons identified by PW-2 were enquired in the Court, they had disclosed their names as Satish, Lakhan and Rakesh. It is stated by PW-2 that his companion, Dinesh Sharma had sustained firearm injuries and he sustained serious injuries on his head at the spot of the incident. He (PW-2) gained consciousness on 26.10.2005 at Yashoda Hospital, Ghaziabad and then he was told by his family members that the police had taken him to the Government Hospital, Bulandshahr initially, wherefrom he was referred to Yashoda Hospital, Bulandshahr. The injured PW-2 filed the discharge summary of the Yashoda Hospital in the

Court wherein the date of discharge was mentioned as 30.10.2005.

20. On confrontation by the defence, PW-2 stated that he had left his house in the morning at about 12:00 noon, met Dinesh Sharma at Jahangirabad, where he went by his motorcycle. From Jahangirabad, they (he and the deceased) left for Pahasu at around 1:00 PM and reached there by 2:30 PM. They stayed in the mill for about 2-1/2 hours, where they met the Senior Sugarcane Manager, Rathi. He further stated that he and the deceased were not partners. They reached Sikarpur at around 6:00 PM and after buying petrol, they left for Jahangirabad straightaway. The incident of assault and loot had occurred at around 6:25 PM. Two miscreants came out from ambush from the left side whereas one from the right side and they came from the side of Puliya. The miscreants first opened fires at the deceased (Dinesh Sharma) which hit him and he fell from the scooter.

PW-2 further stated that when he fell on the ground, his head was not banged at the road and then stated that he could not handle the scooter and fell on the road. By the time, he could see the condition of deceased Dinesh, the miscreants had attacked him by a heavy iron object in his head and he became unconscious. After that he did not know as to what had happened, who took him and deceased Dinesh to the police station and hospital. PW-2 further stated that it was not dark when the incident had occurred and he got consciousness on 26.10.2005. Though the police came to him on 26.10.2005 but the doctor had advised him not to speak. His family members informed him as to how he was brought to the hospital. PW-2 further stated that he sustained injuries on right ear, knees and right hand apart from head. The suggestion that he sustained injuries on head because of the accident wherein scooter got banged with the stone or Puliya and fell down, was refuted by PW2. He also refuted the suggestion that no incident of loot or assault had occurred.

PW-2 further stated that he had reached home from the hospital on 30.10.2005 and then his statement was recorded where he disclosed that three persons had opened fire at deceased Dinesh and assaulted him. PW-2 was confronted with his previous statement under Section 161 Cr.P.C. statement and refuted the suggestion that the statement about the firearm injury caused to Dinesh was made by him in the Court for the first time on legal advice.

21. On further confrontation about identification of three accused persons by him in the Court, PW-2 stated that three accused persons came from Ghaziabad Jail when he came to the Court on the previous day and he had also seen the accused persons on that day, but he had not identified the accused persons before the date of his deposition. He further categorically stated that he told the Investigating Officer that miscreants had attacked on his head by a heavy object after coming out of the ambush and he did not know as to what had happened thereafter. The suggestion that he did not identify anyone on the spot nor he had seen the incident was refuted by PW-2.

22. PW-3 is Prem Jeet Singh, the informant, who had proved the written report given by him on 24.10.2005 as Exhibit Ka-1, noted above. The Criminal law was set into motion with the registration of the FIR on the report filed by PW-3, on the date of the incident.

It is stated by PW-3 that the looted articles were recovered by the police and he and his wife went to the Court of Magistrate, Bulandshahr on 21.2.2006 to identify them. The S.D.M., Bulandshahr had mixed the looted articles with other similar articles, he (PW-3) and his wife had identified the looted articles correctly, they had also signed and put their thumb impressions on the recovery memo. The identification memo of the looted articles was shown to this witness and he had identified his signature on the same and thumb impression of his wife. PW-3 further stated that on 22.2.2006 he and his wife went to the District Jail, Bulandshahr for identification of the accused and the identification parade was conducted by putting the accused persons in three rows with 11-11 persons in each row. He (PW-3) had identified three accused Lakhan, Satish and Rakesh correctly. The identification memo of the accused persons was shown to this witness and he had identified his signature and thumb impression of his wife on the same.

23. In examination-in-chief, PW-3 stated that he had seen three accused persons on the spot of the incident on the date of the incident itself and thereafter in jail on the date of identification, and in between the said period, he had never seen the accused persons. PW-3 brought the jewellery which were identified by him and handed over to him under the order of the Court. He proved in the Court that the jewellery brought by him (one earring and one gold chain) were looted by the miscreants and they were identified in the presence of the Magistrate. The looted articles were marked as Material Exhibits '1, 2 and 3'. The motorcycle of PW-3 which was looted by the miscreants was brought by PW-3 on the date of his deposition and on identification, it was marked as Material Exhibit-"4'.

PW-3 further proved that the accused persons Lakhan, Satish and Rakesh were present in the Court on the date of his deposition.

On confrontation, PW-3 stated that he left his house at about 11:00 AM on 24.10.2005, he went to Gram Bavanpur where he stayed for about 3 hours. The Gram Bavanpur was at a distance of 30-35 kms. from Israuli and he left the house of his brother-in-law at Gram Bavanpur at about 5:00 PM. He reached at Jahangirabad at about 7:00 PM and he did not make any purchases at Jahangirabad. When he reached Doraha (two way) of Chandauk, it was around 7:00 PM. While he was going from Chandauk Doraha to Sikarpur, three miscreants were standing on the road. PW-3 stated that he had seen three miscreants correctly but did not know them prior to the incident. They were standing besides the road in the coverage of bushes, the road was running North-South. They were covering themselves towards the Eastern side of the road and it was such dark that the he had to turn on the light of the motorcycle. The motor cycle was running at the speed of 20 kms. per hours and as soon as he reached near the place where the miscreants were hiding, they suddenly attacked him. In the assault, he sustained injuries in his head and other parts of the body and became unconscious. His wife was not injured. The miscreants had looted personal belongings of him (PW-3) and his wife and looted his motorcycle to run away towards Sikarpur. After 10-20 minutes of the miscreants having left the place of the incident, he (PW-3) gained consciousness and then he saw one scooter and two injured persons lying on the street, at a distance of 2-3 meters towards the West.

The incident wherein two persons were lying injured had occurred before assault on him and the said incident did not occur before him. He, thus, could not tell as to when the incident with other two persons occurred.

PW-3 further clarified that he reached at the police station at about 8:15 PM and narrated the entire incident to the police personnel who reached at the spot along with him. His wife and uncle accompanied him to the police station. He further stated that he could not narrate the time when he reached at the place of the incident as he was not fully conscious. Two injured who were present on the spot were unconscious. The police then took all of them to the police station where they reached at about 9:00 PM. PM-3 was admitted in the Government Hospital, Jahangirabad and other two injured were sent to Bulandshahr. He could not narrate as to when he gained consciousness in the hospital at Jahangirabad. However, he stated that on 25.10.2005 at about 9:00 AM, he was fully conscious.

PW-3 stated that he gave report to the police and three accused persons met him on the spot. On further confrontation, PW-3 had narrated another incident of loot of truck and Maruti car committed by the accused persons. He further stated that he also told the police personnel about the incident of loot of truck and Maruti car at the same place where PW-3 was attacked. He then stated that when he reached at the spot along with the police, truck and Maruti car were present on the spot and the drivers were there. The miscreants had run away seeing the police jeep. The police had not chased the miscreants and all of them including the truck and Maruti car and police reached at the police station.

In cross, PW-3 stated that the report of loot of truck and Maruti car was not scribed before him. He was further confronted as to why the said disclosure was not made under Section 161 Cr.P.C. and answered that he could not give the reason for the same. He then stated that about 2 to 2½ months after the incident, he got information that the miscreants were arrested by the police of P.S. Jahangirabad. They were not lodged in the police station Jahangirabad rather were at Gautam Budha Nagar, he did not go along with his wife and uncle to Gautam Budha Nagar. He went in the identification parade of the accused persons held after three months of the incident. On further confrontation, PW-3 stated that he did not mention any specific identification mark of the accused in his report but told the police about the marks of identification of the miscreants which are narrated in his statement. PW-3 further stated that his statement was recorded at the hospital and if the fact of disclosure of identification marks of the accused persons had not been mentioned therein, he could not give any reason. PW-3 further stated that he and his wife went to identify the looted items after about two months of the incident. He was further confronted with the identity of the jewellery, recovered at the instance of the accused persons. The suggestion that no such incident had occurred nor he could identify the accused persons on the spot had been refuted by PW-3. Further suggestion that the police had shown the accused persons to the informant (PW-3) and his wife at the police station Raghupura, District Gautam Budha Nagar prior to the identification parade at police station Jahangirabad was categorically refuted by PW-3. The suggestion that the photographs of accused persons were shown to the witnesses prior to the identification parade was also refuted.

Arguments of the counsels:-

24. Placing the above noted evidence on record, it is vehemently argued by the

counsels for the appellants that the identification of the appellants in the Court by PW-2, Sunil Sharma could not have been given credence, inasmuch as, it has come in the evidence of the said witness that the accused persons were present in the Court on the previous day as well when PW-2 went to the Court. PW-2 though has been projected as injured witness but his injury had not been proved. There is nothing on record to establish that PW-2 was admitted in the hospital by the police. No fatal injury had been caused to any of the two witnesses. The discharge summary filed by PW-2 during his deposition in the Court could not have been admitted in evidence.

25. As regards the identification by PW-3, it is argued that PW-3 is not an eye-witness of the incident of murder of Dinesh Sharma and he did not identify PW-2 as an injured witness. The endorsement on the report given by PW-6 (brother of the deceased) is of the Station House Officer which is dated 4.11.2005, whereas the incident had occurred on 24.10.2005. It is, thus, evident that the incident of murder of Dinesh Sharma and the injury caused to PW-2 namely Sunil Sharma, if any, in the same sequence of events, could not be established with the testimony of PW-3. For the defective identification of the accused persons on the part of PW-2 Sunil Sharma for the first time in the Court, the conviction of accused persons for the offence of murder under Section 302 IPC cannot be sustained.

It is further argued that even the identification of the accused by PW-3 was highly delayed. As per own testimony of PW-3, the accused persons were shown to him during the identification parade held after three months of the incident. The inordinate delay in conduct ing the test identification parade is fatal to the prosecution case.

Reliance is placed on the decisions of the Apex Court in **Hindu Singh and other vs. State of Uttar Pradesh1 and Md. Sajjad alias Raju alias Salim vs. State of West Bengal**2.

26. It is argued that even otherwise, the identification parade was not held in accordance with law. The accused were not in veil on the date when the Court gave their remand and in all likelihood, they were identified by the witnesses prior to holding of the identification parade. It is further pointed out from the evidence of the Investigating Officer that though the remand of the accused was taken on 2.2.2006 but the identification parade of three accused persons was held on 21.2.2006. This delay on the part of the Investigating Officer in conducting the identification parade established that the identification was a mere formality.

It is further argued that the recovery shown at the instance of accused persons was planted. Apart from the recovery, there is no other evidence to connect the appellants from the crime and their identification being faulty, they are entitled for acquittal.

The contention, thus, is that the prosecution has not been able to establish its case beyond reasonable doubt and the appeal deserves to be allowed.

27. Learned A.G.A., on the other hand, argued that PW-2 being injured witness got proved with the discharge summary brought in the Court and he was not confronted by the defence on the issue of injury. The charge framed with respect to

injured PW-2 was under Section 307 IPC which has not been ultimately proved and the accused persons have not been convicted for the offence under Section 307 IPC. The fact that the injuries of PW-2 were not proved by the prosecution by bringing the injury report on record would be immaterial. The recovery of the mobile of the deceased at the instance of the accused persons connect them with the crime of murder of Dinesh Sharma. The recovery of articles looted from the informant (PW-3) and his wife on the spot had been proved by the prosecution. The recovered articles were produced in the Court and were marked as material exhibits. The Magistrates who conducted the identification parade of accused and the recovery articles had proved both the instances. Two incidents occurred in sequence and in one of them, Dinesh Sharma (deceased) had died and his companion got injured. Both the injured were lying on the spot when the informant (PW-3) reached at the police station. The categorical statement of PW-3 that the police took all of them to the hospital where one had died and another injured was admitted for a long time, could not be disputed.

He argued that even the identification of the accused persons by PW-2 in the Court is free from any reasonable doubt. From the statement of PW-2, only this much can be noted that he came to the Court on the previous day and the accused persons were also brought from Ghaziabad Jail and PW-2 had seen the accused persons on the previous day but that fact itself is not sufficient to discard the evidence of PW-2 when he had identified the accused in the Court by pointing out towards them that they had committed the crime. PW-2 got injured in the same incident which is proved from the fact that the police brought him along with the deceased from the spot on the information given by PW-3 and admitted him in the hospital. It was proved by PW-2 in his deposition that he was told by his family members that police took him to the government hospital Bulandshahr and from there he was sent to Yashoda hospital, Bulandshahr. The discharge summary dated 30.10.2005 was brought in the Court by PW-2 and was filed in evidence. The test identification parade was conducted soon after the arrest of the accused persons by PW-3 who had proved that the incident of causing injury to Dinesh Sharma and Sunil Sharma was committed at the same spot and he saw them lying on the spot in injured state when he gained consciousness. It is, thus, argued by the learned A.G.A. that the conviction of the accused persons cannot be faulted for any reason.

Analysis:-

28. Having heard learned counsels for the parties and perused the record, we may note that from the manner in which the incident had occurred with the informant (PW-3), it is evident that he had seen the assault on him and had opportunity to identify the assailants. The incident of murder of Dinesh Sharma and injury caused to Sunil Sharma (PW-2) having occurred on the same spot was proved from the statement of PW-3 in the first information report as also from the evidence of the Investigating Officer and that both the incidents had occurred in sequence. The prosecution has relied upon the identification parade and recoveries made at the instance of the accused persons along with the evidence of PW-3 to assert that the appellants herein had committed the crime. We are, therefore, required to

consider the circumstance of the identification of accused persons and recovery made at their instance.

29. The conviction of the accused persons has been made under Section 302 read with Section 34 IPC for the murder of Dinesh Sharma and Section 323 read with Section 34 IPC for causing injury to the informant (PW-3). The conviction under Section 394 IPC is on account of commission of robbery by the accused persons and voluntarily causing hurt in committing the robbery.

30. Before appreciating the evidence pertaining to the identification parade and recoveries at the instance of the accused persons, we are required to first record that the information of the incident is a prompt report made by the injured Prem Jeet Singh who had entered in the witness box as PW-3, 45 minutes time taken by him in lodging the report stood explained from the circumstances in which the incident had occurred. It is categorically stated in the written report filed by PW-1 at the police station Jahangirabad that four miscreants had attacked him on his head by hard blunt object and he became unconscious. Cash and jewellery of his wife as also his motorcycle were looted by miscreants. When he gained consciousness, he saw two injured persons and a scooter lying besides them on the spot. It is categorically stated by the informant (PW-3) in the written report that he had seen the miscreants in the light of the motorcycle and could identify them. The place of the incident had been proved with the site plan and no plausible argument could be made with regard to the place of the incident nor the witnesses produced by the prosecution to prove the recovery of one Cartridge Shell 315 bore and blood stained and plain earth from the spot could be confronted on any material circumstance to dispute the place of the incident.

31. The injuries on the persons of informant Prem Jeet Singh were examined on 24.10.2005 at about 8:40 PM at the Community Health Center, Jahangirabad, District Bulandshahr. Dr. PW-5 had appeared in the witness box to prove the injury report which were found to be on the face of the informant.

32. The first Investigating Officer had entered in the witness box to prove the site plan, the recovery of Cartridge Shell and blood stained and plain earth from the spot and proved that he had recorded the statement of the informant soon after the lodging of the report and inspected the spot on the same day, i.e. 24.10.2005 to make recoveries of blood stained earth in the presence of independent witnesses. The inquest of deceased Dinesh Sharma held on 25.10.2005 in the District Hospital was proved by PW-12, the first Investigating Officer. He also proved that the statement of Sunil Kumar Sharma (PW-2) was recorded in the Case Diary on 31.10.2005 and his injury report was entered therein. PW-12 was confronted as to when he had conducted the entire proceedings and in reply he proved that he had left for the spot of the incident at about 8:45 PM soon after the registration of the FIR and returned to the police station on the next day, i.e. 25.10.2005 in the evening. Nothing contrary could be gathered from the statement of the informant about lodging of the first information report, the Check writer who had entered in the witness box as PW-11 and the first Investigating Officer who had conducted investigation on 24.10.2005 and 25.10.2005. It may be noted that PW-12, the first Investigating

Officer had not been confronted about the injured persons found on the spot and further that both the incidents of attack and loot on deceased Dinesh Kumar Sharma and Sunil Sharma as also on the informant PW-3 Prem Jeet Singh and his wife had occurred on the same spot in sequence, one after the other.

It is proved by PW-11 that the case was initially lodged under Section 394 IPC and on the information of the death of Dinesh Sharma received from the hospital, GD entry was made to convert the crime for an offence under Section 302 IPC. The GD entries were proved by PW-1 by bringing it in original in the Court which had been marked as Exhibit Ka-"15'.

33. In the said scenario, the contention of the learned counsel for the appellants that from the evidence of PW-2, Sunil Sharma or that of PW-3 it could not be proved that both the incident had occurred on the same spot in sequence, cannot be sustained. The fact that the injury report of PW-2 Sunil Sharma was not proved by the prosecution is irrelevant, inasmuch as, the appellants have not been convicted for the charge under Section 307 read with Section 34 IPC for the grievous injuries caused to the Sunil Sharma (PW-2).

34. The substantive evidence, in the instant case, to connect the accused persons with the crime is evidence of PW-3 who had identified the accused persons in the identification parade held on 22.2.2006 in the District Jail Ghaziabad. The Magistrate in whose presence the identification parade was conducted had appeared in the witness-box as PW-8 and proved the identification memo as Exhibit Ka-"11' and the identification parade being conducted in her presence.

35. The argument of the learned counsels for the appellants, however, is that the identification parade was conducted after about a period of four months and for the delay caused in the identification of the accused persons, in all probability, the correct identification of the miscreants at the instance of PW-3 was not possible. The identification of accused persons at the instance of informant (PW-3) is, therefore, doubtful. The consequent recoveries from the accused persons are, thus, liable to be discarded.

36. To deal with this arguments of the learned counsels for the appellants, we are required to consider the law pertaining to the test identification parade, the procedure prescribed in law and the legal pronouncements pertaining to the matter.

In a recent decision in **Rajesh alias Sarkari and another vs. State of Haryana**3, the Apex Court has considered a long line of precedents on the purpose of conducting a test identification parade, the source of the authority of the investigator to do so, the manner in which these proceedings should be conducted and the weight to be ascribed to identification in the course of a test identification parade. The principles which have emerged from the precedents of the Apex Court have been summarized therein as under:-

"43.1. The purpose of conducting a TIP is that persons who claim to have seen the offender at the time of the occurrence identify them from amongst the other individuals without tutoring or aid from any source. An identification parade, in other words, tests the memory of the witnesses, in order for the prosecution to determine whether any or all of them can be cited as eye-witness to the crime;

43.2. There is no specific provision either in the Cr.P.C. or the the Evidence Act, 1872 ("the Evidence Act") which lends statutory authority to an identification parade. Identification parades belong to the stage of the investigation of crime and there is no provision which compels the investigating agency to hold or confers a right on the accused to claim a TIP;

43.3. Identification parades are governed in that context by the provision of Section 162 of the CrPC;

43.4. A TIP should ordinarily be conducted soon after the arrest of the accused, so as to preclude a possibility of the accused being shown to the witnesses before it is held;

43.5. The identification of the accused in court constitutes substantive evidence;

43.6. Facts which establish the identity of the accused person are treated to be relevant under Section 9 of the Evidence Act;

43.7. A TIP may lend corroboration to the identification of the witness in court, if so required;

43.8. As a rule of prudence, the court would, generally speaking, look for corroboration of the witness' identification of the accused in court, in the form of earlier identification proceedings. The rule of prudence is subject to the exception when the court considers it safe to rely upon the evidence of a particular witness without such, or other corroboration;

43.9. Since a TIP does not constitute substantive evidence, the failure to hold it does not ipso facto make the evidence of identification inadmissible;

43.10. The weight that is attached to such identification is a matter to be determined by the court in the circumstances of that particular case;

43.11. Identification of the accused in a TIP or in court is not essential in every case where guilt is established on the basis of circumstances which lend assurance to the nature and the quality of the evidence; and

43.12. The court of fact may, in the context and circumstances of each case, determine whether an adverse inference should be drawn against the accused for refusing to participate in a TIP. However, the court would look for corroborating material of a substantial nature before it enters a finding in regard to the guilt of the accused."

37. In **Matru alias Girish Chandra vs. the State of Uttar Pradesh**4, the Apex Court had noted that the identification tests do not constitute substantive evidence. Such decisions are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines.

38. In **Asharfi vs. State**5, this Court had considered that the evidence of identification of a stranger based on a personal impression, even if the veracity of the witness is above board, should be approached with considerable caution, because a variety of condition must be fulfilled before evidence based on the impression can become worthy of credence. While discussing the general precautions regarding identification proceedings, it was held that the Court is bound to follow the rule that evidence as to the identification of an accused person must be such as to exclude with reasonable certainty the possibility of an innocent person being identified.

39. In **Rameshwar Singh vs. State of Jammu and Kashmir**6, it was held that:-

"6. Before dealing with the evidence relating to identification of the appellant it

may be remembered that the substantive evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards are effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is thus and thus alone that justice and fairplay can be assured both to the accused and to the prosecution. The identification during police investigation, it may be recalled, is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in court of the identifying witness."

The emphasis has been laid down on the requirement to identify the alleged culprit at the earliest possible opportunity after the occurrence so as to ensure justice and fair play both to the accused and to the prosecution. It was reiterated that the identification proceedings during the police investigation is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court.

40. In **Ram Babu vs. State of Uttar Pradesh**7, it was held that as per Section 9 of the Evidence Act, facts which established the identity of an accused are relevant. Identification parade belongs to investigation stage and if adequate precautions are ensured, the evidence with regard to test identification parade may be used by the Court for the purpose of corroboration. The purpose of test identification parade is to test and strengthen trustworthiness of the substantive evidence of a witness in Court. It is for this reason that the test identification parade is held under the supervision of a Magistrate to eliminate any suspicion or unfairness and to reduce the chances of testimonial error as magistrate is expected to take all possible precautions.

41. In **R. Shaji vs. State of Kerala**8, it was held by the Apex Court in paragraph "58' as under:-

"58. In Vijay vs. State of M.P. , (2010) 8 SCC 191, this Court, while dealing with the effect of non holding of a test identification parade, placed very heavy reliance upon the judgments of this Court in Santokh Singh v. Izhar Hussain & Anr., AIR 1973 SC 2190; State of Himachal Pradesh v. Lekh Raj & Anr., AIR 1999 SC 3916; and Malkhan Singh & Ors. v. State of M.P., AIR 2003 SC 2669 and held that, the

evidence from a test identification parade is admissible under Section 9 of the Evidence Act, 1872. The identification parade is conducted by the police. The actual evidence regarding identification, is that which is given by the witnesses in court. A test identification parade cannot be claimed by an accused as a matter of right. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. Further, conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public. Holding a test identification parade may be helpful to the investigation to ascertain whether the investigation is being conducted in a proper manner and with proper direction. (See also: Munna Kumar Upadhyay v. State of A.P., AIR 2012 SC 2470)."

42. Considering the principles of test identification parade evolved over a period of time in legal pronouncements as discussed in the recent judgment in **Rajesh alias Sarkari (supra)**, the identification of the accused in Court constitutes substantive evidence and the test identification parade may lend corroboration to the identification of the witnesses in Court, if so required. As a rule of prudence, the Court would look for corroboration of the witnesses' identification of the accused in the Court, in the form of earlier identification proceeding. The weight that is attached to such identification is a matter to be determined by the court in the circumstances of that particular case.

43. Keeping in mind the above principles, reverting to the facts of the instant case, we may note that the Investigating Officer PW-7 had proved that two accused persons namely Rakesh and Satish were arrested in another criminal case and were lodged in Thana Raghupura, District Gautam Budha Nagar when he came to know about their arrest through telephonic information on 10.1.2006 given by S.H.O., Raghupura and that they had confessed the crime committed on 24.10.2005. Both the accused persons had also disclosed the name of Lakhan @ Akash, Munna son of Hari Singh being their accomplices. The entry of the interrogation made from them had been made in GD at Rapat No. 28, Time 22:50 hours dated 9.1.2006 at P.S. Raghupura. It was deposed by PW-7 that he recorded statements of accused Rakesh and Satish on the same day when they were in veil. On 13.1.2006, the report was submitted to the concerned court for preparation of warrant. On 14.1.2006, the information of arrest of accused Lakhan at P.S. Raghupura was received through telephone. The report was submitted in the concerned court on 16.1.2006 for preparation of warrant, after recording statement of accused Lakhan in the Case Diary at the Police Station Raghupura. On 17.1.2006, warrant of three accused persons were prepared and filed in the District Jail, Ghaziabad. On 22.1.2006, efforts were made to nab the fourth accused but he could not be arrested. As three accused persons were not produced in the Ghaziabad Court, request was again made and finally the Court had summoned the accused persons on 2.2.2006. On 2.2.2006 on the presence of the accused in the Court, warrant in veil was prepared by the Court and remand was accepted uptill 15.2.2006. On 4.2.2006, the application was given to take the accused in police custody remand which was accepted on 8.2.2006 and the remand in the police custody was accepted for a period of 72 hours till 12.2.2006. The

accused persons were then taken on remand on 9.2.2006 and on 10.2.2006 the recovery of Nokia Mobile-1100 with the IMEI was made at the instance of the accused Satish. The recovery of jewellery was made at the instance of accused Rakesh on the said date and both the recoveries were made from a house taken on rent by the accused persons. The recovery of looted motorcycle of the informant (PW-3) was made at the instance of accused Lakhan on 10.2.2006 itself. After giving information to three accused persons about identification proceedings on 14.2.2006, the test identification parade was conducted in the District Jail, Ghaziabad on 21.2.2006 in the presence of the Magistrate and the identification of the looted articles was made on 22.2.2006 in the Court of the Magistrate. After completion of the investigation in the above manner, the charge sheet was submitted against the accused persons.

44. From the evidence of PW-7, it, thus, transpires that as the accused persons were arrested on 10.1.2006 but time was taken in completion of the test identification parade due to legal formalities as accused persons were arrested in another police station in relation to another crime. PW-7 was confronted about the identification of the accused persons by the witnesses prior to the test identification parade and he categorically asserted that the accused persons were given on remand in veil and the suggestion that the witnesses had identified them earlier was refuted. The validity of the test identification parade held on 21.1.2006 had been proved with the deposition of the Magistrate as PW-8 who had conducted the said proceeding. Nothing contrary could be culled out from the deposition of the Magistrate and the procedure for test identification parade as adopted by the investigating agency cannot be said to be faulty.

45. It is further relevant to note that three accused persons were identified in the Court correctly by the injured witness namely Sunil Sharma who had entered in the witness box as PW-2. The identification by this witness was made of three accused persons who were intermingled with 6-7 persons while standing in the Court.

The statement made by PW-2, in cross, that three accused persons came from Ghaziabad Jail on the previous day when he came to the Court, cannot be considered to mean that he had identified the accused persons on that day. A categorical statement has been made by PW-2 while saying so that he had never identified the accused persons prior to his deposition in the Court on the said day.

46. The accused persons were also identified by the informant PW-3 in the Court who had entered in the witness box on 17.1.2007. The identification of the accused persons in the Court by PW-2 is corroborated from their identification by PW-3 in the Court as well as the test identification parade.

In his examination-in-chief, PW-3 had categorically stated that he had never seen the accused persons in between the date of the incident and their identification in the Jail and three accused persons namely Lakhan, Satish and Rakesh who had committed the crime were present in the Court on the date of his deposition. This statement of PW-3 recorded on 17.1.2007 could not be confronted by bringing any contrary fact and circumstance before us to raise any doubt on the test identification parade conducted by the police, in the

presence of the Magistrate, which has been proved with the deposition of PW-8, the identification Magistrate. The narration by PW-3 of the circumstances in which he could identify the accused persons at the time of the incident does not give rise to any reasonable apprehension on the veracity of the testimony of this witnesses. PW-3, with whom the incident of loot and assault had occurred and who had lodged the prompt report of the incident had categorically stated that the accused persons were unknown to him and he had seen them clearly in the light of the motorcycle. He had sufficient chance to see and identify the accused considering the manner of assault on him. There is no reason to doubt the testimony of PW-3.

The decisions relied upon by the learned counsel for the appellants to assail the identification of the accused persons in the identification parade, therefore, are of no benefit to them.

47. The circumstance of identification of the accused persons at the instance of two witnesses, one in the Court (by PW-2) and another in the identification parade (by PW-3) is further corroborated from the recoveries made at the instance of the accused persons prior to their identification by PW-3, the informant. The recoveries of looted motorcycle, jewellery and Nokia Mobile phone had been proved by the Investigating Officer and the police witness of recovery who had entered in the witness box as PW-9.

48. All the recoveries were made in the police custody during remand given by the Court concerned. The IMEI number of Nokia Mobile-1100 was tallied with the IMEI number of deceased Dinesh Sharma which was disclosed by his son in his statement recorded in the Case Diary on 6.1.2006, much prior to the arrest of the accused persons and the recovery. The looted motorcycle, which was recovered at the instance of accused Lakhan was related to the crime and was handed over to the informant PW-3 who had brought it in the Court on the date of his deposition on 17.1.2006. During his examination-in-chief, it was also marked as Material Exhibit-"4'. The defence could not raise any dispute with regard to the identify of the motorcycle marked as Material Exhibit-"4' at the instance of PW-3, the informant, to whom it belonged. The looted jewellery was identified by the informant and his wife being belonging to her in the Court of the Magistrate, who had entered in the witness-box as PW-10. The identification memo of identification of looted jewellery was proved by the Magistrate (PW-10) and, as such, the recoveries made by the police on 10.2.2006 of looted articles namely the motorcycle and jewellery belonging to the informant (PW-3) and his wife and the recovered mobile phone of deceased Dinesh Sharma were rightly connected to the crime. With the proof of recovery of looted articles at the instance of accused persons who were identified subsequent to the recoveries, by the informant and his wife in the District Jail, Ghaziabad in the test identification parade, the connection of the accused persons with both the incidents stood proved beyond any reasonable doubt.

49. On appreciation of the evidence on record in totality, we find that the prosecution has established each and every circumstance of the case leading towards the guilt of the accused persons. There is no doubt about their identification and connection with the crime. The prosecution has established its case beyond all reasonable doubt. No interference can, thus, be made in the judgment of conviction. The sentence awarded to the accused persons cannot be said to be disproportionate to the offence for which they have been convicted.

No interference, as such, is required in the judgment of the trial court.

The appeal is **dismissed** being devoid of merits.

The appellant no. 1 Lakhan @ Lakhan @ Akash and appellant no. 2 Rakesh are in jail. The appellant no. 3 namely Satish @ Ajay has been granted bail vide order dated 20.3.2013. The Court concerned is directed to take the custody of appellant no. 3 and send him to jail for serving out the remaining part of his sentence.

The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance. His bail bonds are cancelled and sureties are discharged.

Necessary steps shall be taken by the court below to notify this judgment to all concerned.

The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad within one month.

Sri Akhilesh Srivastava learned Amicus for the appellant nos. 2 and 3 has rendered valuable assistance to the Court. The Court quantifies Rs. 15,000/- (Rupees Fifteen Thousand only) to be paid to Sri Akhilesh Srivastava learned Advocate towards fee for the able assistance provided by him in the hearing. The said amount shall be paid to him by the Registry of the Court within the shortest possible time.

(2022) 12 ILRA 989
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

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

Criminal Appeal No. 999 of 2013

Jagdish & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri J.N. Singh, Sri Arimardan Singh, Sri Ravindra Balkrishna Kanhere

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 8- Circumstantial Evidence- Motive- The motive, as set up by the prosecution, fails and when the motive is failed then it creates a great dent in the prosecution case and doubt emerges as to why the person would commit offence like murder without any motive and thus, the averment made in the report to the police regarding motive, is not proved by the prosecution and first of all chain of circumstances breaks here.

In a case of circumstantial evidence, motive is relevant and is one of the links in the case of the prosecution; hence, failure to prove the motive dents the case of the prosecution.

Indian Evidence Act, 1872- Section 106 - The burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution. It is only when this burden is discharged, the accused could be called on to prove any fact within his special knowledge u/s 106 Indian Evidence Act to establish that he was not guilty of the offence.It is not disputed that the house of appellants was vacant when the dead body was recovered. Hence, the prosecution could not discharge its burden as to how the dead body of the deceased was buried in the house of the appellants and when the house of appellants was vacant, they could not be called on to prove their innocence or to establish any

fact, which could have been in their special knowledge. Hence, Section 106 of Indian Evidence Act has no applicability in this case.

The burden of proof is always upon the prosecution and until the same is discharged the burden of proof upon the accused u/s 106 of the Evidence Act cannot be pressed.

Indian Evidence Act, 1872- Section 27- Recovery memo of aforesaid weapons is Ext. Ka7, which has no independent witness. The recovery officer has stated in his statement during trial that no independent person was ready to become the witness of recovery. If this statement is believed even then the police personnel who were the witnesses of recovery, were also not examined during trial. Hence, the aforesaid recovery is very much doubted.

Where there are no independent witnesses of the alleged recovery and even the police officers , who were witnesses of the said recovery are not examined by the prosecution then the recovery is rendered doubtful.

Indian Evidence Act, 1872-Prosecution has failed to prove the motive. The factum of last seen is also not proved by any cogent evidence. Recovery of weapons alleged to be used in commission of crime, is also not proved. Hence, the chain of circumstances could not be formed and so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellants and none else.

In a case of circumstantial evidence, it is incumbent upon the prosecution to link all the circumstances in a single chain to establish the inescapable conclusion of the guilt of the accused.

Criminal Appeal allowed. (E-3) (Para 18, 22, 23, 28)

Case Law/Judgements relied upon:-

1. Murlidhar Vs St. of Raj. 2005 LawSuit (SC) 884.

2. C. Chenga Reddy & ors. Vs St. of A.P., (1996) 10 SCC 193

3. Shivu & anr. Vs Registrar General, High Court of Kar. & anr., (2007) 4 SCC 713

4. Padala Veera Reddy Vs St. of A.P. & ors., 1989 Supp. (2) SCC 706

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgement and order dated 23.01.2013 passed by Additional Sessions Judge, Court No.1 in Session Trial No.102 of 2010 (State Vs. Jagdish and others), arising out of Case Crime No.1734 of 2009, under Section 302, 201, 120B IPC, Police Station- Tirva, District- Kannauj, whereby the appellants were convicted and sentenced under Section 302 IPC for life imprisonment along with fine of Rs.5,000/- , under Section 120B IPC for 10 years imprisonment along with fine of Rs.2000/- and under Section 201 IPC for 7 years simple imprisonment along with fine of Rs. 2000/-.

2. The brief facts of the case as culled out from the record are that written report was submitted to Police Station-Tirva, District- Kannauj by informant Ram Kumar on 17.11.2009 with the averments that his brother Ram Bahadur aged about 40 years was missing since 15.11.2009. His missing report was submitted at police station on 17.11.2009. While searching, his brother-in-law Shri Ganga Ram and Feran Singh, who used to reside in the vicinity, told him that they had seen Ram Bahadar with Jagdish son of Rameshwar, Prem Chandra son of Jagdish, Raja Ram and Sarvesh on 15.11.2009, who had taken Ram Bahadur from his house. His brother Ram Bahadur and wife of Jagdish namely Desh Rani were having illicit relationship. On the basis

of suspicion, the informant Ram Kumar went to the house of Jagdish along with Om Pratap, Dayanand and Babu Ram etc. In the courtyard of the house of Jagdish, they saw some digging earth. They dug the earth on that point at 3:00 pm and the body of deceased Ram Bahadur was recovered from there covered in a jute bag. The body was identified by all the people present there. It is further stated in the report that Jagdish, Prem Chandra, Raja Ram, Sarvesh, Desh Rani and Priyanka had committed the murder of Ram Bahadur and had hidden the dead body under the ground.

3. On the basis of aforesaid written report a Case Crime No.1734 of 2009 was registered at police station on 17.11.2009 u/s 302, 201, 120B IPC against aforesaid accused persons.

4. The investigation was taken up by SHO Shri Karan Singh, who visited the spot and prepared the site-plan, jute bag covering the body, was taken into custody for which recovery memo was prepared. Blood stained axe and stick was recovered on the pointing out of accused Jagdish from the heap of straw from his house. Inquest report was prepared and the dead body was sent for post mortem. Doctor conducted the post mortem on the body of the deceased and prepared post mortem report. The statements of witnesses were recorded by the investigating officer. After completion of investigation, charge sheet was submitted by I.O. against Jagdish, Prem Chandra, Desh Rani, Priyanka and Raja Ram u/s 302, 201 and 120B IPC. Magistrate took the cognizance and committed it to the Court of Sessions because the case was triable exclusively by Court of Sessions.

5. Learned trial court framed charges against all the accused persons u/s 302, 201 and 120B IPC. Accused persons denied the charges and claimed to be tried.

6. The prosecution so as to bring home the charges, framed against the accused, examined the following witnesses:

1.	Ram Kumar	PW1
2.	Ganga Ram	PW2
3.	Dr. Devendra Singh Chauhan	PW3
4.	Maheshwar Dayal	PW4
5.	Karan Singh	PW5
6.	Tribhuvan Singh	PW6

7. Following documentary evidence was filed by prosecution, which was proved by leading evidence:

1.	FIR	Ex.ka5
2.	Written Report	Ex.ka1
3.	Application	Ex.ka3
4.	Recovery memo of Bora	Ex.ka6
5.	Recovery memo of blood stained Axe & Stick	Ex.ka
6.	P.M. Report	Ex.ka4
7.	Vidhi Vigyan Pryogshala Report	Ex.ka10
8.	Panchayatnama	Ex.ka2
9.	Charge sheet	Ex.ka9
9.	Site Plan with index	Ex.ka8
10.	Site Plan with index	Ex.ka5

8. After completion of prosecution evidence, statements of accused u/s 313 of

Cr.P.C. were recorded, in which they told that false evidence has led against them. Accused persons produced DW1 Vinod Kumar and DW2 Siya Ram in their defense. After hearing the argument of both the parties, learned trial court convicted only appellant accused Jagdish, Prem Chandra and Desh Rani u/s 302, 201, 120B of IPC and awarded sentence accordingly. Rest of accused persons were acquitted by the trial court. Hence, this appeal by the appellants.

9. Heard Shri J.N. Singh, learned Senior Advocate and Shri Ravindra Balkrishna Kanhere, learned counsel for the appellants and Shri N.K. Srivastava, learned AGA appearing on behalf of the State.

10. Learned counsel for the appellants submitted that appellants have been falsely implicated in this case and learned trial court has not made correct appreciation of evidence and on the basis of presumption convicted the appellants, which is contrary to the law. It is further submitted that the alleged incident is said to have taken place as per prosecution case on 15.11.2009, but the missing report was lodged after two days i.e. 17.11.2009 by the informant. But no explanation for delay was mentioned. It is next submitted that mainly this case is based on the last seen. As per prosecution story, Ganga Ram and Feran Singh had seen the deceased in the company of accused persons, namely, Sarvesh, Rajaram, Prem Chandra and Jagdish on 15.11.2009 but this fact is not disclosed by Ganga Ram and Feran Singh to the informant, whose deceased brother was missing while they reside in the vicinity of the house of the informant.

11. Learned counsel for the appellants vehemently submitted that the recovery of dead body of the deceased is said to be made from the house of the accused Jagdish. Another appellant Desh Rani is wife of Jagdish and Prem Chandra is son of Jagdish. Admittedly, at the time of alleged recovery of dead body, the house of the appellants was lying vacant. It is not told by any prosecution witness as to how they did get access in the house of the appellants. In fact, the dead body was recovered somewhere else but it is shown from the house. There is no independent witness of recovery of the dead body. There is no incriminating evidence against them. There is no eye-witness of this case and this case is based purely on circumstantial evidence, but the chain of circumstances is not complete. There was no motive with the accused to commit the murder of the deceased and if somebody will do so why he will bury the dead body in his own courtyard. The house of the appellants said to be visited by PW1, brother of the deceased and other villagers on the basis of suspicion and they suspected the place by seeing some disturbed earth. This story does not inspire confidence and the villagers in whose presence the place was dug out were not produced as witnesses, who were the best witness to prove the factum of recovery. Hence, the appellants could not get opportunity to cross-examine them. Hence, the story of prosecution with regard to the recovery of dead body from the house of the appellants is concocted.

12. Learned counsel for the appellants also submitted that according to the prosecution case, the weapons i.e. stick and axe, by which the offence was committed, were recovered from the house of the appellants at the instance of appellants Jagdish and Prem Chandra but there is no independent witness of this recovery.

13. Lastly, the submission made by learned counsel for the appellants is that learned trial court has taken the help of

Section 106 of Indian Evidence Act for convicting the appellants but the prosecution has not discharged its burden to prove the case first. Absolute burden cannot be put on the shoulder of accused for proving his innocence. Hence, learned trial court has convicted the appellants on the basis of presumptions and without completion of chain of circumstances, which is bad in the eye of law and liable to be set aside.

14. Learned counsel for the appellants placed reliance on the judgement of Apex Court in **Joydeb Patra and others Vs. State of West Bengal (2014) 12 Supreme Court Cases 444** and **Murlidhar Vs. State of Rajasthan 2005 LawSuit (SC) 884.**

15. Learned AGA opposed the contentions made by the learned counsel for the appellants and submitted that PW2 Ganga Ram has seen the deceased in the company of accused persons and after that he was not seen alive in the company of anybody else. PW2 Ganga Ram and Feran Singh had seen the deceased with them last time. It is not necessary for prosecution to produce all the witnesses for the same fact. It is further submitted that the deceased was having illicit relations with the wife of appellant- Jagdish, who is co-accused, namely, Desh Rani. Hence, with this motive in mind, the offence was committed. Moreover, the dead body of the deceased was recovered from the courtyard of the house of the appellants, hence, the burden of proof was on the appellants to prove the fact if they had not committed the offence, how the dead body was found buried in their courtyard. But they had not proved this fact by any evidence. They have simply stated in their statement u/s 313 Cr.P.C. that at the time of recovery, they were not in the house. This is not sufficient explanation.

16. Lastly, it is submitted by learned AGA that the weapons, stick and axe, were recovered at the instance of appellants, hence, chain of circumstances is complete, which indicated that the offence has been committed by the appellants only and learned trial court has not committed any error in convicting the appellants. There is no illegality or infirmity in the impugned judgement, which calls for any interference by this Court.

17. Admittedly, there is no eye-witness of this case. This case is solely based on circumstantial evidence. Prosecution has set up the last seen theory as the informant Ram Kumar had lodged a report in the police station- Tirva, District-Kannauj on 17.11.2009 stating that he had lodged the missing report in the police station on 17.11.2009. After that his brother Ganga Ram and Feran Singh has told him that on 15.11.2009 at about 9:00 pm they had seen the deceased Ram Bahadur in the company of accused Jagdish, Prem Chandra, Rajaram and Sarvesh, who had taken him from his house. Apart from it, motive is also mentioned in the aforesaid report by stating that his deceased brother Ram Bahadur and wife of Jagdish, namely, Desh Rani were in illicit relationship.

18. First of all, we come to the motive. Prosecution has set up the motive that the co-accused Desh Rani, who is wife of Jagdish, was having illicit relationship with the deceased Ram Bahadur. To prove this fact PW1 Ram Kumar and PW2 Ganga Ram have deposed in their respective statements. PW1 Ram Kumar has deposed in his testimony that deceased Ram Bahadur and Desh Rani were having illicit relationship since last 4-5 years but further he says that this fact was not in his knowledge and later on he admitted that

this is true that he was giving this statement on telling by others. It means he was not having personal knowledge that accused Desh Rani and deceased Ram Bahadur were in illicit relationship. PW2 Ganga Ram has stated in his examination-in-chief that accused persons murdered Ram Bahadur because he was having illicit relations with Desh Rani but in his cross-examination he has specifically deposed that Ram Bahadur used to go to the house of the Desh Rani but he has no personal knowledge that he was having illicit relations with Desh Rani. No other witness of fact is produced by the prosecution. Hence, only two witnesses PW1 and PW2 are produced and both have stated categorically that they were not having personal knowledge with regard to the fact that Desh Rani and deceased were having any illicit relations. Hence, the motive, as set up by the prosecution, fails and when the motive is failed then it creates a great dent in the prosecution case and doubt emerges as to why the person would commit offence like murder without any motive and thus, the averment made in the report to the police regarding motive, is not proved by the prosecution and first of all chain of circumstances breaks here.

19. Now comes the theory of "last seen", according to the prosecution case, two persons, namely, Ganga Ram and Feran Singh had seen last time the deceased in the company of accused persons on 15.11.2009 at 9:00 pm. Feran Singh is not examined by the prosecution. Only Ganga Ram is examined as PW2. He has supported the fact of last seen in his examination-in-chief. But in his cross-examination, he has admitted the fact that from 15.11.2019 to 18.11.2009, he continuously lived in the village but went no where in search of deceased and not even he had gone to his house. While in his cross-examination, PW1 Ram Kumar has admitted that PW2 Ganga Ram was his real brother-in-law and his house is just 10 metres away from the house of the Ganga Ram. It is further stated by PW1 Ram Kumar that in the night of 15.11.2009 itself this matter was in the air that Ram Bahadur is missing and on 16.11.2009 (next day) this news was in the air in the entire village. In such circumstances and situation, the fact of last seen is not told by PW2 Ganga Ram to informant or anybody else in the entire village, while he was real brother-in-law of the informant and everybody in the village was knowing that deceased was missing. Hence, the theory of last seen cannot be believed. This theory of last seen does not inspire confidence because it is not worth believing that a real brother-in-law will not tell the fact of last seen to the informant when he resides just 10 metres away from the house of the informant and the search of missing Ram Bahadur was going on. In this way, the chain of circumstances breaks here also.

20. Learned trial court has taken the recourse of Section 106 of Indian Evidence Act and held that since the dead body was recovered from the court yard of the appellants, the burden shifts on them to prove the factum of murder but this is not the legal position.

21. Section 106 of Indian Evidence Act read as under:

106. Burden of proving fact especially within knowledge--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(a) When a person does an act with some intention other than that which the

character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

22. The aforesaid provision of Section 106 of Indian Evidence Act does not absolve the prosecution from his burden to prove its case. The burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution. It is only when this burden is discharged, the accused could be called on to prove any fact within his special knowledge u/s 106 Indian Evidence Act to establish that he was not guilty of the offence. In the case in hand, it is admitted fact by the prosecution that when the dead body of the deceased was dug out and recovered from the courtyard of appellants, appellants were not in the house. Although, the PW1 has stated in his second statement when he was cross-examined by co-accused Sarvesh that at the time of recovery of dead body, accused Desh Rani and Priyanka were present there. But this statement was not given by him in his first statement when he was cross-examined by other co-accused persons and this fact cannot be believed that also due to reason that if they both were present there, they must have been arrested or apprehended. But they were not arrested from their house. This fact supported by the PW2. It is not disputed that the house of appellants was vacant when the dead body was recovered. Hence, the prosecution could not discharge its burden as to how the dead body of the deceased was buried in the house of the appellants and when the house of appellants was vacant, they could not be called on to prove their innocence or to establish any fact, which could have been in their special knowledge. Hence, Section 106 of Indian Evidence Act has no applicability in this case.

23. The recovery of weapons, i.e., stick and axe is said to be made at the instance of appellants Jagdish and Prem Chandra. It is a case of prosecution that the stick was recovered on the pointing out of appellant Jagdish and axe was recovered at the pointing out of appellant Prem Chandra from the heap of straw in their house. Recovery memo of aforesaid weapons is Ext. Ka7, which has no independent witness. The recovery officer has stated in his statement during trial that no independent person was ready to become the witness of recovery. If this statement is believed even then the police personnel who were the witnesses of recovery, were also not examined during trial. Hence, the aforesaid recovery is very much doubted.

24. Learned trial court has convicted the appellants on the basis of circumstantial evidence.

25. There is no doubt that conviction can be based solely on the circumstantial evidence. But it should be tested on the touchstone of the law relating to circumstantial evidence. Apex Court in **C. Chenga Reddy & Ors. vs. State of A.P., (1996) 10 SCC 193**, para (21) held as under :-

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of [pic]evidence. Further, the proved circumstances must be consistent only with the hypothesis of the

guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

26. After referring to a catena of cases based on circumstantial evidence in **Shivu and Anr. vs. Registrar General, High Court of Karnataka & Anr., (2007) 4 SCC 713**, Apex Court held as under:-

*"12. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. {**See Hukam Singh v. State of Rajasthan, (1977) 2 SCC 99; Eradu v. State of Hyderabad(AIR 1956 SC 316), Earabhadrappa v. State of Karnataka(1983) 2 SCC 330, State of U.P. v. Sukhbasi(1985 (Supp.) SCC 79), Balwinder Singh v. State of Punjab(1987) 1 SCC 16 and Ashok Kumar Chatterjee [pic]v. State of M.P (1989 Supp. (1) SCC 560)** The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.In Bhagat Ram v. State of Punjab, AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt."*

27. In **Padala Veera Reddy v. State of A.P. and Ors., 1989 Supp. (2) SCC 706**, it was laid down that in a case of circumstantial evidence such evidence must satisfy the following test:-

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

*(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. **(See Gambhir v. State of Maharashtra (1982) 2 SCC 351)."***

28. In our case, prosecution has failed to prove the motive. The factum of last seen is also not proved by any cogent evidence. Recovery of weapons alleged to be used in commission of crime, is also not proved. Hence, the chain of circumstances could not be formed and so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellants and none else. Hence, learned trial court has committed a grave error in convicting the appellants on the basis of circumstantial evidence.

29. As far as the concept of Section 106 of Indian Evidence Act is concerned, that is misread by the learned trial Judge because when the offence like murder is committed in secrecy inside the house, the initial burden to establish the case would

undoubtedly be upon the prosecution. In view of Section 106 Indian Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quite and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty challenge on the accused to offer. Then the initial burden of proving that, as on the date of the alleged incident, the accused was present in the house of lastly seen with the deceased or that he was lastly in the company of the deceased at the time of the incident would be primarily upon the prosecution but in our case, prosecution has failed to prove the factum of last seen and as held above prosecution could not also prove the fact that after the deceased went missing, the appellants were in their house because it is proved on record that the house of appellants was vacant. Otherwise it was not possible for informant and other villagers to dig out the courtyard of the appellants and it is also not prosecution case that appellants were present in their house.

30. In view of aforesaid discussion, we are of the considered view that in this case there is no applicability of Section 106 Indian Evidence Act and the chain of circumstances is not so complete as to indicate that offence was committed by the appellants only and none else. Chain of circumstances is broken on several stages with regard to motive, factum of last seen and recovery of alleged weapons.

31. Hence, learned trial Judge has committed error in convicting and sentencing the appellants for the offences u/s 302, 201, 120B IPC. Hence, we upturn the impugned judgement and appeal is liable to be allowed.

32. Appeal is **allowed** accordingly.

33. Conviction and sentence of appellants Jagdish, Prem Chandra and Desh Rani is set aside and they are acquitted of all the charges framed against them. Jagdish is in jail. He be set free forthwith if not wanted in any other case. Appellants- Prem Chandra and Desh Rani are on bail. Their personal bonds are cancelled and sureties are discharged.

33. Record and proceedings be sent back to the court below.

(2022) 12 ILRA 997
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2022

BEFORE

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

Criminal Appeal No. 1376 of 2022

Dinesh ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Awadh Narain Rai

Counsel for the Respondents:
G.A.

Criminal Law- Code of Criminal Procedure, 1973- Section 372-Appeal against acquittal - It is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court- The appellate Court is

not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper- Where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

The judgement of acquittal should not be disturbed by the appellate court merely because two views are possible and moreover the presumption of innocence stands reinforced by the order of acquittal hence interference is required only where the judgement of the trial court is wholly perverse and illegal.

Criminal Appeal dismissed as withdrawn.
(E-3) (Para 8, 13,17)

Case Law/ Judgements relied upon:-

1. M.S. Narayana Menon @ Mani Vs St. of Ker. & anr, (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Kar.,(2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr.,(2007) 3 S.C.C. 75

4. St of U.P Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of MP, 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors., (2009) SCC 749

7. Mookkiah & anr. Vs St. Rep. by the Inspr. of Police, T.N, AIR 2013 SC 321

8. St. of Kar. Vs Hemareddy, AIR 1981, SC 1417

9. Shivasharanappa & ors. Vs St. of Kar., JT 2013 (7) SC 66

10. St. of Punj. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Kar., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750

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

1. This appeal has been preferred by the informant against respondent No.2 against his acquittal in S.T. No.45 of 2015 (State Vs. Nilendra @ Mithun) arising out of Case Crime No.108 of 2013, under Sections 363, 366, 376 IPC and 3/4 POCSO Act, Police Station- Dholna, District- Kasganj. The aforesaid judgement and order was passed by trial court on 03.09.2022, by which the respondent was acquitted of all charges.

2. Heard Shri Awadh Narian Rai, learned counsel for the appellant and Shri Patanjali Mishra, learned AGA.

3. The allegations are made against the respondent No.2 by appellant/informant that on 02.06.2013 his daughter, aged about 15 years, was going to attend the marriage of her friend at about 12:00 noon. Respondent No.2 along with others enticed away his daughter. This occurrence was seen by the son of the informant, who was going after them by cycle.

4. The aforesaid FIR was culminated into charge sheet and prosecution examined 9 witnesses in its support and filed documentary evidence also.

5. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

6. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of

acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another, (2006) 6 S.C.C. 39***, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

7. Further, in the case of ***Chandrappa vs. State of Karnataka***, reported in (2007) 4 S.C.C. 415, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

8. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

9. Even in the case of ***State of Goa vs. Sanjay Thakran and another***, reported in *(2007) 3 S.C.C. 75*, the Apex Court has reiterated the powers of the High Court in

such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

10. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others***, *2007 A.I.R. S.C.W. 5553* and in ***Girja Prasad (Dead) by L.R.s vs. State of MP***, *2007 A.I.R. S.C.W. 5589*. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

11. In the case of ***Luna Ram vs. Bhupat Singh and others***, reported in *(2009) SCC 749*, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

12. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in *AIR 2013 SC 321*, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has

repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

13. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy***, *AIR 1981, SC 1417*, wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

14. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka***, *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

15. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma,*** (2013) 14 SCC 153, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was

found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

16. The Apex Court recently in ***Jayaswamy vs. State of Karnataka***, *(2018) 7 SCC 219,* has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

17. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat***, *(2020) 14 SC 750*, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in

Samsul Haque v. State of Assam, (2019) 18 SCC 161 held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

18. The prosecutrix was examined as PW1, who did not support the prosecution case and deposed that she was in love with respondent No.2. Her parents wanted her to marry with an old man, hence, she eloped with respondent No.2 out of her own volition. They both performed marriage in Ghaziabad and after that she came to the police herself. It is also deposed by the prosecutrix that she was never enticed by respondent No.2 and rape was not committed with her against her will. This witness was declared hostile.

19. Apart from the prosecutrix, the prosecution examined three more witnesses of fact, namely, PW2, who is the informant, PW3, who is brother of the prosecutrix and PW4, who is mother of the prosecutrix. As per prosecution story, no one is eye-witness except PW3.

20. Prosecution examined PW5 Dr. Sandesh Arekh, who had medically examined the prosecutrix. He has opined that no opinion can be given with regard to the fact of rape. Learned trial court after examining the evidence on record and hearing both the sides, found that prosecution could not prove the case against respondent No.2 beyond reasonable doubt and respondent No.2 was not guilty. Consequently he was acquitted of all the charges levelled against him.

21. We are also of the opinion that this appeal is nothing but an abuse of the process of law. Hence, we permit the learned counsel for the appellant to withdraw this appeal.

22. Accordingly, the appeal is dismissed as withdrawn.

(2022) 12 ILRA 1003
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2022

BEFORE

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

Criminal Appeal No. 2218 of 2018

Smt. Kiran & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Abhay Raj Singh, Sri Vikas Rana, Sri Vishal Mohan Gupta

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1972- Section 154- Evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

Settled law that the part of the testimony of a hostile witness which is relevant and admissible can be used.

Indian Evidence Act, 1972 – Section 32- In case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording

conviction. In such an eventuality no corroboration is required. In order to pass the test 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-The hostility of the witnesses of fact cannot demolish the value and reliability of the dying-declaration of the deceased which has been proved by the prosecution in accordance with law and is a truthful version of the incident that occurred and the circumstances leading to her death.

Dying declaration can be solely relied upon for convicting the accused, without seeking further corroboration, where the dying declaration is found to be truthful and legally admissible.

Indian Evidence Act, 1972 – Section 32-Dying-declaration no where says that appellant Smt.Kiran had any role in setting the deceased ablazed- Conviction and sentence against appellant Smt. Kiran under Sections 304/34 and 120-B I.P.C. is hereby set aside and she is acquitted of all the charges framed against her.

Where no part is assigned to the accused in the dying declaration, then conviction of such accused is illegal and unsustainable.

Doctrine of Proportionality- Keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. 'Reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'.

As the judicial trend in our country is reformative and not retributive hence the period of incarceration undergone by the accused would be a relevant factor in imposing the punishment.

Criminal Appeal partly allowed. (E-3)
(Para 16, 17, 18, 20, 22, 25, 27, 28, 29)

Case law/ Judgements relied upon:-

1. Jail Appeal No.315 of 2013 (Prakash Vs St. of U.P.).

2. Koli Lakhmanbhai Chandabhai Vs St. of Guj. [1999 (8) SCC 624]

3. Ramesh Harijan Vs St. of U.P. [2012 (5) SCC 777]

4. St. of U.P. Vs Ramesh Prasad Misra & anr.,1996 AIR (SC) 2766

5. Lakhan Vs St. of M.P ,(2010) 8 Supreme Court Cases 514

6. Krishan Vs St. of Har. (2013) 3 Supreme Court Cases 280

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

8. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

(Delivered by The Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the appellants and learned A.G.A. for the State and perused the record.

2. The instant criminal appeal has been filed with the prayer to set aside/quash the impugned judgment and order dated 5.4.2018 passed by the learned Additional Sessions Judge, Court No.3, Shahjahanpur in Sessions Trial No.338 of 2014 (State v. Anil & Anr.) (arising out of Crime No.175 of 2014, under Sections 304, 452, 506, 120-B IPC, Police Station-Sadar Bazar, District-Shahjahanpur and to acquit the appellants.

3. Brief facts as culled out from the record are that the informant-Kandhai submitted a written report to the Superintendent of Police-Shahjahanpur, on the basis of which, F.I.R. was registered at Police Station-Sadar Bazar, District-Shahjahanpur. It is stated in the aforesaid report that daughter of the informant namely Rajbeti used to reside in a separate house with her husband. On 25.11.2013 at about 10:00 p.m., Govind, Suraj and Anil all real brothers entered the house of her daughter and set her ablaze by pouring kerosene oil. It is also stated in the report that the son of informant Rajesh and Budhpal s/o Amarpal and informant himself saw them coming out from the house and running. Smt. Kiran who is daughter-in-law of his daughter was having illicit relations with the aforesaid Suraj to which the informant's daughter Rajbeti objected several times. Rajbeti was admitted to hospital on 25.11.2013 in burning condition where she died on 01.12.2013 during the course of treatment. On the basis of the aforesaid report, the Case Crime No.175 of 2014 was registered at police station. The investigation was taken up by the Investigating Officer during which he visited the spot before the site plan. The dying-declaration of the injured/deceased Rajbeti was recorded by the Additional District Magistrate in hospital on 27.11.2013. The statements of witnesses were recorded by the the Investigation Officer under Section 313 Cr.P.C.. After the death of the deceased, inquest proceedings were conducted and inquest report was prepared. The concerned doctor conducted the post-mortem on the dead-body and prepared the post-mortem report. After completion of investigation, the charge-sheet was submitted by the Investigating Officer only against two accused persons Anil and Smt. Kiran and other named accused Suraj and Jagdish were not charge-sheeted because no evidence was found against them. The case being triable exclusively by the court of sessions was committed by the Magistrate to the sessions court.

4. Learned trial court framed charges against the accused Anil and Smt. Kiran under Sections 452, 304 read with Section 34, 120-B and 506 I.P.C. The accused persons denied the charges and came to be tried.

The prosecution examined the following witnesses:-

1.	Kandhai (informant)	PW-1
2.	Rajesh	PW-2
3.	Budh Pal	PW-3
4.	Dr. K.P. Singh	PW-4
5.	Laxmi Shankar Singh	PW-5

5. To bring on the charges, apart from the aforesaid oral testimony, the prosecution filed the following documentary evidence also which was proved by leading the evidence:-

1.	F.I.R.	Ex. Ka.4
2.	Written Report	Ex. Ka.1
3.	Dying- Declaration	Ex. Ka.3
4.	Death Memo	Ex. Ka.13
5.	Post-mortem report	Ex.Ka.2
6.	Panchayatnama	Ex.Ka.7
7.	Charge-sheet	Ex. Ka.14
8.	Site Plan	Ex.Ka.6

6. After completion of prosecution evidence, the statement of accused persons

were recorded under Section 313 Cr.P.C. No evidence was adduced by the accused persons in their defence.

7. After hearing both the parties learned trial court convicted Smt. Kiran for the offence under Section 304/34 IPC and awarded sentence for ten years with fine, under Section 120-B IPC and awarded 10 years with fine. The trial court convicted accused Anil under Section 304/34 IPC for life imprisonment with fine and Section 120-B for ten years with fine and under Section 452 I.P.C. for 5 years imprisonment with fine. Both the accused persons were acquitted for the offence under Section 506 IPC and Smt. Kiran was also acquitted for the offence under Section 452 IPC.

8. Learned counsel for the appellants submitted that this is a case of no evidence as far as appellant-Smt. Kiran is concerned. It is submitted that in this case prosecution has produced three witnesses of fact namely PW-1, PW-2 and PW-3. Among them, PW-1 is father of the deceased who is informant also. In his testimony, he has not supported the prosecution version and has been declared hostile. Even in cross-examination by the State, no fact has emerged which could go against the appellant. In the same way, PW-3 and PW-4 have also not supported the prosecution case and have turned hostile hence there is no witness of fact who had supported the prosecution case. It is next submitted that in dying-declaration also the deceased has not stated any role of appellant Smt Kiran and even in the dying-declaration, it is stated that at the time of occurrence appellant Kiran was sleeping in separate room and she did not come out from her room.

9. Learned counsel for the appellants also made submission that the trial court has convicted both the appellants only on the basis of dying-declaration which cannot be said to be reliable. It is also submitted that no witness of fact has supported the prosecution case hence dying-declaration is not corroborated by any evidence hence it is not safe to rely on such dying-declaration which is not corroborated at all. Moreover, the deceased has implicated two brothers of appellant Anil namely Suraj and Jagdish but no evidence was found against them during investigation by the Investigating Officer and they were not charge-sheeted. Even the named accused Suraj and Jagdish were minor at the time of the said occurrence hence the dying-declaration is wholly unreliable, concocted and exaggerated version as given by the deceased to implicate all three brothers falsely. Learned counsel also submitted that in dying-declaration, it is stated that the deceased had taken her daughter-in-law to her house and Suraj and Jagdish and Anil came behind them secretly and committed the crime in the night. This story cannot be believed. This narration is given only to implicate all the three brothers which was not found correct even during investigation. Hence, learned trial court has committed grave error in relying on such type of dying-declaration. Hence appellants are liable to be acquitted. Learned counsel for the appellants in support of his submission has also placed reliance upon the judgments of this Court passed in ***Criminal Appeal No.2878 of 2013 (Babu v. State of U.P.) and in Jail Appeal No.315 of 2013 (Prakash v. State of U.P.).***

10. Learned A.G.A. opposed the submissions made by learned counsel for the appellants and contended that witness of fact have turned hostile because they entered into connivance with the appellants at the time of their deposition in learned

trial court but it does not create any doubt on prosecution case because the deceased was the best witness of the occurrence for which she had given dying-declaration and dying-declaration was recorded by the Additional District Magistrate in hospital. Learned A.G.A. further submitted that A.D.M. Laxmi Shankar Singh is examined as PW-5 who is absolutely an independent witness. He had proved dying-declaration in his testimony and stated that he had recorded it by going in the I.C.U. Ward of the hospital where the deceased was under treatment. It is also stated by the PW-5 that before and after the dying-declaration, the doctor had appended the certificate of fitness and the injured/deceased was in a fit mental state to give the dying-declaration and during recording of dying-declaration also she remained in a fit state of mind hence dying-declaration is reliable and learned trial court has not committed any error in acting upon the dying-declaration. Hence, there is no illegality or infirmity in the impugned judgment which calls for interference by this Court.

11. The entire evidence goes to show that the three witnesses of fact are produced by prosecution namely PW-1 to 3 but nobody has supported the prosecution case. All the aforesaid witnesses have turned hostile but the testimony of hostile witnesses cannot be brushed aside. The testimony of the hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

12. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat [1999 (8) SCC 624]***, has held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

13. In ***Ramesh Harijan vs. State of U.P. [2012 (5) SCC 777],*** the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

14. In ***State of U.P. vs. Ramesh Prasad Misra and another [1996 AIR (Supreme Court) 2766]***, the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

15. Learned trial court has relied on the dying-declaration made by the deceased and entire impugned judgment is based on the evidence which is the dying-

declaration. Dying-declaration is very important piece of evidence.

16. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh [(2010) 8 Supreme Court Cases 514],*** in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

17. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

18. In the wake of aforesaid judgments of ***Lakhan*** (supra), dying declaraion cannot be disbelived, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana [(2013) 3 Supreme Court Cases 280]*** that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test 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 circumstance of the death and the assailants of the victim, there is no question of further corroboration.

19. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat, [(2002) 7 SCC***

56], the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

20. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

21. The dying-declaration of injured/deceased was recorded by PW-5 Laxmi Shankar Singh, Additional District Magistrate, Bareilly who has entered the witness box and proved the dying-declaration. PW-5 is an independent witness hence his testimony can be believed. Moreover, PW-5 has deposed that on 27.11.2013, he was posted as Additional City Magistrate-I Bareilly and he recorded the dying-declaration in I.C.U. Ward of the hospital. This witness has also stated that doctor of the hospital appended the certificate of mental fitness of the injured Rajbeti. After recording the dying-declaration, it was read over to the injured who verified it and put her thumb impression. In cross-examination, PW-5 has stated that he had recorded the dying-declaration after being satisfied with regard to the state of mind of the injured with the consent of the doctor who was treating her.

22. In such a situation, the hostility of the witnesses of fact cannot demolish the value and reliability of the dying-declaration of the deceased which has been proved by the prosecution in accordance with law and is a truthful version of the incident that occurred and the circumstances leading to her death but we find that dying-declaration no where says that appellant Smt.Kiran had any role in setting the deceased ablazed rather it is stated by injured/deceased that as soon as she slept at about 10:00 p.m., Anil, Suraj and Govind all sons of Jagdish R/o Mohanpura entered her house and ignited fire by match-stick after pouring the kerosene oil on her. It is specifically stated that the daughter-in-law (appellant Smt. Kiran) did not come out of her room even on calling. Further, it is made clear in dying-declaration that aforesaid all the three ran away with daughter-in-law after turning her hence deceased nowhere says in the dying-declaration that appellant Smt. Kiran was having any role in either pouring kerosene oil on her or igniting of fire rather it was made clear by the deceased that at the time of the said occurrence, appellant Smt. Kiran was sleeping in her room and she did not come out at the time of occurrence hence we fail to understand how the learned trial court has convicted the appellant Smt. Kiran only on the basis of fact/evidence that she ran away from the house after the occurrence. If somebody

runs away from the house, it does not mean that he has committed offence specially with the deceased even if the dying-declaration does not assign any role to him. Hence in our opinion, the appellant Smt. Kiran has been wrongly convicted and sentenced by trial court and no charge has been proved against her.

23. As far as role of other appellant Anil is concerned, there is absolutely clear allegation made in dying-declaration. The role of pouring the kerosene oil on the deceased and ignition of fire by the match-stick is assigned to the appellant Anil as discussed above. The dying-declaration is found wholly reliable. As far as role of appellant Anil is concerned, he has been convicted by the learned trial court and awarded sentence for life imprisonment under Section 304 I.P.C. Which is too harsh and severe. Sentence should be awarded in proportion to the crime.

24. In **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

25. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

26. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441],*** and ***Raj Bala vs State of Haryana, [(2016) 1 SCC 463]*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of

consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

27. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

28. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

29. Learned A.G.A. admitted the fact that the appellant is in jail for more than 8 and a half years without remission. Hence, we modify and reduce the sentence awarded to the appellant-Anil under Section 304 IPC from life imprisonment to the period already undergone. Sentence of fine and default shall remain intact. Sentence under Section 120-B IPC is also reduced to the period already undergone. Sentence under Section 452 IPC has already been undergone by the appellant Anil.

30. Conviction and sentence against appellant Smt. Kiran under Sections 304/34 and 120-B I.P.C. is hereby set aside and she is acquitted of all the charges framed against her.

31. The appeal is, accordingly, ***partly allowed.***

32. Appellant-Anil be set free forthwith if he is not wanted in any other case. Personal bond of appellant Smt. Kiran is cancelled and sureties are discharged.

33. Lower court record be transmitted back to the court concerned.

(2022) 12 ILRA 1012
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2022

BEFORE

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

Criminal Appeal No. 2964 of 2014
with
Criminal Appeal No. 2965 of 2014

Pawan ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sanjay Singh, Sri Amrendra Nath Rai, Sri Manoj Kumar Srivastava, Sri Pradeep Saxena, Sri Sandeep Kumar Rai, Sri Shams Uz Zaman

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1972- Section 154- Evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

Settled law that the part of the testimony of a hostile witness which is relevant and admissible can be used.

Indian Evidence Act, 1972 – Section 32- Dying Declaration- In case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In order to pass the test 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-The hostility of the witnesses of fact cannot demolish the value and reliability of the dying-declaration of the deceased which has been proved by the prosecution in accordance with law and is a truthful version of the incident that occurred and the circumstances leading to her death. It is admitted fact that deceased survive for nine days after the date of occurrence, therefore, truthfulness of the dying declaration can further be evaluated from the fact that she was in fit condition to make the statement at the relevant time and in dying declaration she had not unnecessarily involved other family members of accused-appellant.

Notwithstanding the hostility of the prosecution witnesses dying declaration can be solely relied upon for convicting the accused, without seeking further corroboration, where the dying declaration is found to be truthful, legally admissible and inspires the confidence of the Court.

Doctrine of Proportionality- Keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. 'Reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'.

As the judicial trend in our country is reformative and not retributive hence the period of incarceration undergone by the accused would be a relevant factor in imposing the punishment.

Criminal Appeal partly allowed. (E-3)
(Para 18, 21, 23, 25, 26, 27, 28, 34)

Case Law/ Judgements relied upon:-

1. Koli Lakhmanbhai Chandabhai Vs St. of Guj. [1999 (8) SCC 624]

2. Ramesh Harijan Vs St. of U.P. [2012 (5) SCC 777]

3. St. of U.P. Vs Ramesh Prasad Misra & anr.,1996 AIR (SC) 2766

4. Lakhan Vs St. of M.P ,(2010) 8 Supreme Court Cases 514

5. Krishan Vs St. of Har. (2013) 3 Supreme Court Cases 280

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

7. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

8. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

9. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

10. Kashmira Devi Vs St. of UK & ors, 2020 0 Supreme (SC) 81

11. Anil Kumar Vs St. of U.P., 2022 0 Supreme(All) 976.

(Delivered by Hon'ble Ajai Tyagi, J.)

1. The appeal has been preferred by the appellant-Pawan against the judgment and order dated 15.07.2014, passed by Additional District Judge, Court No.12, Bareilly in Session Trial No. 756 of 2012, arising out of Case Crime No. 537 of 2012, under Sections 498-A, 304-B, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Baradari, District Bareilly whereby the appellant-Pawan is convicted and sentenced for the offence under Sections 304-B I.P.C. for life imprisonment.

2. The second appeal has been preferred by the appellants namely, Smt. Meera Devi, Kapil and Km. Mona Mala against the judgement and order dated 15.07.2014 passed by Additional District Judge, Court No.12, Bareilly in Session Trial No.932 of 2013, arising out of Case Crime No.537 of 2012, under Sections 498-A, 304-B, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Baradari, District Bareilly, whereby the accused-appellants, Smt. Meera Devi, Kapil and Km. Mona Mala are convicted and sentenced for the offence of under Section 498-A I.P.C. for two years imprisonment and fine of Rs.1,000/- each.

3. Brief facts of the case giving rise to this appeal are that a written report was sent by informant-Rajkumari (mother of the deceased) to D.I.G., Bareilly stating the fact that her daughter aged about 22 years was married to accused-appellant, Pawan before six months of the occurrence and her daughter was subjected to cruelty for demand of additional dowry just after the marriage. At last, on 06.04.2012, deceased was set ablezed by pouring the kerosene oil on her in her matrimonial home. The husband, mother-in-law, brother-in-law (Devar) and sister-in-law (Nanad) of the deceased were involved in the aforesaid crime. It is also stated in the written report that her complaint in this regard is not being entertained by the concerned police station.

4. On the basis of aforesaid written report, a case was registered at police station Baradari, District Bareilly as Case Crime No.537 of 2012, under Section 307, 498-A, 323 I.P.C. and Section 3/4 of D.P. Act. During the treatment, victim died after nine days of the occurrence. The investigation was taken up by the Investigating Officer. After the death of the deceased, the case was converted into

Section 304-B I.P.C. along with other offences.

5. During the course of investigation, Investigating Officer has recorded the statement of witnesses under Section 161 Cr.P.C. After completion of investigation, I.O. submitted the charge sheet against the accused-appellants Pawn, Smt. Meera Devi, Kapil and Km. Mona Mala under Sections 498-A, 304-B, 307, 323 I.P.C. and Section 3/4 of D.P. Act.

6. Learned trial court took the cognizance on charge sheet. The matter being exclusively triable by the court of sessions, which was committed to the court of sessions where learned Trial Judge framed the charges against the accused persons. Accused-appellant denied the charges and claimed to be tried.

7. To bring home the charges, the prosecution examined following witnesses:

1.	Smt. Rajkumari	P.W.-1
2.	Guddu Prasad	P.W.-2
3.	Shiv Charan	P.W.-3
4.	Ramesh Chandra	P.W.-4
5.	Gopal	P.W.-5
6.	Dr. Subhas Chandra Sundar Pal	P.W.-6
7.	Girdhari Lal	P.W.-7
8.	Vijay Yadav	P.W.-8
9.	Sushil Kumar Verma	P.W.-9
10.	Om Prakash Yadav	P.W.-10
11.	Raju Rav	P.W.-11

8. In support of oral evidence, prosecution submitted following documentary evidence, which was proved by leading oral evidence:-

1.	FIR	Ex.ka-4
2.	Written report	Ex.ka-1
3.	Post-mortem report	Ex.ka-3
4.	Panchayatnama	Ex.ka-2
5.	Charge sheet	Ex.ka-14 & 15
6.	Site plan with index	Ex.ka-16

9. After completion of prosecution evidence, the statement of accused was recorded under Section 313 of Criminal Procedure Code (Cr.P.C.) and after completion of prosecution evidence, in which they told that false evidence has been let against them. Accused-appellants have examined two witnesses in defence. After hearing the arguments of both the sides, learned trial court convicted all the accused persons.

10. Heard Mr. Sandeep Kumar Rai, learned counsel for the appellants and learned counsel for the State. Record has been perused.

11. Learned counsel for the accused-appellant has submitted that appellants have been falsely implicated by the informant because there was no demand of additional dowry on the part of the appellant or any of his family members. This is a case of suicide. In fact, deceased was not having any child and remained under continuous depression. On the date of said occurrence, she was committed suicide by pouring kerosene oil on her and herself set ablezed.

12. It is also submitted by learned counsel for the appellants that in First Information Report, the role of setting ablazed is also assigned to Smt. Meera Devi, Kapil and Km. Mona Mala but learned trial court did not find guilty for the offence under Section 304-B I.P.C. and they were convicted only for the offence of Under Section 498-A I.P.C. and Section 4 of Dowry Prohibition Act. It means that F.I.R. was lodged with false exaggerated version. Moreover, accused-appellants Smt. Meera Devi, Kapil, Km. Mona Mala were living separately from the husband of the deceased and they never demanded any additional dowry.

13. It is next submitted that appellant-Pawan solemnized love marriage with the deceased, therefore, there was no question of demanding any additional dowry. F.I.R. is lodged after a delay of five days to pressurise the appellants. All the witnesses have turned hostile and they have not supported the prosecution version. Only on the basis of dying declaration of the deceased, learned trial court had convicted the accused-appellants. This dying declaration is not corroborated by any of the prosecution witness, therefore, no reliance could have been placed on such dying declaration, which is not corroborated and conviction cannot be based solely on the basis of dying declaration. There is no sufficient evidence on record to convict the accused-appellants.

14. Learned counsel for the accused-appellants has relied on the judgment of Hon'ble Apex Court in the case of ***Kashmira Devi Vs. State of Uttarakhand and Others, 2020 0 Supreme (SC) 81*** and the judgment of this Court in the case of ***Anil Kumar Vs. State of U.P., 2022 0 Supreme(All) 976.***

15. Learned A.G.A. has submitted that F.I.R. is not lodged with the delay because report of mother of the deceased was not being entertained by the police concerned, therefore, she made an application to the D.I.G. Bareilly then the case was registered. There is no delay on the part of the informant. It is next submitted that witnesses of fact connived with the appellants, therefore, they did not told the truth and they turned hostile but there is a dying declaration of the deceased on record, in which, she has clearly stated that her husband/accused set her ablazed in the room by pouring kerosene oil and ran away. It is also stated in the dying declaration that other appellants used to demand additional dowry from her, therefore, all the accused-appellants were responsible for death of the deceased.

16. Learned A.G.A. has further submitted that reliance can be placed on dying declaration and it is not necessary that dying declaration must be supported by some other evidence. If dying declaration inspires confidence then it can be acted upon solely. Moreover, accused-appellant Pawan has not given any explanation in his statement recorded under Section 313 Cr.P.C. as to how the death of the deceased had taken place and, therefore, there is no illegality or impropriety in the impugned judgment and order, which calls for any interference by this Court.

17. In alternative, learned counsel for the appellants has submitted that deceased died after nine days of the occurrence because of septicemia, which is evident from the post-mortem report, hence, death of the deceased is septicemial death, which was due to carelessness in the treatment, otherwise, her life could be saved. Therefore, in view of septicemial death,

learned trial court has imposed a very harsh and severe punishment to the appellant-Pawan by sentencing him for life imprisonment under Section 304-B I.P.C., which can be reduced.

18. This is admitted fact that death of the deceased occurred in her matrimonial home due to burning. Post-mortem report shows that she died in hospital due to septicemia. Dr. Subhas Chanda Sundar Pal, P.W.-6 conducting the post-mortem has also corroborated this fact in his testimony that death of the deceased occurred due to septicemia. As far as the hostility is concerned, in our view, the hostility of hostile witnesses should be looked into with great care and caution. The testimony of hostile witnesses cannot be brushed aside. It can be relied to the extent it supports the prosecution case.

19. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat [1999 (8) SCC 624]***, as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

20. In ***Ramesh Harijan vs. State of U.P. [2012 (5) SCC 777]***, the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

21. In ***State of U.P. vs. Ramesh Prasad Misra and another [1996 AIR (Supreme Court) 2766]***, the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

22. Perusal of impugned judgment shows that learned trail court has scrutinised the evidence on record very carefully.

23. As far as the dying declaration is concerned, it is not necessary in all the matters that dying declaration should be corroborated by other evidence. If it is reliable and inspires confidence it can be acted upon solely and conviction can be based only on the basis of dying declaration.

24. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court

has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh [(2010) 8 Supreme Court Cases 514],*** in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

25. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

26. The deceased survived for nine days after the incident took place. It is not the case of prosecution even that victim was not in a fit condition to make the dying declaration, therefore, dying declaration cannot be believed. In the wake of aforesaid judgments of ***Lakhan (supra)***, dying declaraion cannot be disbelived, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana [(2013) 3 Supreme Court Cases 280]*** that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration.

27. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

28. It is admitted fact that deceased survive for nine days after the date of occurrence, therefore, truthfulness of the dying declaration can further be evaluated from the fact that she was in fit condition to make the statement at the relevant time and in dying declaration she had not unnecessarily involved other family members of accused-appellant Pawan by attributing the role of burning to them. She

had only attributed the role of burning to her husband Pawan, in such a situation, hostility of witnesses of fact cannot demolish the value and liability of the dying declaration of the deceased.

29. In view of above discussion, we are of the considered opinion, the prosecution has proved the offence under Section 304-B, 498-A I.P.C. and Section 4 of Dowry Prohibition Act against the accused-appellant Pawan and also has proved the offence under Section 498-A I.P.C. and Section 4 of Dowry Prohibition Act against other accused persons and the learned trial court has rightly convicted them for the aforesaid offences.

30. As far as the quantum of sentence is concerned, learned counsel for the appellants has submitted that appellant-Pawan has been awarded life imprisonment for the offence under Section 304-B I.P.C. which is too harsh and severe. As far as the principle of proper sentencing are concerned, we have gone through theory privileging in India as well as principle of proportionality.

31. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

32. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

33. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was

planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

34. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

35. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

36. Keeping the aforesaid position of law for sentencing, we consider that sentence of life imprisonment for the offence under Section 304-B I.P.C. is not in consonance with the principle of proportionality, therefore, we reduce the sentence of life imprisonment to the sentence for a period of 10 years for the offence under Section 304-B I.P.C. and sentence under Section 498-A I.P.C. & Section 4 of D.P. Act as awarded by learned trial court, has already been undergone by the accused-appellant Pawan. Further keeping in view the role assigned to other appellants Smt. Meera Devi, Kapil and Km. Mona Mala, they have been awarded sentence for two years under Section 498-A I.P.C. and one year for the offence of Section 4 of D.P. Act, which we reduce to the period already undergone by them.

37. Accordingly, the appeal is partly allowed with the modification of the sentence, as above. The accused-appellants shall be released forthwith, if not wanted in any other case.

38. Let a copy of this judgment along with the trial court record be sent to the

court below and jail authorities concerned for compliance.

(2022) 12 ILRA 1020
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

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

Criminal Appeal No. 3549 of 2016

Smt. Balveer Kaur ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Vijay Prakash Pandey, Sri Deepak Kumar Srivastava, Sri Ashok Kumar mishra

Counsel for the Respondent:
G.A., Sri N.K. Srivastava

Criminal Law- Indian Penal Code, 1860- Section 299- Section 302- Section 304- The death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC- Above offence committed will fall under Section 304 Part-I.

Where the offence was committed without any pre-meditation or intention but resulted in the death in the ordinary course of nature, then instead of Section 302 IPC the offence will fall under Section 304 Part I.

Quantum of Sentence-The criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system. 'Reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'.

The punishment imposed should be proportionate to the gravity of the offence and may not be unduly harsh. As the offence is one under Section 304-Part I of the IPC hence sentence modified accordingly.

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Tukaram & ors. Vs St.of Maha., (2011) 4 SCC 250

2. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

3. Veeran & ors. Vs St. of M.P., (2011) 5 SCR 300

4. Mohd. Giasuddin Vs St. of AP, [AIR 1977 SC 1926

5. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

6. Ravada Sasikala Vs State of A.P. AIR 2017 SC 1166

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

1. This appeal challenges the judgment and order dated 21.6.2016 passed by Shri Mohammad Faiz Alam Khan, Sessions Judge, Shahjahanpur, in Sessions Trial No.163 of 2015 convicting accused-appellant under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo rigorous life imprisonment with fine of Rs.25,000/- and in case of default of payment of fine, further to undergo one year imprisonment.

2. Investigation was moved into motion, after recording statements of

various persons, the investigating officer submitted the charge-sheet against accused under Sections 147/307/302 of I.P.C. The learned Chief Judicial Magistrate before whom charge sheet was laid put the same before the learned Sessions Judge. The learned Sessions Judge, on hearing the learned Government Advocate and learned counsel for the accused, framed charges under Section 302 of I.P.C. read with Section 34 of IPC.

3. On being summoned, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 4 witnesses who are as follows:

1	Jaspal Singh	PW1
2	Jasveer Singh	PW2
3	Raj Kumar Saroz	PW3
4	Vijay Kumar Trivedi	PW4

4. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.8
2	Written Report	Ex.Ka.1
3	Panchayatnama	Ex. Ka.2A
4	Postmortem Report	Ex.Ka.10
5	Site Plan	Ex.Ka.2
6	Charge-sheet	Ex.Ka.11

5. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid.

6. Heard Sri Deepak Srivatava for the appellant and Sri N.K. Srivastava for the State and perused the record.

7. It is submitted by learned counsel for accused-appellant that the accused is in jail since 1.12.2014.

8. The allegations against the appellant are writ large and, therefore, the dying declaration is fruitful piece of evidence under Section 32 of the Evidence Act is the submission of Counsel for the State. We are agreeable of the same that it is fruitful piece of evidence.

9. In alternative, it is submitted that at the most punishment can be under Section 304 II or Section 304 I of I.P.C. If the Court feels, as the accused have been in jail for more than 8 years without remission, they may be granted fixed term punishment of incarceration.

10. Learned A.G.A. for the state has vehemently submitted that facts of this case will not permit the Court to convert the sentence to that under Section 304 Part I of I.P.C. as none of the judgments relied by the accused-appellant will apply to the facts of this case.

11. The learned Judge, while discussing all the issues, has relied on several authoritative pronouncement hence the submission of the Counsel that the dying declaration is doubtful cannot be accepted. The second issue is whether it is 302 or 304 Part-I or II have considered the fact that 2 other co-accused has been acquitted in the same set of circumstances what would be the fate of this appeal. The

appellant is sister-in-law of the deceased and the fact that the deceased was alive for 6 days after injury and it was septicaemial death.

12. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

13. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

14. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

15. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

16. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

17. This takes us to the alternative submission of learned counsel for the appellant that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

18. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

19. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

20. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of***

Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

21. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

22. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

23. The learned Judge himself has not considered him under Section 304 IPC. The State has not preferred any appeal against the acquittal of the other accused. Smt. Balveer Kaur has been convicted for life imprisonment under Section 302 IPC. We convert the same under Section 304 Part-I. She has been in jail since 1.12.2014. We reduce the sentence to 8 years with remission. We maintain the fine and default sentence.

24. Appeal is partly allowed. Record and proceedings be sent back to the Court below forthwith. The fine if she has yet not deposited, will deposit the same within four

weeks from the date of release from jail. The jail authority shall see that the accused-appellant is lodged in the jail to re-incarcerate for the default period if fine is not paid after she is released.

25. This Court is thankful to Sri N.K. Srivastava for ably assisting this Court.

(2022) 12 ILRA 1025
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2022

BEFORE

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

Criminal Appeal No. 3681 of 2013

Suresh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Shashwat Shukla, Sri Mohammad Zakir

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Code of Criminal Procedure, 1973- Section 391- Additional Evidence- Evidence of P.W.2 before the Juvenile Justice Board by way of additional evidence under Section 391 of Cr.P.C. in which she has categorically denied that she had seen any of the accused killing her husband, Ashok Kumar. She has further stated that she was at home when the incident occurred and people of the village had informed her that her husband was killed by some other people.

Where the prime witness of the prosecution has not supported the case of the prosecution, having given a contradictory version, before the Juvenile Justice Board in the separated trial of the co-accused then considering the said evidence the appellant held to be entitled to be acquitted.

Indian Evidence Act, 1872- Section 3- Section 27- Neither the driver of the bus nor any passenger was examined. The recoveries were also not at the instance of accused-appellant. P.W.6, who had drawn the site plan had not shown that the accused-appellant was carrying any weapon with him.

Where the prosecution has withheld relevant witnesses and neither the appellant was shown to be armed and nor any incriminating recoveries were effected upon his instance, then the implication of the appellant held to be false.

Criminal Appeal allowed. (E-3) (Para 17.18)

Case law/ Judgements cited:-

1. Jalpat Rai Vs St. of Har., (2011) 14 SCC 208

2. Badam Singh Vs St. of M.P. (2003) 12 SCC 792

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

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

2. This appeal challenges the judgment and order dated 20.6.2013 passed by Additional Sessions Judge, Court No.8 in Sessions Trial No.333 of 2006 (State vs. Kaluwa and others) wherein the learned Sessions Judge convicted accused-appellant, Suresh and accused-Kaluwa under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced them to imprisonment for life with fine of Rs.10,000/- and, in case of default in payment of fine, further to under six months' simple imprisonment.

3. Three accused namely Kaluwa, Veerendra and Suresh tried for commission of offence under Section 302 read with 34 of IPC. Accused-Kaluwa died on the date of pronouncement of judgment when he felt that his sister had deposed against him. Accused-appellant, Virendra was declared juvenile and his trial was separated. We are concerned here with the accused-appellant, Suresh, who has been assigned the role of aiding the main assailant.

4. Brief facts as culled out from the record are that an F.I.R. was registered on 17.11.2005 at about 7.25 p.m. in the night for commission of offence under Section 302 read with Section 34 IPC on the very same day. The said information was given by one Durga Prasad (informant/P.W.1) conveying that his son-Ashok Kumar was done to death by three people namely Kalua, Virendra & Suresh. The occurrence alleged to have taken place on 17.11.2005. It was conveyed by the informant that on that day, he along with his son's wife (P.W.2) had gone for taking medicine for his grandson and his son-Ashok Kumar had also gone to his village Sekhpur Gadhwa from Aurangabad for some domestic purpose. It was further alleged that when the informant and his daughter-in-law were returning after taking medicines for grandson of informant, they saw that appellant along with two other persons namely Kalua and Virendra who were armed with Balkati (a sharp-edged weapon) were pushing the deceased. On seeing this, P.W.1 asked for to stop the bus. The bus halted and they came down. They saw that accused-Kalua inflicted injuries to deceased-Ashok Kumar by hitting Balkati on his neck. After seeing the informant and P.W.2, the accused threatened them and ran away. It was also averred that after dropping his daughter-in-law he had come for lodging the F.I.R.

5. After lodging of the F.I.R, the investigation was moved into motion. The police arrested all three accused and remand was asked for. On pointing out of accused-Kalua and Virendra, Balkati (a sharp-edged weapon) was recovered. The Investigating Officer, after taking statements of witnesses, submitted charge-sheet against the accused-appellant under Section 302 of IPC.

6. The accused was committed to the Court of Sessions as the case was triable by the Court of Session. The learned Sessions Judge framed charges on the accused. The accused pleaded not guilty and wanted to be tried. Accused-appellant, Virendra was declared juvenile, hence, his trial was separated.

7. So as to bring home the charge, the prosecution has examined 7 witnesses who are as under :

1	Durga Prasad	PW1
2	Smt. Sunita	PW2
3	Dr. S.K. Rastogi	PW3
4	Mange Ram	PW4
5	Satya Pal Singh	PW5
6	Sansar Singh Rathi	PW6
7	Amrit Singh	PW7

8. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.4
2	Written Report	Ex.Ka.1
3	Recovery memo of two Balkati	Ex. Ka. 3
4	Postmortem Report	Ex. Ka.2.
5	Panchayatnama	Ex. Ka.6

6	Charge-sheet	Ex. Ka. 15
7	Site Plan with Index	Ex. Ka.14

9. The Court also examined Deep Chand Sharma as C.W.1. The learned Sessions Judge, after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellant as mentioned above.

10. Learned counsel for the appellant has submitted that conviction of the accused-appellant is bad in the eye of law as there was vast contradictions in the testimony of P.W.1 and P.W.2 on various points which clearly indicates that they are not an eye witness of the alleged incident but they have falsely implicated the appellant being an educated member in the family as, if he has not been implicated, he might have started pairvi of other co-accused who were real brothers.

11. It is further submitted that co-accused, Kalua and Virendra, who were the real brothers had cordial relationship with his sister i.e. P.W.2 and deceased-Ashok Kumar as three years were elapsed after their marriage and there was one child out of their wedlock of P.W.2 (sister of accused). It is therefore submitted that the accused more particularly accused-appellant had no intention to kill the deceased and he was falsely implicated.

12. It is submitted by learned counsel for the appellant that though the offence is alleged to have taken place in the broad daylight, neither any independent witness nor the family members of the deceased were present near the dead body of the deceased. It is submitted that though P.W.2 tried to fill this gap, but she would not be able to depose as to who and how her in-laws were informed about the said incident and it creates serious doubt regarding the presence of P.W.1 and P.W.2 at the place of occurrence.

13. In support of his arguments, he has relied on the decisions in **Jalpat Rai v. State of Haryana, (2011) 14 SCC 208 & Badam Singh v. State of M.P. (2003) 12 SCC 792** and has contended that the conviction of the accused-appellant is bad and requires to be set aside.

14. As against this, learned A.G.A. for the State has submitted that the learned Sessions Judge has rightly convicted the accused-appellant as P.W.1 and P.W. 2 had seen the accused-appellant along with co-accused committing the murder of deceased.

15. While going through the evidence, one aspect is very clear that deceased-Ashok Kumar himself had criminal history which fact has been admitted by the prosecution also but accused-appellant, Suresh, did not have any criminal history. Weapons were never recovered at the behest of accused-appellant, Suresh and he was not assigned any role of having any weapon in his hand.

16. The accused-appellant, has already undergone more than 11 years' of incarceration and more than 14 years' of incarceration with remission. He has no criminal antecedent. The present case stems out of deteriorated relationship between P.W.2's in-laws and his maternal family. Co-accused, Kalua and Virendra are real brothers of P.W.2. The accused-appellant is her cousin and had nothing to do with the family affairs of his aunt.

17. The appellant has brought on record the evidence of P.W.2 before the Juvenile Justice Board by way of additional evidence under Section 391 of Cr.P.C. in which she has categorically denied that she had seen any of the accused killing her husband, Ashok Kumar. She has further stated that she was at home when the incident occurred and people of the village had informed her that her husband was killed by some other people.

18. This evidence is enough for us to come to the conclusion that the accused-Suresh has been wrongly roped into this case because of earlier enmity though it is submitted that accident occurred while the bus was passing by, but, neither the driver of the bus nor any passenger was examined. The recoveries were also not at the instance of accused-appellant. P.W.6, Sansar Singh Rathi who had drawn the site plan had not shown that the accused-appellant was carrying any weapon with him.

19. Hence, while going through the factual data and the evidence produced by way of application under Section 391 of Cr.P.C., we are convinced that the conviction of accused-appellant is liable to be set aside.

20. In view of the above, accused-appellant, Suresh, is acquitted of the offences alleged against him. The order of conviction & sentence passed by the learned Sessions Judge is set aside. The accused-appellant, Suresh, be set free forthwith if not warranted in any other offence.

21. Record and proceedings be sent back to the Trial Court forthwith.

22. This appeal is, accordingly, allowed.

(2022) 12 ILRA 1028
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 5705 of 2013
connected with
Criminal Appeals No. 324 of 2014 & 362 of 2014

Tayyab & Anr. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Salman Ahmad, Sri Atharva Dixit, Sri Rajiv Lochan Shukla, Sri Vijay Kumar Dwivedi

Counsel for the Respondent:
Govt. Advocate, Sri Amit Kr. Srivastava, Sri Shams Tabrez, Sri Abhisht Jaiswal, Sri Atharva Dixit, Sri Manish Tiwary(Sr. Advocate)

Criminal Law- Indian Evidence Act, 1872- Section 3- It is not the obligation of the defence to prove its version beyond reasonable doubt, rather, the limited requirement on its part is to probablise it. It is the prosecution case which is on trial and not the defence-The injuries on three sisters Km. Fatima, Shabana and Tabassum as also the statement of Investigating Officer that he had heard that the ladies in the accused house also sustained injuries coupled with fact that they were medically examined on the same night at about 11.00 pm and their injuries have been proved by PW-3 clearly supports the defence case. The statement of DW-1 that she caused a knife blow from behind on Minzar while he was trying to grab Shabana also finds corroboration from the injuries shown on Minzar i.e. in the back lumbar area. We are, therefore, of the view that the defence version has been successfully probalised. The prosecution has also failed to explain the injuries suffered by

the three sisters of accused appellants- The failure of prosecution to explain the genesis and origin of the occurrence has the effect of prosecution failing to bring on record the correct version of event.

Settled law that where the prosecution fails to explain the genesis and origin of the occurrence as well as the injuries on the side of the accused and where the version of the defence is found to be probable, then the story of the prosecution cannot be relied upon.

Criminal Appeal allowed. (E-3) (Para 46, 53, 54, 56, 60)

Case Law/ Judgements relied upon/ cited:-

1. Suchand Pal Vs Phani Pal, 2003 (11) SCC 527 (cited)

2.Vijay Narain Mishra Vs St. of U.P., 2013 0 Supreme (All) 1913(cited)

3.Balwan Singh Vs St. of Har., 2005 3 Supreme (SC) 740 (relied)

4.Ganesh Datt Vs St. of UK, 2014 0 Supreme (SC) 457(cited)

5.Sanjay Sharma Vs St. of U.P., Crl. Appeal No.3667 of 2018, decided on 24.12.2021(All.)

6. Sukhendra Singh Vs St. of M.P, 2017 SCC OnLine MP 1138(cited)

7. Jagdish Narain & anr. Vs St. of U.P., (1996) 8 SCC 199(cited)

8. Shivanna Vs St. by Hunsur Town Police, (2010) 15 SCC 91(cited)

9. Tori Singh & anr. Vs St. of U.P, (1962) 3 SCR 580(cited)

10. Ganga Singh Vs St. of M.P, (2013) 7 SCC 278(cited)

11. Jai Prakash Vs St. of U.P & ors, (2020) 17 SCC 632(cited)

12. Hema Vs St. thru Inspr. of Police, Madras, (2013) 10 SCC 192(cited)

13. Ram Bali Vs St. of U.P., (2004) 10 SCC 598(cited)

14. Ramanand alias Nandlal Bharti Vs St. of U.P., (2022) SCC Online SC 1396 (relied)

(Delivered by The Hon'ble Ashwani Kumar Mishra, J.)

1. Criminal Appeal Nos. 5705 of 2013 (Tayyab & Tahir vs. State of U.P.), 324 of 2014 (Waheed Ahmad vs. State of U.P.) and 362 of 2014 (Iqbal vs. State of U.P.) are directed against the judgment and order dated 27.11.2013, passed by Additional Session Judge/Special Judge (E.C. Act), Bareilly in Session Trial No.345 of 2009 (State vs. Tahir and others), arising out of Case Crime No.76 of 2009 under Sections 323/34, 324/34, 302/34, 504 and 506(2) IPC, Police Station Bahedi, District Bareilly, whereby accused appellants have been convicted and sentenced to undergo one year imprisonment under section 323/34 IPC; two year imprisonment under section 324/34 IPC; and life imprisonment under section 302/34 IPC with fine of Rs.10,000/- each and in default of fine the accused appellants are to further undergo one year additional imprisonment. All the sentences are to run concurrently and half of the fine is directed to be paid to the nearest relative of deceased Minzar.

2. Prosecution case in this case proceeds upon a written report of first informant Mohd. Arif (PW-1) alleging that on 17.01.2009, at about 08.45 PM, he was going towards Majar of Maula Shah Miyan when accused Tahir on a motorcycle kicked him and on his objection hurled filthy abuses and also threatened him. On his return when he reached Hauli Chauraha he

found that the accused Tahir alongwith his real brothers Iqbal and Tayyab and cousin Wahid Ahmad were waiting, armed with pistol, sword, kanta and lathi (wooden log) and on seeing him the accused Iqbal exhorted that kill the informant. Accused persons started assaulting the informant with the pistol grip and lathi (wooden log) and on hearing his cries the informant's brother Minzar and Ashraf came and saved him, whereafter accused persons took Minzar and Ashraf inside their house and with an intent to kill them started assaulting them with sword and kanta and accused Tahir fired from his pistol but the bullet missed. Minzar and Ashraf suffered injuries from sword and kanta and the accused persons left them in the nearby lane presuming them to be dead. The entire incident was seen in the tube-light by the informant and that his brothers are in serious condition.

3. On the basis of aforesaid written report (Ex.Ka.1) the First Information Report (Ex.Ka.7) came to be registered as Case Crime No.76 of 2009 under Sections 323/34, 324/34, 302/34, 504 and 506(2) IPC, Police Station Bahedi, District Bareilly on 17.01.2009 at 09.10 PM. The injured Minzar was sent to the Community Health Centre for his medical examination alongwith Chitthi Majroobi with Home Guard Dwarika Prasad. The Medical Officer (PW-3) examined the injured Minzar on 17.01.2009 at 09.30 PM and found following injuries on him:-

"An incised wound 8cm x 3cm Not probed on the left side back of abdomen (in the loin region) margins are clear, regular, fresh blood oozing present. Pulse weak, B.P. note recordable respiration- in gasping condition, G.C. Low, altered sesnsorium."

In the opinion of Medical Officer the injuries were to be kept under observation and were caused by a sharp object and were fresh injuries. The injured was referred to District Hospital where he died soon thereafter. The information regarding his death was sent to the nearest Police Station at 00.15 AM on 18.01.2009. Inquest proceedings commenced at 11.30 AM and concluded at 12.20 PM at the District Hospital itself. The first informant Mohd. Arif was one of the inquest witnesses and in the opinion of inquest witnesses the deceased Minzar died on account of injuries sustained on his back and to know the cause of death his postmortem be got conducted. The body of the deceased Minzar was sealed and sent for postmortem. The postmortem (Ex.Ka.5) of the deceased has been conducted by Dr. K. K. Mishra (PW-5) at 02.15 PM on 18.01.2009 and the cause of death has been determined as shock and haemorrhage due to ante-mortem stab wound injury. The injuries found during postmortem are as under:-

"Incised wound 8cm x 3cm x body cavity deep 18cm below the left scapula over back lumbar area underneath rib is also cut down"

4. The first informant Mohd. Arif and his brother Mohd. Ashraf were also sent to Community Health Centre, Bahedi for their medical examination on the next day i.e. on 18.01.2009. They have been medically examined at 10.15 AM and their injury reports are also part of the record and their injuries are as under:-

"Injuries of Mohd. Arif

1. Abrasion 1cm x .5cm on mid part of upper lip. Colour Red.

2. Abrasion 3cm x 2cm on anterior surface of neck. 3cm above supra sternal notch. Colour Red.

Injuries of Mohd. Ashraf

1. Incised wound 2cm x .5cm x muscle deep on left side of scalp. 5cm above the left year clotted blood present. Margin sharp.

2. Contusion with traumatic swelling 3cm x 1cm on posterior surface of left hand. Colour reddish. Advise x-ray left hand AP & lateral view."

5. The Investigating Officer collected bloodstained and plain floor (Ex.Ka.20). On 19.01.2009 the accused Tahir during custodial interrogation is stated to have informed the Investigating Officer about the place where the weapon of assault was kept by him and on his pointing out a bloodstained knife has been recovered, which allegedly was used by Tahir to cause fatal injury to Minzar. This knife, however, has not been sent for forensic report and has also not been produced before the Court. The recovery of knife vide recovery memo alone has been proved by Ram Siromani Saroj, SHO, Bahedi (PW-8). The description of knife is that its blade size is eight fingers; its handle is ten fingers in length; in the nature of fish and contains carving of red and blue colour; and having a brass clip for its opening and closing.

6. The statutory investigation ultimately concluded with submission of charge sheet on 02.03.2009 against accused appellants Tahir, Iqbal, Tayyab and Wahid. The magistrate took cognizance on the charge sheet and committed the case to the court of sessions, who took cognizance on the charge sheet. Five charges were framed against the accused appellants under sections 323/34, 324/34, 302/34, 504, 506(2) IPC. The accused appellants denied the charges and demanded trial.

7. The prosecution in order to bring home the charge has adduced several documentary evidence i.e. FIR as Ex.Ka.7; written report as Ex.Ka.1; recovery memo of bloodstained and plain floor as Ex.Ka.20; recovery memo of knife as Ex.Ka.9; injury report of Mohd. Arif as Ex.Ka.4; injury report of Mohd. Ashraf as Ex.Ka.3; injury report of deceased Minzar as Ex.Ka.2; postmortem report as Ex.Ka.5; inquest report as Ex.Ka.12; charge sheet as Ex.Ka.11; and site plans with index as Ex.Ka.21 and 10 etc.

8. The prosecution in order to bring home the charge has also produced oral testimony of first informant Mohd. Arif as PW-1; Mohd. Ashraf (injured) as PW-2; Dr. Ram Prasad, Medical Officer, CHC, Bahedi as PW-3 who proved the injury report of deceased Minzar; Dr. Jai Prakash, CHC, Bahedi as PW-4, who proved the injuries of injured Mohd. Ashraf and Mohd. Arif; Dr. K. K. Mishra, Autopsy Surgeon from District Hospital, Bareilly as PW-5, who proved the postmortem report of deceased Minzar; Constable Jhajhan Lal, Moharir as PW-6, who proved the G.D. Entry; Head Constable Rohitas Singh as PW-7, who proved the Chik FIR and G.D. Entry Kayami Mukadma; Ram Shiromani Saroj, SHO Bahedi as PW-8, who proved recovery memo of knife and charge sheet etc.; S.I. Subhash Chand Yadav as PW-9, who proved inquest report etc.; and Sushil Kumar Verma, Outpost Incharge Police Station Bahedi as PW-10, who proved recovery memo of bloodstained earth etc.

9. As against the above-noted prosecution version, in respect of the incident, the defence version is somewhat distinct and needs to be noticed. Km. Fatima Parveen (DW-1), sister of the accused brothers, claims that on 17.01.2009 at about 09.00

PM the deceased Minzar Ahmad, who had a suspicious character entered her house after seeing her sister Shabana in the room and with a bad intent caught hold of her. When Shabana objected to his act she was inflicted a stab injury and on hearing the commotion DW-1 together with her sister Tabassum attempted to save Shabana but they too were inflicted knife injuries by Minzar. At this stage Km. Fatima claims to have taken a knife from kitchen and in order to save her sisters hit Minzar whereafter he fled. Mother of Fatima soon returned from the neighbourhood and all of them went to the police station Bahedi for lodging the report, but the police personnel did not register it and instead asked them to get themselves medically examined first. Km. Fatima, Shabana and Tabassum accordingly went to CHC, Bahedi and got themselves medically examined, whereafter they allegedly again came to the police station but even then their report was not registered. Following day i.e. 18th January was a Sunday and on 19.01.2009 a letter was sent to police personnel informing that the family members of Minzar have falsely lodged a report against her brothers for killing Minzar whereas her brothers were not even at home and the police has not registered her report. With similar contents letters have been allegedly sent to I.G. Range, Bareilly, S.S.P. Bareilly under certificate of posting which are at pages 6 to 11 of the paper book. These letters have been duly exhibited. The injury reports of Shabana, Tabassum and Fatima have also been exhibited and have been proved by Dr. Ram Prasad, Medical Officer, CHC Bahedi (PW-3). The injuries on the three sisters of accused have been noticed as under:-

Injuries of Sabhana

चोट सं॰ 1- कटा हुआ घाव 7 से.मी x 2 से.मी. x मांस पेशी तक गहरा। बायीं अग्र भुजा पर पीछे की तरफ कलाई के जाेड से 8 से.मी ऊपर था।

चोट सं 2- 5 लाईन दार खरोंच 11 x 4 से.मी के क्षेत्रफल में बायी अग्र भुजा में पीछे की तरफ चोट सं. 1 से ठीक नीचे थी।

चोट सं 3- दो ऊपरी खरोंच 6 x 2 से.मी लम्बाई दाहिनी भुजा पर पीछे की तरफ दाहिनी अग्र भुजा पर पीछे की तरफ कलाई के जोड से 3 से.मी ऊपर थी।

Injuries of Tabassum

चोट सं॰ 1- खरोंच 2 से.मी x 2 से.मी चेहरे में दायी तरफ दाहिने कान के (sic) हिस्से से आगे की तरफ जमा हुआ खून मौजूद था।

चोट सं॰ 2- 7 खरोंचे 7 से.मी x 4 से.मी क्षेत्रफल में बायीं अग्र भुजा के आगे की तरफ निचले हिस्से में थी।

Injuries of Fatima Parveen

चोट सं॰ 1- लाईनदार खरोंच। माथे पर 2.5 से.मी दाहिनी तरफ थी। दाहिनी आई ब्रो से ठीक ऊपर थी।

चोट सं॰ 2- लाईनदार खरोंच (sic) से.मी x . 2 से.मी बाये हाथ में पीछे की तरफ थी।

चोट सं॰ 3- कई लाईनदार खरोंच संख्या में 6 सीने के ऊपरी हिस्से में आगे की तरफ थी।

10. The original register maintained in the CHC Bahedi has also been produced by the doctor to prove the injuries caused to three sisters.

11. PW-1 in his deposition has supported the prosecution case by stating that at about 08.45 PM on 17.01.2009 he was going towards Majar of Maula Shahmiyan when the accused Tahir kicked

him while going on motorcycle and on his resisting it the accused hurled filthy abuses and also threatened him. On his return when he reached Hauli Chauraha he saw that accused Tahir together with his brothers Iqbal, Tayyab and cousin Wahid were waiting with arms. Tahir was carrying a pistol, Iqbal had a sword, Wahid was armed with kanta and Tayyab was armed with lathi. Accused Iqbal exhorted to kill the informant and he was assaulted by pistol grip (but) and lathi. On raising an alarm by him, his brothers Minzar Ahamd and Mohd. Ashraf came and started saving him on which the accused persons took them inside their house and while accused Tahir tried to kill Minzar, by firing pistol, but the bullet missed whereafter Minzar and Ashraf were assaulted by sword and kanta and they got injured. Presuming them to have died the accused persons left them in the adjoining lane. He has stated that when the accused persons were taking his two brothers inside their house and assaulting them the informant (PW-1) saw the incident from the courtyard in the tube-light lighted on an inverter. The incident was also seen by Parvej and Ikhtyar Ahmad but they have not been produced in evidence. It is also stated that he took his brother Minzar and Ashraf to the police station and dictated the written report to his brother Tahir, which is exhibited Ka.1. A constable thereafter was sent alongwith deceased Minzar and he was examined in the government hospital Bahedi, whereafter Minzar was referred to district hospital at Bareilly.

In the cross examination questions have been put to PW-1 with regard to contest of election of Nagar Palika Bahedi. He has stated that accused Iqbal has attended marriage of deceased Minzar. The witness at a later stage in the cross-examination has clarified that his relations with accused Iqbal were good and they used to wish each other. The house of PW-1 was at a distance of about 300-350 paces from the Hauli Chauraha, whereas the house of accused from Hauli Chauraha was about 200 paces. PW-1 has also verified the written report on the basis of which FIR got registered. He has, however, stated that details about possessing of arms by accused i.e. Iqbal having sword, Wahid Ahmad having kanta and Tayyab having lathi was disclosed to the Investigating Officer and no reasons can be given for its non-narration in the statement under Section 161 Cr.P.C. He has further admitted that in the written report he has not mentioned the injuries caused to him. He has also admitted that he has not disclosed that Ashraf was taken with him to police station. PW-1 has categorically stated that prior to the incident in which he was kicked there was no enmity or bad breath between the accused and PW-1. He has stated that at the crossing he was assaulted by Tahir with pistol butt and Tayyab with lathi. The second assault by pistol butt was on his lips. He was held by two persons while other two accused were assaulting him and he had cut injury. On his raising alarm his brothers Minzar and Ashraf came from the Rice Mill and saved PW-1. Ashraf was also assaulted with lathi by Tayyab. None of the shop keepers came to their rescue. The witness however was not able to identify as to in front of whose shop the incident occurred. The accused took Ashraf and Minzar to their house by holding their colour and while PW-1 kept shouting while following them, yet, none came to save them. PW-1 was 10-15 paces behind the accused who were taking Ashraf and Minzar. He has denied any knowledge about the family members living in their house. The two brothers of PW-1 were

taken through the courtyard to a small room where they were assaulted. Accused also fired at Minzar and Ashraf and assaulted them with sword and kanta. PW-1 claims to have seen the incident from a distance near the courtyard. The accused later brought Minzar and Ashraf on shoulder support when PW-1 rushed towards the north. There was no street light and when PW-1 returned he found his brothers Minzar and Ashraf wounded and bleeding. He took them on a rickshaw to the police station. PW-1 took Minzar inside the police station who was sent for medical examination while Ashraf stayed outside the police station. PW-1 has stated that he had not shown his or Ashraf's injury to the police personnel. He has denied the suggestion that there were no injuries caused to PW-1 and Ashraf and that is why it was not shown to the police. He has further denied the defence version that his brother Minzar with bad intent entered the house of accused finding Shabana to be alone and caused injuries to Shabana and Fatima or that he got hurt by the knife blow of Fatima.

12. Mohd. Ashraf has been produced as PW-2, who has stated that around 09.00 PM on 17.01.2009 he alongwith Minzar was returning home from Rice Mill. When he reached near Hauli Chauraha crossing he heard the screams of brother Arif. He alongwith Minzar rushed there and found that accused Iqbal, Tayyab and Wahid were assaulting his brother with lathi and revolver butt. PW-2 tried to save his brother Arif. He and Minzar were dragged to the house of accused with an intent to kill them. Accused Tahir fired at PW-2 and Minzar but the bullet fortunately missed. Tayyab assaulted PW-2 with lathi while Wahid hit mhim by kanta on his head. Iqbal assaulted Minzar with sword and left him and Minzar outside their house in the lane. At the time of incident tube-light was lit with inverter in which the incident has been seen by PW-2 as also by Parvej and Iftakhar. He has further stated that he alongwith Arif took Minzar to police station whereafter Minzar was sent to Government Hospital, Bahedi and from there he was referred to District Hospital, Bareilly where he was declared dead. PW-2 also got himself medically examined.

In the cross-examination PW-2 has stated that he left his house for Rice Mill at about 08.30 PM. It is also stated that version of his return from the Rice Mill has been disclosed for the first time in court. He had denied the suggestion that Rice Mill was lying closed from before the incident. About the incident he has explained that from Hauli Chauraha the accused firstly took them (PW-2 and Minzar) in the courtyard of their house and then in the room. Four accused alongwith PW-2 and Minzar were in the room when the accused started assaulting them. He has stated that Tahir fired when they were about to enter the room and was at a distance of 5-6 paces and that when the accused left them in the lane after assaulting them none was present and Arif reached later. Minzar had fallen on the road when he was left by the accused. He has also denied the suggestion that after three sisters of accused caused injury to Minzar thereafter injuries were got fabricated by PW-1 and PW-2. He also denied the suggestion that Minzar was a drinker or characterless person and entered the house with bad intent towards Shabana finding her alone and sustained injuries when Fatima acted in self-defence.

13. Dr. Ram Prasad of C.H.C., Bahedi has appeared as PW-3 and verifed the injuries caused to Minzar and stated that

such injuries could have caused by sharp weapon like sword and was sufficient to cause death. He later stated that in comparison to sword the injuries of Minzar could have been caused more probably by kitchen knife. He has also verified the injuries of Shabana, Tabassum and Fatima. The injuries could have been caused at about 09.00 PM in scuffle. The injuries of three sisters were simple and he could not say whether they were self inflicted or were caused by someone else.

14. Dr. Jai Prakash, C.H.C., Bahedi has appeared as PW-4, who has verified the injuries of Ashraf (PW-2) and Arif (PW-2). The injuries were simple and superficial and has denied that injuries could be self inflicted.

15. Dr. K. K. Mishra, Autopsy Surgeon has appeared as PW-5. In his opinion the cause of death of Minzar was ante-mortem injuries which could be caused by sharp weapon like sword.

16. The other witnesses are the formal witnesses and would be referred at appropriate stage, including PW-8 who has stated that during investigation he came to know that some of the ladies in the house of accused had also sustained injuries in the incident. He further denied that in the statement under section 161 Cr.P.C. Ashraf had not disclosed the weapon available with the accused or that Wahid assaulted him with kanta or that Iqbal assaulted Minzar with sword or Tayyab assaulted him by lathi.

17. On the basis of evidence led by the prosecution the incriminating materials were put to accused, who denied the charges and stated that they have been falsely implicated due to enmity. Accused Abdul Wahid stated that he too has been implicated as none to do pairvi of his cousin, who too have been falsely implicated. Written statement under section 313 Cr.P.C. has also been given by accused stating that around 09.00 PM on 17.01.2009 the accused were not at home when Minzar with bad intent entered their house and grabbed their sister Shabana and on her objecting assaulted her with knife and when their sisters Tabassum and Fatima tried to intervene they too were caused injuries whereafter Fatima brought knife from kitchen and attacked Minzar and blue knife which hit Minzar after which Minzar fled. When the sisters came to lodge report they were asked to get themselves medically examined and that they were in fact medically examined on the same night and when they returned to lodge the report, yet, their report was not registered and a false case was lodged against accused for murdering Minzar. Complaint in that regard has been sent to police officers on 19.01.2009. The statement under section 313 Cr.P.C. is common on behalf of other three brothers namely Iqbal, Tayyab and Tahir.

18. On behalf of the accused DW-1 Fatima Parveen has also been produced, who has stated that Tahir, Iqbal and Tayyab are real brothers while Wahid his cousin. She knew the deceased Minzar who had a bad character. Shabana is her sister who was unmarried then and is now married. She has stated that on 17.01.2009 around 8.45-9.00 PM she alongwith her sister Tabassum and Shabana were in the house alongwith their father, who was in coma. She and Tabassum were in the room of father and Shabana in the room next to road. The brothers of DW-1 had gone to Ajmer Sarif to offer prayers for welfare of her father who died 15-20 days after the

incident. She has also stated that Minzar entered the house and grabbed Shabana and on her objecting Minzar caused a knife injury on her hand. DW-1 alongwith Tabassum tried to save her sister Shabana from Minzar, to which Minzar caused injuries to her and Tabassum also. In defence the DW-1 claims to have brought out a knife from kitchen and attacked Minzar who got hit and left thereafter. She could not say as to where injury was caused to Minzar. She claims to have gone wiith her cousin Babblu @ Iftakhar for lodging report but they were asked to get themselves medically examined but even thereafter their report was not registered. She has verified the complaint sent to police personnel, which is duly exhibited. Letters were sent by UPC and the receipt is also exhibited. In the cross examination DW-1 stated that when Minzar came to her house there was no light in the lane but inverter light was available. Minzar had come alone. She had elaborately explained as to how she saw Minzar holding knife when she entered in the room of Shabana on her raising alarm. The sisters were shouting but Minzar did not retreat and they got injured by knife. She claimed that knife by which she attacked Minzar was thrown in the room. She further admitted that the police was not informed about causing of knife injury nor the knife was taken to the police station. She claims that three brothers of DW-1 had returned on 18.01.2009 and she heard that they were arrested by the police.

19. The trial court on the basis of evidence led by the prosecution has found the charges levelled against the accused appellants to be proved beyond reasonable doubt and consequently convicted them vide impugned judgement and order.

20. Sri Rajiv Lochan Shukla, learned counsel for the appellants submits that the prosecution has not been able to explain the genesis of the incident nor the commissioning of offence in the manner suggested by its witnesses. He contends that the entire prosecution case lacks credibility and the two witnesses of fact are not reliable. He also submits that the deposition of prosecution witnesses is untruthful. It is also argued that genesis of incident lies in mystery and the prosecution has otherwise suppressed the injuries on the accused. He submits that the injuries on the accused clearly probablize the plea taken by the defence and in such circumstances the prosecution has failed to establish the guilt of accused appellant beyond reasonable doubt. In support of his submission learned counsel has placed reliance upon judgments of the Supreme Court in Suchand Pal Vs. Phani Pal, 2003 (11) SCC 527; Vijay Narain Mishra Vs. State of U.P., 2013 0 Supreme (All) 1913; Balwan Singh Vs. State of Haryana, 2005 3 Supreme (SC) 740; Ganesh Datt Vs. State of Uttarakhand, 2014 0 Supreme (SC) 457, and judgment of the High Court in Sanjay Sharma Vs. State of U.P., passed in Criminal Appeal No.3667 of 2018, decided on 24.12.2021.

21. Sri Manish Tiwari, learned Senior Counsel assisted by Sri Atharva Dixit for the informant, on the other hand, that the prosecution witnesses have truthfully narrated the incident and the conviction of the court below relying upon the prosecution witnesses is valid. He states that presence of PW-1 and PW-2 at the place of occurrence is natural and probable and finds corroboration from the medical evidence available on record. He submits that the cross-version pleaded by the defence is not supported by medical evidence and the defence story is wholly improbable. He also argues that as the

defence has come up with a cross-case the onus would be upon it to prove its case beyond all reasonable doubts or at least to shake the prosecution story leaving it no legs to stand which the defence has failed to do. He also submits that the solitary blow on the deceased could not have been caused by kitchen knife, as is sought to be urged on behalf of defence. He argues that the injuries on the deceased had clearly been caused by a heavy cutting weapon, which in the present case happens to be a sword. He also submits that the defence has not explained as to why it did not pursue its cross-case and that neither dispatch of letter by UPC is reliable nor the conduct of defence in not filing a letter application under Section 156(3) Cr.P.C. is credible. He further submits that the injuries on the defence were clearly self-inflicted and although the cross-version is not substantiated but taking of such stand by the defence clearly proves that the incident is admitted to the defence as well. Learned Senior Counsel has placed reliance upon judgment of the Madhya Pradesh Court in Sukhendra Singh Vs. State of Madhya Pradesh, 2017 SCC OnLine MP 1138 and judgments of the Supreme Court in Jagdish Narain and another Vs. State of U.P., (1996) 8 SCC 199; Shivanna Vs. State by Hunsur Town Police, (2010) 15 SCC 91; Tori Singh and another Vs. State of Uttar Pradesh, (1962) 3 SCR 580; Ganga Singh Vs. State of Madhya Pradesh, (2013) 7 SCC 278; Jai Prakash Vs. State of Uttar Pradesh and others, (2020) 17 SCC 632; Hema Vs. State through Inspector of Police, Madras, (2013) 10 SCC 192 and Ram Bali Vs. State of U.P., (2004) 10 SCC 598. He further submits that in the case of a defective investigation the court has to be circumspect in evaluating the evidence. He further points out that the doctor has clearly stated that the injuries on the prosecution witnesses were not self-inflicted and none of the accused in their statement under Section 313 Cr.P.C. have been taken the plea that they were at Ajmer.

22. It is in the light of the above conditions and the evidence placed on record that this Court is required to consider as to whether the prosecution has succeeded in proving the guilt of the accused appellant beyond reasonable doubt?

Analysis on Facts:

23. The prosecution story emanates on the report of PW-1, who claims that while going to offer prayer at Majar of Maula Shah Miyan on 17.1.2009, at about 08.45 PM, he was kicked by accused Tahir. PW-1 objected to it on which the accused allegedly hurled filthy abuses and threatened him. This part of the prosecution story, which provides the genesis of occurrence is based upon the sole testimony of PW-1. The reliability of the testimony of PW-1 is therefore required to be examined, first.

24. PW-1 in his testimony has supported the prosecution case about the genesis of incident and has been elaborately cross-examined. In his cross-examination PW-1 has clearly stated that he had no enmity with the accused Tahir and that their relations were cordial. That being so, the conduct of accused Tahir in kicking PW-1, for no obvious reason, seems doubtful. Accused Tahir otherwise has no criminal history and is not known to be a person of cantankerous or quarrelsome nature. The genesis of occurrence, as per the prosecution, therefore, does not seem probable and remains a grey area.

25. PW-1 then stated that he went to Majar; offered prayers and returned soon

thereafter to find that the four accused armed with pistol, sword, kanta and lathi were waiting at Hauli Chauraha and on seeing him Iqbal exhorted that kill the informant. This part of the prosecution story sounds improbable. It is difficult to understand as to why the accused party would come armed with an intent to kill PW-1 when there exists no reason for it. Mere kicking or consequential altercation between PW-1 and Tahir also would not create sufficient reason or provocation for such an act on part of the accused.

26. It is thereafter that PW-1 was assaulted with pistol grip and lathi and on hearing his cries the informant's brother Minzar and Ashraf came and saved him. This part of the prosecution version is also based substantially upon the statement of PW-1. The only material available on record for the purposes of corroboration of such version of PW-1 is the injury report of PW-1 (Ex.Ka-4). The injuries on PW-1 Arif consists of abrasion 1 cm x 0.5 cm on mid front of upper lip and; (2) Abrasion 3cm x 2cm on anterior surface of neck. In the opinion of the doctor both the injuries were caused by rubbing of body part against rough surface of hard blunt object. Both the injuries were simple in nature. The injuries of Arif have not been examined on the date of incident, rather his examination was done on the next morning i.e. 18.1.2009 at 10.55 am.

27. Even if the issue with regard to timing of the medical examination is for the time being kept aside, yet the two injuries which are in the nature of rubbing of blunt object cannot be caused by pistol butt or by lathi. The testimony of PW-1 that he was hit by a butt of revolver or was hit by a lathi does not therefore find corroboration from the injury sustained by PW-1.

28. The prosecution case then is that Ashraf and Minzar hearing the screams of PW-1 came on the spot while returning from the rice mill. The prosecution case further is that two brothers namely Mohd. Ashraf and Minzar saved PW-1, whereafter the two brothers Mohd. Ashraf and Minzar were taken by the accused party to their house situated at a distance of about 200 paces. This part of the prosecution story requires a careful analysis.

29. As per the prosecution case the fight was between PW-1 and the accused Tahir. However, instead of PW-1 being taken by the accused party it was the other two brothers, with whom there was no enmity who were taken by the accused party. PW-1 was left behind. No possible reason is disclosed for such unusual act. There is no material on record to even remotely suggest that there existed any enmity/fight between Minzar and Mohd. Ashraf with the accused persons. There is thus no possible explanation on record as to why the accused persons choose to take Minzar and Mohd. Ashraf with them to their house leaving behind PW-1, when the discord was with PW-1.

30. The statement of PW-1 and PW-2 are to the effect that the accused took Minzar and Mohd. Ashraf with them to their house. This part of the prosecution version remains wholly unexplained. The statement of PW-1 and PW-2 goes contrary to the charge framed against the accused as per which all three brothers were taken by accused party to their house.

31. Once the discord/fight was with PW-1, the natural conduct would have been for the accused to take PW-1, if they wanted to cause any harm to him. However, the prosecution version is that PW-1 was

left and the two other brothers Minzar and Ashraf, who had come to save PW-1, were rather taken by the accused to their house. This version of prosecution is also improbable.

32. It is then the prosecution case that the accused held Ashraf and Minzar and took them to their house at a distance of about 200 paces. It is admitted that the incident occurred at Hauli Chauraha and there were shops around which were open. As per the PW-1 none came forward to save them. As per the prosecution case Minzar, Ashraf and Mohd Arif were on one side while four accused were on the other. It sounds a little unusual that three able bodied men would be taken with an intent to cause harm without any resistance or scuffle on their part through an area inhabited by others. Even if none directly intervened as accused were armed yet the natural conduct would be that someone in the market would raise alarm or inform the police.

33. Even if the accused were armed yet some sort of resistance was expected to be made by Minzar, Ashraf and Arif which is totally missing. This conduct of three able bodied young men in blindly following the accused to their house cannot be termed natural.

34. The prosecution version that PW-1 was following the accused without any protest while his brothers were taken by the accused party also seems unnatural.

35. PW-1 then claims that he saw from a distance the incident in which his two brothers were taken through the courtyard inside a small room. There is no possible explanation as to why PW-1 was left out while the other two brothers were taken inside the house and then assaulted. PW-1 and PW-2 moreover stated that when they entered the room accused Tahir fired at Ashraf and Minzar. There is no empty cartridge found from the spot. If the bullet had missed the two brothers, it would have hit some other wall etc. but no signs/evidence of bullet being fired in the room is available. None of the two brothers have otherwise sustained any bullet injuries.

36. In the event the accused wanted to kill either or both the brothers they could have done so easily by firing upon them particularly when they were armed with firearms but admittedly they have not caused any bullet injuries. There is no reason to take the two brothers inside the house and then assault one of them so as to kill him. The room in which PW-2 and Minzar have been allegedly assaulted is a small room of 8 x 10 feet in which the four accused alongwith Minzar and Ashraf were present. The room otherwise had a fridge, a sofa and bed as per the site plan. No specific reason is thus disclosed for taking the two brothers inside the house. Such conduct of accused otherwise sounds unlikely in a muslim family consisting of aged parents and unmarried sisters, where privacy of ladies is observed.

37. According to the prosecution the deceased Minzar was assaulted with sword by Iqbal and the incident has been seen by PW-1. PW-1, however, admits that he kept seeing the incident without raising any alarm or resisting such act. This conduct is also unusual and creates a doubt on the prosecution story.

38. As per prosecution case Minzar and Ashraf after being assaulted by the accused were brought to the adjoining lane

by offering support and were left there. Minzar was bleeding while he was lying in the lane but no blood has been recovered from the spot. This is clearly admitted by the Investigating Officer PW-10.

39. A suggestion has been given to PW-1 that deceased Minzar was a drunkard and characterless person who entered the house of accused seen Shabana alone, with a bad intent, and on being objected he injured the three sisters of accused namely Shabana, Tabassum and Fatima and Fatima in defence caused injury to Minzar whereafter a false report after deliberation has been lodged.

40. In the facts of the case we find that the genesis of the offence explained by the prosecution through its witness PW-1 is thus not convincing and the manner in which events are stated to have occurred leaves many improbables.

41. PW-2 has also come up with similar testimony, as is the testimony of PW-1, and for the reasons narrated above we do not find him reliable, either.

42. Although, we have doubted the genesis of crime as also the manner in which the incident is said to have occurred, as per the prosecution, yet before arriving at a conclusion in the matter it would be appropriate to examine the defence version about the manner in which the incident occurred.

43. DW-1 in her statement has come up with a entirely different version of the incident. She has stated that it was the deceased Minzar who entered the accuseds' house seeing her sister Shabana alone and tried to grab her with an intent to outrage her modesty. The three accused brothers were stated to have gone to Ajmer to offer prayers for their ailing father. A scuffle followed between the victim Shabana and Minzar and soon thereafter the other two sisters namely DW-1 Fatima and Tabassum also came to the rescue of Shabana. The three sisters were injured by Minzar who caused knife blows to them. DW-1 then states that she took out a kitchen knife and caused a blow to Minzar from behind while he was attempting to grab Shabana after which he fled. She further states that information of the incident was given to police who asked them to get themselves medically examined. Such medical examination took place on the date of incident at about 11 pm. The injuries have been proved by Dr. Ram Prasad, Medical Officer, C.H.C. Bahedi (PW-3) and the original register has also been produced during trial in support of the injuries. Since the police did not register the report of DW-1 a complaint was allegedly made to higher police authorities on 19.1.2009.

44. As per the defence it was the deceased Minzar who was the aggressor and entered their house with evil intent and sustained injury in the scuffle with the three sisters who also got injured.

45. Sri Manish Tiwari, learned Senior Advocate argued that the defence was under an obligation to establish its case beyond reasonable doubt, which it failed to do since the injuries on the three sisters were simple in nature and could have been self-inflicted as per the doctor and the alleged dispatch of complaint by UPC is not reliable. He further submits that adverse inference must be drawn against the defence for such reason and since the incident has been witnessed by PW-1 and PW-2, who are injured witnesses, as such the appeals merit rejection.

46. Law on the standard of proof required on part of the defence is by now well settled. It is not the obligation of the defence to prove its version beyond reasonable doubt, rather, the limited requirement on its part is to probablise it. It is the prosecution case which is on trial and not the defence.

47. Although the prosecution case is that the deceased Minzar was assaulted by a sword but no recovery of sword has been made from any of the accused. The injuries of Minzar have been examined by PW-3, who has opined that the injuries could have been caused by a sharp edged weapon and was fresh injury. He has stated that the injury could have been caused by a sword. This witness in cross-examination has, however, stated that the injury could have been caused to Minzar more by kitchen knife than by a sword. Learned counsel for the parties have laid much emphasis on the nature of injury caused to Minzar and the weapon by which it could have been caused. The postmortem report also shows that 7th rib of left side of deceased was cut down. The injury to the deceased was on back lumbar and apparently was caused from behind.

48. Although on behalf of prosecution and the informant, it is suggested that the ribs were also fractured but such contention does not find support from the medical evidence on record. The ribs are not shown to have been fractured, rather the 7th rib of left side alone has been cut down. This is clearly possible if the assault on deceased was by a sharp edged weapon from behind. Such weapon whether is a knife or a sword would depend upon the physical shape and size of the weapon. However, neither any sword has been produced during the course of trial nor even knife has been placed before the court below in evidence. The Court is, therefore, not in a position to comment on the weapon of assault, which could have caused the injury itself.

49. The record merely shows that a bloodstained knife has been recovered on the pointing out of the accused Tahir from within his house. The length of the knife was about 08 fingers and it had carvings on its handle having the size of 10 fingers. There was a brass clip for opening and closing the knife. The argument of Sri Rajiv Lochan Shukla, Advocate is that description of the recovered knife resembles more like a dagger rather than a kitchen knife. His further argument that this was a muslim household and generally knife in such kitchen would be used for cutting meat and other such hard objects and therefore the possibility of such knife causing the injury to the deceased cannot be ruled out. We may clarify that this discussion nevertheless remains hypothetical as no weapon of assault has been produced by the prosecution.

50. It is in the above context that we are called upon to examine the question as to whether the defence has been able to probablize its version contained in statement of DW-1 or not?

51. The records clearly reveal that the accused brothers have two real sisters and a cousin, who were living in the house in which the incident allegedly occurred. The prosecution story, however, does not refer to their existence in the house nor the witnesses of fact i.e. PW-1 and PW-2 have referred to them. PW-1 rather states that he is not aware about the sisters of the accused brothers.

52. The prosecution story that the two brothers Ashraf and Minzar were taken

inside a muslim household, in a small room, just to assault them also seems unlikely when there are young girls living in the same house. The normal conduct would be that no male members would be taken inside the house when it is inhabited by young unmarried girls in a muslim family where privacy of ladies is of importance. The prosecution story, therefore, does not sound convincing.

53. The injuries on three sisters Km. Fatima, Shabana and Tabassum as also the statement of Investigating Officer that he had heard that the ladies in the accused house also sustained injuries coupled with fact that they were medically examined on the same night at about 11.00 pm and their injuries have been proved by PW-3 clearly supports the defence case. The statement of DW-1 that she caused a knife blow from behind on Minzar while he was trying to grab Shabana also finds corroboration from the injuries shown on Minzar i.e. in the back lumbar area. We are, therefore, of the view that the defence version has been successfully probalised.

54. The prosecution has also failed to explain the injuries suffered by the three sisters of accused appellants. The only argument advanced is that these injuries could be self inflicted in the opinion of the doctor.

55. The argument about injuries caused to three sisters being self inflicted does not appeal to reason inasmuch as the injuries were actually examined on the very night of incident at around 11 pm. This is within two hours of the incident itself. PW-3 has verified the injuries and has also produced the original register to prove it. It seems highly unlikely that within such a short period the defence would be advised to create such evidence and get it examined at the local C.H.C. The Investigating Officer has also admitted that he heard during investigation that ladies in the accused family had sustained some injuries in the incident. We are, therefore, inclined to accept the argument that injuries were sustained by the three sisters in the incident which have not been explained by the prosecution.

56. Rather, it is the injuries of PW-1 and PW-2 which appears questionable for the reason that it was not examined on the date of incident i.e. 17.1.2009 but was examined on 18.1.2009. PW-1 and PW-2 although had gone to the police station on 17.1.2009 but did not inform the police about their injuries. The fact that injuries of Minzar were examined on 17.1.2009 itself yet injuries of Ashraf were not noticed or examined although he was present with Minzar at the police station also raises a doubt on the injuries on Ashraf. Similarly the act of Arif not reporting his injuries to police on the night of incident and getting himself medically examined the next morning also raises a doubt about the genuineness of their injuries.

57. On behalf of the appellants reliance is placed upon a judgement of Supreme Court in Balwan Singh vs. State of Haryana, (2005) 11 SCC 245, wherein the Court considered the consequence of failure of prosecution to explain the injuries suffered by the defence in the same incident and the defence had probablised its case. Relevant part of para 12 of the judgement is extracted hereinafter:-

"12. ..... From the facts of the case it becomes apparent that the prosecution has not disclosed the true genesis of the occurrence. The motive suggested by the

prosecution does not appeal to us, because if there was an altercation between PW 5 and A-2 in Village Juan when a request was made by PW 5 to A-1 to take the groom on his motorcycle to the chaupal, there appears to be no reason why the accused would have assaulted his father after returning to the village, particularly, when PW 5 was not with his father. The motive as alleged by the prosecution does not appeal to us because it does not appear to be natural that for the conduct of his son at a different place, the appellant would return to the village and kill his father. Having regard to the place of occurrence as found by the High Court, the defence of the accused is probabilised. ***It is well settled that while the prosecution has to prove its case beyond reasonable doubt, the defence has only to produce evidence or show material on record which probabilises its defence."***

58. The issue has recently been examined by the Supreme Court in Ramanand alias Nandlal Bharti vs. State of U.P., (2022) SCC Online SC 1396, wherein the Court has held as under in paragraph nos.113 to 116:-

"113. In Mohar Rai and Bharath Rai v. State of Bihar, AIR 1968 SC 1281, it was observed:

"6. .....In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

[Emphasis supplied]

114. In another important case Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394, after referring to the ratio laid down in Mohar Rai (supra), this Court observed:

"12. .....where the prosecution fails to explain the injuries on the accused, two results follow : (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants....."

115. It was further observed that:

"12. .....in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case....."

116. In Mohar Rai (supra) it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true, or at any rate, not wholly true. Likewise in Lakshmi Singh (supra) it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot itself be a sole basis to reject such evidence, and consequently the

whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in Vijay Singh v. State of U.P., 1990 Cri LJ 1510."

59. One of the circumstances cited on behalf of the appellants regarding improbability of the prosecution case was with reference to the site plan. Judgements have thus been relied upon on behalf of the informant on the evidentiary value of the site plan. However, as we are persuaded to decide the appeal on aspects other than site plan, therefore, the judgements in that regard are not being referred to. Similarly, judgements cited by the informant on the impact of embellishments on the investigation also need not be referred to as those aspects do not form the basis of our consideration in the present appeals.

60. The trial court has proceeded to accept the prosecution case relying upon the testimony of PW-1 and PW-2 without subjecting it to careful scrutiny. The failure of prosecution to explain the genesis and origin of the occurrence has the effect of prosecution failing to bring on record the correct version of event. The improbability of prosecution version regarding the genesis, events and the manner in which the events unfolded creates a doubt on the prosecution case which has not been examined by the court below in correct perspective. The defence had clearly probablised its version but the same has been overlooked. The finding of the court below that prosecution has established its case beyond reasonable doubt, therefore, cannot be sustained. The accused appellants are clearly entitled to benefit of doubt in the matter.

61. For the reasons and discussions held above, the present appeals succeed and are allowed. The judgment and order of conviction and sentence dated 27.11.2013 in Session Trial No.345 of 2009 is set aside. The appellants shall be set free if they are in jail and in the event they are on bail, their bail bonds shall stand discharged, subject to compliance of Section 437-A of the Criminal Procedure Code, provided they are not wanted in any other case.

(2022) 12 ILRA 1044
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2022

BEFORE

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

Jail Appeal No. 6157 of 2016

Ramayan ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
In Jail, Sri Chetan Chatterjee, A.C.

Counsel for the Respondent:
A.G.A.

Criminal Law- Code of Criminal Procedure, 1973- Section 216- Alteration of Charge- In this case learned trial court framed the charges against the accused-appellant on 25.02.2011 under Sections 306 and 498-A I.P.C. On the basis of those charges, the prosecution led its evidence and produced six witnesses. Statement of accused-appellant was recorded under Section 313 Cr.P.C. on 04.07.2015 and after that learned trial court all of sudden altered the charge and framed the charges on 29.07.2015 under Sections 304-B and 302 I.P.C.- Learned trial court did not hold accused-appellant guilty for the offence under Section 498-A, 306 and 304-B I.P.C. but convicted and sentenced him for the offence under Section 302 I.P.C. Hence, in this way, the accused-appellant was convicted and sentenced for the offence,

for which he was not given proper opportunity to defend himself.

Charge cannot be altered at the fag end of the trial without giving opportunity to the accused to defend himself.

Indian Evidence Act, 1872- Section 106- Section 114- Indian Penal Code, 1860- Section 302- Code of Criminal Procedure, 1973- Section 216- Provisions of Section 106 and 114 of Act, 1872 were raised by the learned Judge below but oral and other reliable evidence would not permit this Court to raise such presumption as the said presumption is rebuttable. The fact that the deceased died in the matrimonial home is not in dispute but whether it was accused who authored the act which would fulfill the ingredients of Section 300 of IPC and whether it would fall within its purview, such presumption cannot take place of proof. The learned judge with utmost respect could not have convicted the accused under Section 302 of I.P.C. on evidence which was not laid or rather the evidence which was led, was never put to him under Section 313 of Cr.P.C statement and, therefore, he was taken off guard. The presumption under Section 106 of Act, 1872 will not also come to the aid of the prosecution as it was not proved beyond reasonable doubt that the charge which was added did not even mention the satisfaction of the learned Judge below and the conviction was not from major to minor but was from minor to major offence.

Conviction of the accused cannot be secured by altering the Charge at the end of the trial u/s 302 IPC by resorting to the provisions of Section 106 of the Evidence Act without any evidence being led under the amended Charge since it is incumbent upon the prosecution to first prove its case beyond reasonable doubt and only thereafter the burden will shift upon the accused.

Code of Criminal Procedure, 1973- Section 216- Alteration of Charge - The main concern should be to see whether accused has/had a fair trial though he may know or not of what he was being tried for, once the evidence is over, he would not have a fair chance of cross-examination of the witnesses for the new charge added which is under Section 302 of I.P.C. and no evidence was recorded so as to bring home charge of Section 302 of IPC. No doubt the stage of framing new charge under Section 216 of the Cr.P.C. can be at any stage, but the charge for alteration or addition has to be so that the accused is put to circumstance which are against him. The basic feature for framing and/or altering charge in criminal trial is based on principle of fair play-accused is highly prejudiced for not getting the fair and proper opportunity to defend himself against the altered charge and the impugned judgment and order is liable to be set aside and is hereby quashed on this score.

Although Charge can be altered at any stage of the trial but the exercise cannot be held to be legal without putting the circumstances under the new Charge to the appellant as the rule of fair play and providing opportunity of hearing is fundamental to a fair and legal trial, without which the trial would stand vitiated and conviction of the accused would be illegal.

Criminal Appeal allowed. (E-3) (Para 13, 14, 22, 26, 27, 31, 32)

Case Law/ Judgements relied upon:-

1. R. Rachaiah Vs Home Secretary, 2016 0 Supreme (SC) 383

2. Crl. Appeal No.234 of 2017 (Dharmendra Rajbhar Vs St. of U.P.),All. (cited)

3. Nallapareddi Sridhar Reddy Vs St. of A.P., (2020) 12 SCC 467

4. Satish Nirankari Vs St. of Raj., (2017) 8 SCC 497

(Delivered by Hon'ble Ajai Tyagi, J.)

1. The appeal has been preferred by the appellant-Ramayan against the judgment and order dated 29.09.2016,

passed by learned Additional District and Sessions Judge/F.T.C.-II, Kushinagar in Session Trail No. 02 of 2011 (State of UP vs. Ramayan), arising out of Case Crime No. 445 of 2009, under Sections 498-A, 306 Indian Penal Code, 1860 (in short "I.P.C.'), Police Station- Turkpatti, District Kushinagar whereby the appellant is convicted and sentenced for the offence under Section 302 I.P.C. for life imprisonment with a fine of Rs.50,000/- and in default of payment of fine, further imprisonment for two years.

2. Brief facts of the case giving rise to this appeal are that a written report was submitted by informant-Anil (brother of the deceased) at police station Turkpatti, District Kushinagar with the averments that marriage of his sister Sundarmati was solemnized with the accused-Ramayan before six years of the occurrence. Accused used to torture his sister regularly. On 07.06.2009 at about 3:00 PM, his sister died due to burn injuries and dead body of the deceased is lying in the room. On the basis of aforesaid written report, a case crime no.445 of 2009 was registered under Sections 306 and 498-A I.P.C. and the investigation had taken place. During the course of investigation, I.O. visisted the spot and prepared the site plan. Inquest proceedings were conducted and inquest report was prepared. After that, the dead body was sent for post-mortem where post-mortem was conducted by the concerned doctor and post-mortem report was prepared.

3. Investigating Officer has recorded the statement of witnesses under Section 161 Cr.P.C. and after completion of investigation, I.O. has submitted the charge sheet against the accused-appellant, Ramayan under Sections 306 and 498-A I.P.C. The matter being exclusively triable by the court of sessions, which was committed to the court of sessions where learned Trial Judge framed the charges against the accused-appellant under Sections 306 and 498-A I.P.C. Accused-appellant denied the charges and claimed to be tried.

4. To bring home the charges, the prosecution examined following witnesses:

1.	Anil Kumar	P.W.-1
2.	Ramawati	P.W.-2
3.	Dasai	P.W.-3
4.	Anirudh	P.W.-4
5.	Ramcharan Kanaujiya	P.W.-5
6.	Dr. Vijay Kumar Madheshiya	P.W.-6

5. In support of oral evidence, prosecution submitted following documentary evidence, which was proved by leading oral evidence:-

1.	FIR	Ex.ka-7
2.	Written report	Ex.ka-1
3.	Post-mortem report	Ex.ka-11
4.	Panchayatnama	Ex.ka-12
5.	Charge sheet	Ex.ka-10
6.	Site plan with index	Ex.ka-6

6. After completion of prosecution evidence, the statement of accused was recorded under Section 313 of Criminal Procedure Code (Cr.P.C.). After recording the statement of accused-appellant, fresh charge was framed by the learned trial court under Section 304-B and in alternative under Section 302 I.P.C. and

opportunity of cross-examination was given only against the P.W.-1, Anil. No witness in defence was produced by the accused. After hearing the arguments of both the sides, learned trial court convicted the accused-appellant under Section 302 I.P.C. and sentenced him for life imprisonment with fine of Rs.50,000/-.

7. Heard Mr. Chetan Chatterjee, learned Amicus Curiae for the appellant and Mr. N.K. Srivastava, learned counsel for the State. Record has been perused.

8. Learned counsel for the accused-appellant has submitted that deceased died due to fire in the house but it is nowhere proved that fire was ignited by the accused-appellant. Prosecution has further failed to prove that at the time of occurrence, accused-appellant was inside the house because if it could have been the case then accused should also have suffered burn injuries nor he was arrested on the spot. Initially, the case was registered under Section 306 I.P.C. as a suicide case and after the investigation, charge sheet was also filed under Section 306 I.P.C.

9. It is also submitted by learned counsel for the appellant that charge was framed by learned trial court under Sections 306 and 498-A I.P.C. but after completion of entire prosecution evidence, charge was suddenly altered under Sections 304-B and 302 I.P.C. No opportunity was given to the accused-appellant to defend himself against the altered charges.

10. Per contra, learned A.G.A. has submitted that it is not disputed that deceased died in her matrimonial home by burning and it is also proved that she was living with accused-appellant in the same house since last six years, therefore, learned trial court has rightly taken the recourse of Section 106 of Indian Evidence Act where the burden of proof was on the shoulders of the accused-appellant to prove the fact that he has not committed the offence but he failed to do so.

11. It is further submitted by learned A.G.A. that all the witnesses of fact have supported the prosecution case and post-mortem report also confirms that the death of the deceased had taken place due to burn injuries, therefore, there is no illegality or impropriety in the impugned judgment and order, which calls for any interference by this Court.

12. In reply, it is submitted by learned counsel for the appellant that deceased was not the legally wedded wife of the accused-appellant and the learned trial court has also given finding that she was not legally wedded wife, therefore, no offence regarding the dowry death is made out against the accused-appellant and offence under Section 302 I.P.C. is not proved due to lack of evidence, in this regard also.

13. This is clear in this case that learned trial court framed the charges against the accused-appellant on 25.02.2011 under Sections 306 and 498-A I.P.C. On the basis of those charges, the prosecution led its evidence and produced six witnesses. Statement of accused-appellant was recorded under Section 313 Cr.P.C. on 04.07.2015 and after that learned trial court all of sudden altered the charge and framed the charges on 29.07.2015 under Sections 304-B and 302 I.P.C.

14. It is pertinent to note that only P.W.-1 Anil was given opportunity to defend himself with regard to altered charges and no other witness namely P.W.-

2 to P.W.-6 was given any opportunity for cross-examination with regard to altered charges, therefore, the accused-appellant could not get any opportunity to defend himself. As far as testimony of P.W.-2 to P.W.-6 is concerned, while writing the judgment, learned trial court did not hold accused-appellant guilty for the offence under Section 498-A, 306 and 304-B I.P.C. but convicted and sentenced him for the offence under Section 302 I.P.C. Hence, in this way, the accused-appellant was convicted and sentenced for the offence, for which he was not given proper opportunity to defend himself.

15. It appears that the learned judge who had subsequently taken charge of the matter had made up his mind that despite there being no evidence which proved the guilt against the accused-husband. The learned judge convicted the accused-appellant on the basis of what is known as morale conviction. This is the submission made by learned counsel for the appellant.

16. Learned counsel for the appellant has contended that the charge could not have been altered in the fashion and in the manner in which it has been done which has acted prejudicial to the appellant herein and learned counsel has relied on the decision in ***R. Rachaiah Vs. Home Secretary, 2016 0 Supreme (SC) 383*** and decision of this Court in ***Criminal Appeal No.234 of 2017 (Dharmendra Rajbhar Vs. State of U.P.)***, decided on 19.1.2021 so as to contend that accused requires to be given benefit of doubt as the prosecution has failed to prove the circumstances connecting accused to death of deceased.

17. Learned counsel for the State has vehemently submitted that the burden of proof has been shifted on the accused as per Section 106 of the Evidence Act, 1872 as the death was unnatural and at the dwelling place of husband.

18. Investigation of the case had taken place and the charge-sheet was laid under Section 498A, 306 of IPC but as we can see, convicted the accused under Section 302 of IPC after altering the charge.

19. It is further submitted by learned counsel for the appellant that once Trial Court came to the conclusion that no offence was committed under Section 498A of IPC, the presumption under Section 113-B of Evidence Act, 1872 could not be raised.

20. It would be pertinent to reproduce Section 216 of Cr.P.C. regarding alteration of charge which reads as follows:

"216. Court may alter charge.

(1)Any Court may alter or add to any charge at any time before judgment is pronounced.

(2)Every such alteration or addition shall be read and explained to the accused.

(3)If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4)If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

*(5)If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a p*rosecution on the same facts as those on which the altered or added charge is founded."

21. The question which arises before us is that when no cogent evidence to convict the accused despite that the learned Judge has relied on what can be said to be his own conjectures which are not borne out even on interpretation of Section 106 of the Evidence Act, 1872 (hereinafter referred to as 'Act, 1872') which reads as follows:

"106. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(a)When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b)A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

21. Section 113B and 114 of the Act, 1872 reads as follows:

".1[113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).]."

114. Court may presume existence of certain facts. --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 the facts of the particular case.

22. Provisions of Section 106 and 114 of Act, 1872 were raised by the learned Judge below but oral and other reliable evidence would not permit this Court to raise such presumption as the said presumption is rebuttable. The fact that the deceased died in the matrimonial home is not in dispute but whether it was accused who authored the act which would fulfill the ingredients of Section 300 of IPC and whether it would fall within its purview, such presumption cannot take place of proof. The learned judge with utmost respect could not have convicted the accused under Section 302 of I.P.C. on evidence which was not laid or rather the evidence which was led, was never put to him under Section 313 of Cr.P.C statement and, therefore, he was taken off guard. The presumption under Section 106 of Act, 1872 will not also come to the aid of the prosecution as it was not proved beyond reasonable doubt that the charge which was added did not even mention the satisfaction of the learned Judge below and the conviction was not from major to minor but was from minor to major offence.

23. The submission of learned A.G.A. is that no objection was raised at the time of alteration of charge.

24. We may hasten to mention here that the charge was added at the fag end of

the trial. The accused could not have thought that the said alteration of charge would be acted upon within seven days and the trial would culminate into returning the finding of punishment to him under Section 302 of IPC though the evidence was not completing the right of 1872, Act.

25. In our case, we can safely hold that the alteration of charge was bad and reliance is placed on the decision in R. Rachaiah (Supra) which will apply in full force.

26. In judging the question of prejudice as of guilt, the Trial Court was supposed to act with a broad vision and look to the substance and not to the technicalities. The main concern should be to see whether accused has/had a fair trial though he may know or not of what he was being tried for, once the evidence is over, he would not have a fair chance of cross-examination of the witnesses for the new charge added which is under Section 302 of I.P.C. and no evidence was recorded so as to bring home charge of Section 302 of IPC. No doubt the stage of framing new charge under Section 216 of the Cr.P.C. can be at any stage, but the charge for alteration or addition has to be so that the accused is put to circumstance which are against him. The basic feature for framing and/or altering charge in criminal trial is based on principle of fair play.

27. The charges which were levelled and in absence of any evidence, being proved and when there was no charge of murder, the Trial Court could not have altered the charge at the fag end of the Trial and raised presumption as to commission of offence under Section 302 of IPC.

28. The object and scope of altering the charge and the principles therein have been summarized by the Apex Court in ***Nallapareddi Sridhar Reddy Vs. State of A.P., (2020) 12 SCC 467***, which are applicable in our case.

29. In this case, the learned Trial Judge perused the charges and suddenly after most of the witnesses were examined and when it appeared that he could not base the conviction, on the basis of presumption under Section 106 and 114 of the Evidence Act, 1872, he altered the charge to Section 302 of I.P.C.

30. The Apex Court in ***R. Rachaiah Vs. Home Secretary, 2016 0 Supreme (SC) 383*** has held that alteration of charge in violation of mandate as per Sections 216 and 217 of Cr.P.C., and conviction recorded under altered charges seriously causes prejudice to the accused. Thereafter, this impropriety of the Trial Court stands vitiated and there could have been no conviction under altered charge namely under Section 302 of IPC.

31. We can safely conclude that accused-appellant was not given opportunity to defend himself against the charge for which he was convicted. It is sorry state of affair that learned trial judge altered the charge even after recording the statement of accused-appellant under Section 313 Cr.P.C., therefore, the charge was fitted according to the prosecution evidence. There is no doubt that charge can be altered at any stage of the trial but in such a case, the learned trial court should give proper and fair opportunity to the accused to defend himself against the altered charge so that his interest may not be prejudiced. He must get the opportunity of fair trial.

32. In our case, accused is highly prejudiced for not getting the fair and

proper opportunity to defend himself against the altered charge and the impugned judgment and order is liable to be set aside and is hereby quashed on this score.

33. Further, if we go by the evidence on record, then also the case of prosecution is not proved even for the offence under Section 302 I.P.C. There is no eye witness of this case and after alteration of charge, opportunity of cross-examination of P.W.-1 is given. P.W.-1 has specifically stated that he has not seen the occurrence as to how his sister caught fire and he also did not see who set her sister ablezed. Even before cross-examination, he has stated in his testimony that he was not present at the place of occurrence and he was told by the villagers that her sister had set her ablezed.

34. The learned trial court has brushed aside the story of prosecution with regard to the demand of additional dowry and dowry death because it is held by learned trial court that deceased was not legally wedded wife of the accused and the factum of additional demand of dowry was not proved, therefore, learned trial court did not hold guilty to the accused-appellant under Section 304-B & 498-A I.P.C. hence, there remains only the charge of murder under Section 302 I.P.C. against the accused-appellant for which there is no evidence on record. Accused-appellant could not be convicted on the basis of presumption for the offence under Section 302 I.P.C.

35. The prosecution was bound to prove the guilt of the accused under Section 302 I.P.C. beyond reasonable doubt but we find no such evidence on record. Although, the learned trial court has opined that on the basis of circumstantial evidence, the case was proved against the accused-appellant but there are no circumstances in this case, which lead to the conclusion that accused-appellant had committed the offence.

36. The Hon'ble Supreme Court in the case of ***Satish Nirankari Vs. State of Rajasthan, (2017) 8 SCC 497***, in paragraphs 29, 30 and 31 has held as under:-

"29. It is now well established, by a catena of judgments of this Court, that circumstantial evidence of the following character needs to be fully established:

(i) Circumstances should be fully proved.

(ii) Circumstances should be conclusive in nature.

(iii) All the facts established should be consistent only with the hypothesis of guilt.

(iv) The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused ***(seeState of U.P. v. Ravindra Prakash Mittal [State of U.P. v. Ravindra Prakash Mittal, (1992) 3 SCC 300 : 1992 SCC (Cri) 642]; Chandrakant Chimanlal Desai v. State of Gujarat [Chandrakant Chimanlal Desai v. State of Gujarat, (1992) 1 SCC 473 : 1992 SCC (Cri) 157])****. It also needs to be emphasised that what is required is not the quantitative, but qualitative, reliable and probable circumstances to complete the claim connecting the accused with the crime. Suspicion, however grave, cannot take place of legal proof. In the case of circumstantial evidence, the influence of guilt can be justified only when all the incriminating facts and circumstances are found to be not compatible with the innocence of the accused or the guilt of any other person.*

30. The following tests laid down in ***Padala Veera Reddy v. State of A.P.***

[Padala Veera Reddy v. State of A.P., 1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407] *also need to be kept in mind : (SCC pp. 710-11, para 10) "10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

31. Sir Alfred Wills in his book Wills' Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: "(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there by any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

37. In our case, there is no motive alleged by the prosecution and whatever motive is alleged i.e. with regard to dowry for which the accused-appellant has not been found guilty. No other any circumstantial evidence is available in this case, which could reach to the conclusion that the offence could have been committed by the accused-appellant himself and none else. The chain of circumstances is not complete. It is the duty of the court to evaluate the chain of circumstances to ensure that the chain of events clearly established and complete, in such a way, as to rule out the reasonable likelihood of innocences of the accused-appellant.

38. On the basis of above discussion, we have no other option but to acquit the accused-appellant under Section 302 I.P.C. as this is the case of no evidence. In the aforesaid view, we are of the considered opinion that there is neither the evidence against the acused-appellant with regard to offence under Section 302 I.P.C. nor he was given fair opportunity to defend himself against the altered charges, therefore, we are of the considered view that learned trial court could not have convicted the accused-appellant without any evidence and fair opportunity to defend himself, hence, upturn the findings of learned trial court and the appeal is laible to be allowed.

39. Therefore, in the considered opinion of this Court, the impugned judgment and order dated 29.09.2016 passed by the trial court deserves to be set aside and is accordingly, set aside.

40. Resultantly, the appeal stands **allowed.**

41. The accused-appellant is acquitted of the offences for which he was charged. The accused-appellant shall be released forthwith, if not wanted in any other case. Fine if deposited be refunded.

42. Let a copy of this judgment along with the trial court record be sent to the court below and jail authorities concerned for compliance.

(2022) 12 ILRA 1053
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

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

Criminal Appeal No. 6485 of 2018

Mohd. Amir ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Gaurav Kakkar, Sri Noor Muhammad, Sri Yogesh Kumar Srivastava

Counsel for the Respondent:
G.A.

Criminal Law- Indian Penal Code, 1860- Section 302- Section 304 Part I- The deceased died out of septicaemial death. We, therefore, hold that the death was a homicidal death. It was the appellant who was instrumental in commission of the offence and was the author of the offence- Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants-The offence would be one punishable under Section 304 part-I of the IPC- It appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC.

Although the prosecution has established that act of the accused resulted in the death of his wife in the ordinary course of nature but as the same was neither pre-meditated and nor intentional, hence the offence will fall within the ambit of Section 304 Part-I of the IPC instead of Section 302 of the IPC.

Doctrine of Proportionality- Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream- 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

As the judicial trend in our Country is reformative and corrective hence punishment imposed must be proportionate to the offence and should not be unduly harsh. Sentence modified accordingly.

Criminal Appeal partly allowed. (E-3)
(Para 10, 11, 15, 19, 23, 25, 26)

Case Law/ Judgements relied upon:-

1. Ankush Shivaji Gaikwad Vs St. of Maha., (2013) 6 SCC 770

2. Tukaram & ors Vs St. of Maha., (2011) 4 SCC 250

3. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

4. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

5. Crl. Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St. of Guj.) decided on 11.9.2013

6. Khokan@ Khokhan Vishwas Vs St. of Chattis., 2021 LawSuit (SC) 80

7. Anversinh Vs St. of Guj., (2021) 3 SCC 12

8. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

9. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

10. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

11. Deo Narain Mandal Vs St. of UP (2004) 7 SCC 257

12. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

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

1. This appeal challenges the judgment and order dated 22.9.2018 passed by Ist Additional Sessions Judge, Jhansi, in Sessions Trial No.240 of 2016 (State Vs. Mohd. Amir) in connection with Case Crime No.586 of 2015, Police Station Sipri Bazar, District Jhansi convicting the appellant under Section 302 IPC for life imprisonment along with fine of Rs.5,00,000/-, under Section 354 IPC for 3 years rigorous imprisonment along fine of Rs. 50,000/- and under Section 452 IPC for 3 yars rigorous imprisonment along with fine of Rs. 50,000/- and all the sentences shall run concurrently.

2. According to F.I.R., the applicant's daughter Km. Vinita Bajpai @ Doli, age - 24 years, used to live in Old Charliganj, Police Station - Sipri Bazar, Jhansi, District-Jhansi for the care of the applicant's late brother and bhabhi (brother's wife)'s son Abhilash Tiwari and daughter Km. Rinki, who is mentally challenged. The occurrence took place on 18.12.15 at around 11:30 a.m. Km. Vinita, daughter of the applicant, was alone at her Jhansi located residence. Taking advantage of the opportunity, Mohd. Amir s/o Mohd. Anees, resident of Sarai Mohalla, Police Station - Kotwali, Jhansi entered the room of the applicant's daughter and tried to commit rape on the applicant's daughter, against which act the applicant's daughter protested, and raised alarm; so fearing to be get apprehended, the said Mohammad Amir poured kerosene, kept in the house, on the applicant's daughter and set her on fire with the intention of killing her. While executing the said occurrence, Mohammad Amir also came into flames. Hearing the commotion, Vivek Tiwari, the grandson of the applicant, and many other people reached the spot, and took Km. Vinita to the Medical College, Jhansi. As her condition was critical, she, not being allowed to be admitted, was asked to be taken to Gwalior instead. The daughter of the informant was admitted to Ayushman Hospital, Gwalior and she was in moribund state.

3. On being summoned, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 10 witnesses who are as follows:

1	Gayari Bajpayee	PW1
2	Janki Prasad Bajpayee	PW2

3	Vivek Tiwari	PW3
4	Pramod Kumar Shukla	PW4
5	Shivnandan Singh Kushwaha	PW5
6	Dr. Ajay Gupta	PW6
7	Puttan Lal	PW7
8	Pravin Kumar Yadav	PW8
9	Kamta Prasad	PW9
10	Shiv Mohan Prasad	PW10

4. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.8
2	Written Report	Ex.Ka.1
3	Panchayatnama	Ex. Ka.10
4	Postmortem Report	Ex.Ka.11
5	Charge-sheet	Ex.Ka.15

5. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid.

6. Heard learned counsel for accused-appellant, learned A.G.A. for the State and perused the record.

7. It is the submission of appellant's Counsel that PW3- Vivek Tiwari stated on oath that the incident had occurred on 18.02.2015 at 11½ pm. He was inside the home at that time. He heard some screams, he came out of his house and saw that Amir was screaming. His hand and leg were engulfed in fire. He told Vivek that Doli @ Vineeta was in flames inside, save her. Public from the muhalla extinguished Vineeta's fire. Thereafter they took Vineeta to Medical College where the doctors after examination advised her to be taken to Gwalior. After returning from the hospital, he first went to his home to take the elders. From there, he made a telephone call to Vineeta's father who lived in Mahoba. He told me that he had already received the information and that he was coming directly to Gwalior. Vineeta is his Chacheri Bua (father's cousin). She would live with her Mama (maternal uncle) to take care of his son because he was mentally retarded. Amir hails from city. It is not known where he lives in the city. Amir has been visiting there for the last two years.

8. It is submitted by learned counsel for accused-appellant that the accused is in jail since 22.9.2018. In alternative, it is submitted that at the most punishment can be under Section 304 II or Section 304 I of I.P.C. If the Court feels, as the accused have been in jail for more than 4 years without remission, they may be granted fixed term punishment of incarceration.

9. Learned A.G.A. for the state has vehemently submitted that facts of this case will not permit the Court to convert the sentence to that under Section 304 Part I of I.P.C. as none of the judgments relied by the accused-appellant will apply to the facts of this case.

10. While going through the record it is very clear that in view of the judgment of ***Ankush Shivaji Gaikwad Versus State of***

Maharashtra, (2013) 6 SCC 770, the appeal requires to be considered on that aspect. While going through the facts, the deceased died out of septicaemial death on 5.1.2016. We, therefore, hold that the death was a homicidal death. It was the appellant who was instrumental in commission of the offence and was the author of the offence.

11. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants.

12. The question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

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13. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

14. On overall scrutiny of the facts and circumstances of the present case

coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

15. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

16. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana** reported in **(2013) 3 SCC 280**, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence

punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

17. In latest decision **in Khokan@ Khokhan Vishwas Vs. State of Chattisgarh, 2021 LawSuit (SC) 80** on which this court relies wherein the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and sentenced under Section 304 of IPC. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused. .

18. The factual scenario as it emerges would go to show that the incident occurred when the accused came to the place of incident 100 rupees were demanded which he had taken from the deceased and there was a quarrel between the deceased and accused. At about 9:00 p.m. Balbeer fired at the deceased and this occurred in spur of the moment. The evidence goes to show that it was not a premeditated cold blooded murder. However, PW-1 did not see the deceased shooting at the deceased. PW-2, has turned hostile. Similar is the case with PW-3. The gun was recovered at the instance of the accused from a place which was known only to him.

19. As narrated herein above the decision of commission of offence under Section 302 IPC cannot be concurred by us in view of the As narrated herein above as on overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors (supra)** and we are fortified in our view by the judgment of Apex Court in the case of **B.N. Kavatakar and Another (supra)** and therefore, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC and not under Section 302 of IPC or Section 304 Part -II of IPC.

20. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into

criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

21. 'Proper Sentence' was explained in ***Deo Narain Mandal vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

22. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh***, [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

23. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an

opportunity of reformation in order to bring them in the social stream.

24. Since the learned counsel for the appellant has later not pressed the appeal on merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is required to be partly allowed.

25. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

26. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principles laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) of IPC.

Punishment:

27. The accused is in jail since 22.9.2018. The Apex Court in such cases has converted the conviction under Section 302 of I.P.C. to under Section 304 Part I of I.P.C. which will come to the aid of the accused-appellant.

28. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, appeal is partly allowed.

29. The punishment under Sections 354 IPC cannot be sustained. The punishment under Section 452 IPC cannot be sustained as no ingredients are proved and judgment qua the said is upturned. Offence under Section 302 IPC is converted into Section 304 Part-I IPC and 7 years rigorous imprisonment is awarded. The compensation from Rs. 5 Lacs as fine is reduced to Rs. 3 Lacs which would be compensation under Section 354 to be paid to the legal heirs of the deceased. Appellant shall undergo one and half year simple imprisonment in case of default of fine.

30. Record and proceedings be sent back to the Court below forthwith. The fine if he has yet not deposited, will deposit same within four weeks from the date of release from jail. The jail authority shall see that the accused-appellant is lodged in the jail to re-incarcerate for the default period if fine is not paid after he is released.

31. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

32. This Court is thankful to learned Advocates for ably assisting the Court.

(2022) 12 ILRA 1061
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 8461 of 2022

Vikram Singh Saini @ Vikram Saini ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:

Sri Aditya Upadhyay, Sri I.K. Chaturvedi, Sr. Advocate

Counsel for the Respondent:
G.A.

Criminal Law- Code of Criminal Procedure, 1973- Section 374(2)- Representation of People Act, 1951- Section 8-Suspension of Sentence-The disqualification of a person under sub-sections (1), (2) and (3) of Section 8 of the Act, 1951 is due to a conviction for one of the offences as mentioned in the section- In the present case the maximum punishment awarded to the appellant-accused is of two years imprisonment which results in his disqualification as per Section 8 (3) of the Act, 1951- The law as is continuously being held, reiterated and referred too (sic 'to') is that powers of suspension of conviction should be exercised in rare cases only- Section 8 of the Act, 1951 stipulates the disqualification on conviction for certain offences - Merely by pleading that appellant by the conviction will stand disqualified as per the Act, 1951 is no ground to suspend the conviction.

Where the conviction by the trial court has resulted in the disqualification of the accused, then the said conviction cannot be stayed by merely adopting the plea of disqualification as the power to stay the conviction is to be exercised only in rare cases.

Criminal Appeal rejected. (E-3) (Para 18,19,20)

Case Law/ Judgements relied upon:-

1. Navjot Singh Sidhu Vs St. of Pun. & anr.; Appeal (Crl) No. 59 of 2007

2. Shakuntala Khatik Vs St. M.P. ; Crl. Appeal No. 10870 of 2019 (cited)

3. Ravikant S. Patil Vs Sarvabhouma S. Bagali : (2007) 1 SCC 673

4. Shyam Narain Pandey Vs St. U.P.: (2014) 8 SCC 909

5. Lok Prahari Vs Election Commission of India : (2018) 18 SCC 114

(Delivered by Hon'ble Samit Gopal, J.)

Order on Crl. Misc. Suspension of Order of Conviction Application No. 3 of 2022 dated 18.11.2022

1. Heard Sri I.K. Chaturvedi, learned Senior Advocate assisted by Sri Aditya Upadhyay, learned counsel for the appellant/applicant and Sri Ankit Srivastava, learned brief holder for the State of U.P. and perused the record.

2. The Suspension of Order of Conviction Application No. 3 of 2022 has been filed by the appellant-Vikram Singh Saini@ Vikram Saini with the following prayers:-

"It is therefore most respectfully prayed that this Hon'ble Court may be pleased to suspend/stay the order of conviction dated 11.10.2022 passed by Addl. District and Sessions Judge/Special Judge MP/MLA Court, Court No.4, Muzaffar Nagar in S.T. No. 1172/2015 (State of U.P. Vs. Dharamveer and others) arising out of case crime no. 407 of 2013, under section 147, 148, 149, 307, 336, 353, 186, 504, 506 IPC and section 7 of Crl. L.A. Act, P.S. Jansath, Muzaffar Nagar, during pendency of present appeal before this Hon'ble Court.

or pass any such order/or further order which this Hon'ble Court deems fit and proper otherwise the appellant shall suffer an irreparable loss."

3. The appeal has been preferred by the appellant under Section 374(2) Cr.P.C. against the judgement and order dated 11.10.2022 passed by the Additional

District and Sessions Judge/Special Judge MP/MLA Court, Court No. 4, Muzaffar Nagar, in Sessions Trial No. 1172 of 2015 (State of U.P. vs. Dharmveer and others) Case Crime No. 407 of 2013, P.S.- Jansath, District Muzaffar Nagar, whereby the appellant has been convicted and sentenced for the offence under Section 147 I.P.C. to undergo 01 year imprisonment, under Section 148 I.P.C. to undergo two years imprisonment and fine of Rs. 5000/-, and in default of payment of fine to 02 months additional imprisonment and under Sections 336 r/w 149 I.P.C. to undergo 02 months imprisonment, under Section 353 I.P.C. to undergo 01 month imprisonment, under Section 504 I.P.C. to undergo 01 year imprisonment, under Section 506 I.P.C. to undergo 02 years imprisonment with fine of Rs.5,000/- and in default of payment of fine to undergo 02 months additional imprisonment and under Section 7 Criminal Law (Amendment) Act to undergo 06 months imprisonment. Set off under Section 428 Cr.P.C. has been given. All sentences have been ordered to run concurrently.

4. The said appeal has been admitted and the lower court records have been summoned vide order dated 18.11.2022. The prayer for bail/suspension of sentence has been allowed and the appellant has been directed to be released on bail in the said matter. Subsequently, the present application has been filed with the prayers as quoted above.

5. Learned counsel for the appellant argued while placing para 6 of the affidavit in support of application for suspension of order of conviction that the appellant was convicted merely on the basis of witnesses who were police personnels. While placing para 8 of the said affidavit it is argued that the appellant is one of the reputed leaders of Bhartiya Janta Party (BJP). Further, while placing para 13 of the said affidavit it is argued that the appellant enjoys the majority of voters from his constituency. The general public from his constituency have shown their faith upon appellant twice and elected him M.L.A. in two terms from the same constituency, hence in the interest of general public, execution of order of conviction is liable to be stayed by this Court.

6. It is further argued that the appellant has been falsely implicated in the present case at the behest of political persons of the then ruling Samajwadi Party. It is further argued while placing para 30 of the said affidavit that the appellant was a sitting M.L.A. from Assembly Constituency-15, Khatauli, Muazaffar Nagar. The appellant has been disqualified by the Principal Secretary in compliance of a letter issued by the Election Commission. It is further argued while placing para 31 of the said affidavit that subsequently the Election Commission of India vide press note dated 08.11.2022 has issued the schedule for by-elections in 15-Khatauli Assembly Constituency of Uttar Pradesh and 05.12.2022 has been fixed as the date of polling. It is further argued that the maximum sentence awarded to the appellant is of two years and as such he has been disqualified. Learned counsel has placed before the Court the following judgments to buttress his submissions:-

(i) Navjot Singh Sidhu Vs. State of Punjab and another ; Appeal (Crl) No. 59 of 2007 ; Paragraph no. 3.

(ii) Shakuntala Khatik Vs. State of Madhya Pradesh ; Crl. Appeal No. 10870 of 2019 ; Paragraph no. 10 to 12 ;

(decided on 23.09.2020) (Madhya Pradesh High Court).

7. It is further argued that in both the cases, the Courts have held that if accused suffers loss which is irreparable the Court can suspend the order of conviction. It is argued that as such looking to the facts and circumstances, the order of conviction deserves to be stayed.

8. Per contra, learned brief holder for the State vehemently opposed the prayer for staying of conviction. It is argued that the appellant has been convicted after a full trial. He has been proved guilty. The case now is not of the stage of any prima-facie involvement of the appellant. Evidence has been led against him which has been found to be trustworthy and reliable after which the trial court has convicted him. It is further argued that in so far as the judgment in the case of **Navjot Singh Sidhu (supra)** is concerned, the same is distinguishable on the facts as the Apex Court had extended the benefit of Section 8(4) of the Representation of the Peoples Act, 1951 to the appellant therein. The said section has been subsequently declared ultra-virus by the Apex Court and even on facts the said case stands on a different footing. It is argued that there is no exceptional circumstance made out by the appellant so as to warrant stay on the conviction. The present application is devoid of any merit and be dismissed.

9. After having heard learned counsels for the parties and perusing the records, it is evident that the appellant has been convicted by the trial court for a maximum sentence of two years. The ground as taken for the prayer for suspension of conviction is that the appellant is a politician and was involved because of the political rivalry between two political parties, the appellant is allowed by the public constituency and the Election Commission has declared the schedule for by-elections in his constituency and as such the application for suspension of sentence be allowed.

10. The grounds as taken do not in any manner appeal to the Court. There is full-fledged trial conducted after which the appellant has been convicted. The trial court has found the evidence to be trustworthy and reliable.

11. Section 8 of the Representation of People Act, 1951 (hereinafter referred to as the "Act, 1951") reads as under:

*"**8. Disqualification on conviction for certain offences.**--(1) A person convicted of an offence punishable under--*

(a) Section 153-A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171-E (offence of bribery) or Section 171-F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376-A or Section 376-B or Section 376-C or Section 376-D (offences relating to rape) or Section 498-A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for

punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) Sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) Section 7 (offence of contravention of the provisions of Sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) Section 125 (offence of promoting enmity between classes in connection with the election) or Section 135 (offence of removal of ballot papers from polling stations) or Section 135-A (offence of booth capturing) or clause (a) of sub-section (2) of Section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act,

(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991,

(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or Section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971)

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002);

shall be disqualified, where the convicted person is sentenced to--

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(2) A person convicted for the contravention of--

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, [1961 (28 of 1961)];

and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub- section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

12. The disqualification of a person under sub-sections (1), (2) and (3) of Section 8 of the Act, 1951 is due to a conviction for one of the offences as mentioned in the section.

13. In the present case the maximum punishment awarded to the appellant-

accused is of two years imprisonment which results in his disqualification as per Section 8 (3) of the Act, 1951.

14. The law with regards to suspension of conviction is well settled. The Apex Court has ruled, reiterated and discussed the same in a catena of judgments. Some of them are:

a) Ravikant S. Patil v. Sarvabhouma S. Bagali : (2007) 1 SCC 673,

b) Navjot Singh Sidhu v. State of Punjab : (2007) 2 SCC 574,

c) Shyam Narain Pandey v. State of Uttar Pradesh : (2014) 8 SCC 909 and

d) Lok Prahari v. Election Commission of India : (2018) 18 SCC 114.

15. In the case of **Ravikant S. Patil (supra)** it was held that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases. It has been held in para 15 as follows:

"15. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction."

(empasis supplied)

Further relying in the cases of **Gajanan, K.C.Sareen** and **Atar Singh** the Apex Court reiterated the same proposition in para 16.4 which is as under:

"16.4. Lastly, reference may also be made to the decision of this Court in State of Maharashtra v. Gajanan : (2003) 12 SCC 432. In the said case, relying on K.C. Sareen : (2001) 6 SCC 584 it was reiterated that only in exceptional cases, the court should exercise the power of stay of conviction. Since the High Court in the said case had not pointed out any exceptional fact or looked into the ramification of keeping such conviction in abeyance, the order of the High Court staying the conviction was set aside. In the cited case of Union of India v. Atar Singh : (2003) 12 SCC 434 it was noted that the High Court had mechanically passed the order by suspending the conviction and the discretion ought not to have been exercised by the High Court by passing such an order suspending the conviction."

16. Further the Apex Court in the case of **Navjot Singh Sidhu (supra)** has held that grant of stay of conviction can be resorted to in rare cases. In Para 6 it has been held has follows:

"6. The legal position is, therefore, clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should

specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

(emphasis supplied)

17. The Apex Court in the case of **Shyam Narain Pandey (supra)** has while referring to the case of Balakrishna Dattatrya Kumbhar held that loss of public employment / promotion prospects are not at all a relevant consideration for suspension of conviction. Para 9 and 11 of the judgment reads as follows:

"9. In State of Maharashtra v. Balakrishna Dattatrya Kumbhar : (2012) 12 SCC 384 referring also to the two decisions cited above, it has been held at para 15 that: (SCC p. 389)

"15. ... the appellate court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the court as regards the evil that is likely to befall him, if the said conviction is not suspended. The court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.""

(emphasis supplied)

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"11. In the light of the principles stated above, the contention that the appellant will be deprived of his source of livelihood if the conviction is not stayed cannot be appreciated. For the appellant, it is a matter of deprivation of livelihood but he is convicted for deprivation of life of another person. Until he is otherwise declared innocent in appeal, the stain stands. The High Court has discussed in detail the background of the appellant, the nature of the crime, manner in which it was committed, etc. and has rightly held that it is not a very rare and exceptional case for staying the conviction."

(emphasis supplied)

18. The Apex Court in the case of **Lok Prahari** (supra) has again reiterated that the power to stay a conviction is by way of an exception. The decision in the case of **Navjot Singh Sidhu** (supra) has also been relied upon which states that the power to stay of conviction has to be resorted in a rare case only (para 15).

19. In the present case the ground as is taken for suspension of conviction is that in the event the same is not granted the appellant / applicant will remain disqualified under the Act, 1951.

20. The law as is continuously being held, reiterated and referred too is that powers of suspension of conviction should be exercised in rare cases only. The conviction of the appellant / applicant if for rioting, rioting armed with deadly weapon, endangering life or personal safety of others, assault or criminal force to deter

public servant from discharging his duty, intentional insult with intent to provoke breach of peace and criminal intimidation which had caused a law and order problem and had thrown the peace of the citizens out of gear. Section 8 of the Act, 1951 stipulates the disqualification on conviction for certain offences. The offences under the Indian Penal Code covered by the act are which have the potentiality to destroy the core values of a healthy democracy, safety of the State, economic stability, national security, and prevalence and sustenance of peace and harmony amongst citizens and may others. The criminal activities resulting in disqualification are related to various spheres pertaining to the interest of the nation, common citizenry interest, communal harmony, and prevalence of goods governance. Merely by pleading that appellant by the conviction will stand disqualified as per the Act, 1951 is no ground to suspend the conviction.

21. The application is, accordingly ***rejected***.

(2022) 12 ILRA 1068
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.12.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 736 of 1984

Mumtazim & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Hasibullah Khan, Amrendra Nath Tripathi, Suresh Kumar Yadav

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 134-Other eye-witnesses were not produced by prosecution- It is not the number of witnesses which is to be countered but it is the reliability and veracity of witnesses which has to be considered.

Settled law that it is not the quantity but the quality of evidence, which is important.

Indian Evidence Act, 1872- Section 3- P.Ws. 1 and 2 are interested witnesses as P.W.-1 is the son of deceased and P.W.-2 is the brother of the deceased- No material contradiction could be extracted. Therefore they cannot be disbelieved merely because they are interested witnesses.

Where the testimony of the related witnesses is credible and trustworthy then the same cannot be disbelieved merely on the ground that the witnesses happen to be related to the witnesses as they are natural witnesses.

Criminal Appeal rejected. (E-3) (Para 37, 41)

Case Law/ Judgements relied upon:-

1. Sunil Kumar Vs St. Govt. of NCT of Del. (2003) 11 SCC 367

2. Gulam Sabar Vs St. of Bih. (2014) 3 SCC 401:

3. Kartik Malhar Vs St. of Bih. (1996) 1 SCC 614

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. This appeal under Section 374 (2) Cr.P.C has been preferred by the convicted appellants Muntazim, Mustaqim, Rhimuddin and Idris against the judgment and order dated 19.09.1984 passed by Shri H.L. Kurel III-Additional Sessions Judge, Barabanki in Sessions Trial No. 241 of 1982 convicting and sentencing the appellants under Section 147 IPC to undergo one year rigorous imprisonment,

and to further undergo 1½ years rigorous imprisonment under Section 148 IPC and to undergo life imprisonment under Section 302 IPC read with section 149 IPC.

2. Wrapping the facts in brief the deceased Haji Majid Ashraf Khan owned a house in Village Sipahiya, Police Station Mawai District Barabanki. He had raised his house on his own land adjoining to his house. The accused Idris claimed that adjoining land. There was unfriendly atmosphere between the two families A case was registered against the accused but he was acquitted of that offence. On account of this enmity, accused Idris had beaten Haji Ashraf Khan at Madhwa Nala.

3. Parnala of complainant's house falls in Kolia between the house of the complainant and the accused Muntazim. The accused person had taken out parnala, raised a wall in the said kolia and prevented thereby flow of water of parnala. When the father of the complainant abstained the accused appellants from doing so, the accused started abusing and threatening his father. Complainant went to register a report in this regard to the police station concerned but the accused restrained their way and kept a watch standing in the ambush on their way. Therefore they could not lodged the FIR immediately.

4. The complainant along with other relatives Ejaz and Ashraf moved to the police station at about 4 p.m. As soon as they reached "Phool ka talab' near Naya Purwa all the accused person appeared from their hiding place in the Behaya and chased them. The complainant any how managed to escaped by raising alarm but Haji Ashraf was an old man, therefore, he was overpowered by the accused Idris holding Ballam, accused Muntazir holding axe and the rest of accused person with lathi and continued to beat the deceased till his death near the house of Jagjeevan. The incident was witnessed by Sifat Ahmad, Abrar Ahmad, Nizamuddin, Ejaz Ahmad, Shahnawaz and Shabbir.

5. The matter was reported to police station Mawai and a case was registered as Crime No. 84 under Section 147, 148, 149 , 302 IPC Police Station Mawai and endorsed on G.D No. 22 on the same date. Investigation was conducted by Investigating Officer Gulab Singh Bhatia who recorded the statement of witnesses, inspected and prepared the site plan (Ex. Ka-6) and conducted inquest of deceased, prepared photo lash, challan lash, letter to C.M.O and other relevant papers and send the body of the deceased for inquest through constables recorded the statements of witnesses. He collected plain and blood stained earth, sealed and prepared the recovery memo on the spot (Exhibit Ka 7 and 8), and prepared recovery memo of blood stained cloth (Ghamcha) of deceased (Exhibit Ka-9). After collecting all the relevant evidences and noting down the result of post-mortem the Investigating Officer submitted charge sheet No. 22 of 1979 in court under Section 147, 148, 149, 302 IPC.

7. Convict appellants appeared in the Court and after taking cognizance, the Court concerned committed the case to the Court of Sessions.

8. The Sessions Court framed charges against all the accused. The accused abjured from the charges and claimed to be tried.

9. In order to prove the case against the convict appellants, the prosecution produced the following witnesses:

(A) P.W.-1 Mushtjab Ahmad.

(B) P.W.-2 Nijamuddin.

(C) P.W.-3 Gulab Chand Bhatiya Investigating officer.

(D) P.W.-4 Dr. Gopal Swaroop who conducted the autopsy on 08.08.1979 at 3 p.m. and found injuries on the body of the deceased.

(E) P.W.-5 Head Constable 35 Onkar Nath who prepared the chik report on the basis of written report. He proved the G.D entries.

(F) P.W. -6 Kripa Shanker Dubey. He send the case property to Forensic Science Laboratory through constable Ayodhya Prasad in sealed condition.

(G) P.W.-7 Constable Mohd. Jubair Khan. Who send the case property (2 bundle and 2 box) and entered it in G.D. No. 11.

10. Besides oral evidence, prosecution produced and proved following documentary evidence:

(a) FIR (Exhibit Ka-1).

(b) Inquest report (Exhibit Ka-2).

(c) Photo lash (Exhibit Ka-3).

(d) Challan lash (Exhibit Ka-4).

(e) Letter to C.M.O (Exhibit Ka-5).

(f) Site plan (Exhibit ka-6).

(g) Recovery memo (Exhibit ka-7,8,9)

(h) Charge-sheet (Exhibit ka-10)

(I) Postmortem report (Exhibit ka-11)

(J) FIR (Exhibit Ka-12).

11. After concluding the evidence from the side of the prosecution statement of accused were recorded under Section 313 Cr.P.C.

12. Convict appellant No. 1 Muntazim stated in his statement under Section 313 Cr.P.C that he is falsely implicated in the case because he is brother of Mustaqim. The convict appellant No. 2 Mustaqim stated in his statement under Section 313 Cr.P.C that the deceased wanted to purchase his house therefore he is falsely implicated in the case. Convict appellant No. 3 Rahimuddin denied the evidences adduced against him and stated that he was residing in Kanpur and was working in hotel since the last eight to ten years. His father Shaukat had expired. Convict appellant No. 4 Idris denying all the evidences stated that he is falsely implicated in the case. He was playing on transistor, Nizamuddin forbade him from playing transistor but he did not turned off the transistor. Nizamuddin threw his transistor, then he entangled with Nizam Uddin. Due to this animosity he is falsely implicated. The convict appellant Moharram Ali denied the incident.

13. He had expired during the pendency of this appeal and the appeal had already stood abated against him.

14. The accused produced D.W.-1 Kashiram to show that Moharram Ali had no concerned with the Village Sipahiya as such he had no motive for murder.

15. After hearing both the parties and perusal of the record, learned trial Court reached to the conclusion that the prosecution has succeeded in proving the guilt to hilt against the accused person and all of them were found guilty in Sessions Trial No. 241 of 1982 arising out of Crime No. 84 under Section 302, 147, 148, 149 IPC Police Station Mawai District Barabanki.

16. Aggrieved by the judgment and order the present appeal has been preferred by the convict appellants.

17. Heard Shri Anrendra Nath Tripathi, Shri Suresh Kumar Yadav, learned counsel for the appellants and Shri Arunendra, learned Additional Government Advocate appearing on behalf of the State respondents.

18. It is contended by the learned counsel for the appellants that the judgment passed by the trial court is erred in law and on facts. The evidences on record is most tenuous, limping, shaky, suspicious and fragile and the conviction cannot be sustained. Learned trial court misread the evidence on record and did not properly appreciate the veracity of prosecution case as the prosecution case is absolutely inconsistent from the very beginning.

19. The presence of P.W-1 and P.W.-2 is highly doubtful. P.W-2 is a chance witness and it is quite unsafe to rely upon his testimony. The conduct of P.W.-1 is inherently strange against a human conduct to be mere spectator of the occurrence without making any effort to rescue his father. Therefore, the impugned judgment and order dated 19.09.1984 is liable to be set aside and the appellants are entitled to be acquitted from the charges levelled against them.

20. On the contrary Shri Arunendra, learned A.G.A for the State has argued that it is a case based on ocular evidence. P.W.-1 is the son of the deceased and P.W.-2 is the eye-witness of the incident of murder. He is an independent witnesses who witnessed the incident and therefore there is no reason to disbelieve the witnesses. The injuries are corroborated by the eye-witnesses and the post-mortem report. The evidence against the appellants are proved beyond reasonable doubt. Place of occurrence is also established by the investigating officer. There is no error in the judgment and order passed by the court below, hence, the present appeal is liable to be dismissed.

21. Considered the rival submissions and perused the record as well as the record of appeal and gone through the case law cited.

22. During the course of trial accused Israr died and the trial stood abated against him whereas accused Moharram Ali died during the pendency of the appeal and the appeal was abated against him. Now the present appeal survives on behalf of appellants Muntazim, Mustaqim, Rahimuddin and Idris is being heard and decided.

23. In the present matter, the complainant has alleged in the FIR that on account of previous animosity regarding the flow of water parties have strained relations and on 07.08.1979, at about 4 p.m. he was going to the police station to lodge FIR against the accused persons, he was assaulted by the accused persons near "phool ka talab'. The complainant and Ejaz escaped from the place of occurrence however, Haji Ashraf being an old man could not escape and was killed by accused.

24. In order to prove his case the prosecution had adduced seven witnesses. P.W-1 Mushtjab Ahmad stated that he is the son of the deceased when he was going to police station along with his father Haji Ashraf Khan (now deceased) and other relative Ejaz for lodging the FIR in the police station about the incident that had taken place in the fore-noon of the day of occurrence relating to the flow of parnala, prior to this incident. His father constructed a house on the vacant land in the south of

their house, accused Israr claimed that land and about 13 years ago accused Israr (now deceased) assaulted his father Haji Ashraf Khan (now deceased) near Mazwa Nala and a criminal case against Israr was lodged. Israr was acquitted of that case and thereafter both the families have animosity. Again on the date of occurrence accused Muntazim, Mustakeen, Israr, Moharram Ali destroyed their parnala situated in the west of their house and erected a wall in front of their main gate. When his father raised objection to the construction, then the accused abused his father. His father wanted to lodged an FIR regarding that incident but accused obstructed their way towards the police station and he could manage to move for police station at about 3:45 p.m. along with complainant and his relative Ejaz when they reached near "Phool Ka Talab' the accused came out from the ambush, chased them and Muntazim assaulted with axe and Idris with balam and rest of the accused with lathi in their hands. The incident was witnessed by Abrar Ahmad, Nizamuddin, Fiyaz, Ejaz, Shahnawaz, Shabbir and Shyam Lal.

25. P.W.-2 Nizamuddin deposed that he belongs to village Sipahiya to which the accused belongs. This witness was returning from Mehmoodpur, where he had gone for getting his Kripan and fawda (axe) sharpen from the shop of a carpenter. This witness is stated to be an eye-witness of the incident who tried to prove the guilt to the hilt.

26. P.W-3 Gulab Chand Bhatia, the investigating officer of the case who recorded the statement of witnesses, inspected and prepared the site plan (Ex. Ka-6) and conducted inquest of deceased, prepared photo lash, challan lash, letter to C.M.O and other relevant papers and send the body of the deceased for inquest through constables recorded the statements of witnesses. He collected plain and blood stained earth, sealed and prepared the recovery memo on the spot (Exhibit Ka 7 and 8), and prepared recovery memo of blood stained cloth (Ghamcha) of deceased (Exhibit Ka-9).

26. P.W.-4 Dr. Gopal Swaroop conducted post-mortem on the dead body of the deceased and found following injuries on the body of the deceased:

1. Lacerated wounds 4cm x1cm x muscle bone deep over the oxipital bone on the left side 6cm above the trans of VII cervical vertebra.

2. Lacerated wounds 5 cm X.5 cm x muscle deep over the o oxipital bone on the right side 2 cm above the injury no.1.

3. Lacerated wounds 4 cmx.5 cm muscle bone deep over the left side of oxipital bone 2 cm above injury no. 2.

4. Lacerated wounds 5 cm x/75 cm x muscle deep over the left partial bone 3.5 cm above he injury no. 3.

5. Lacerated wounds 6 cm x.5 cm x muscle bone deep over the lower arm on the lateral aspect 10 cm below the left elbow joint.

6. Lacerated wounds 2 cm x .5 x muscle bones deep over the left lower arm on the lateral aspect 10 cm below the left elbow joint.

7. Lacerated wound 1 cm .5 cm muslce bone deep over the left lower and 5 cm above the waist joint.

8. Contused swelling 10cm x .5 cm x black colour over the lower arm on the lateral aspect 4 cm below the left elbow.

9. Contused swelling 13 cm x 8.5 cm black in color around the right elbow joint and arm.

10. Abrasion 3 cm x ½ cm.

11. Abrasion 2.5. cm .5 cm black in color below the left knee.

28. P.W.-5 Head Constable 35 Uma Nath stated on oath that he was posted as Head Constable Muharir at Police Station Mawai and prepared chick report on the basis of written report and endorsed the same in G.D No. 22 dated 07.08.79 at 3:10 p.m. on the same day and proved in Court Ex Ka-13. This witnesses stated that Shri Gulab Singh Bhatia submitted case property; blood stained earth, plain earth and blood stained tehmat on 08.08.79 at 8-10 p.m. which he endorsed on G.D. No. 17.

29. P.W.-5 further stated that Constable 138 Subedar Singh submitted one packet of blood strained tehmat and kurta on 09.08.1979 at about 7:10 a.m. which were endorsed by him at G.D. No. 6 on the same day. 30. The above four packets were given to Constable Mohd. Zubair for submitting in Sadar Malkhana which was endorsed by Head Constable Shri Prakash Srivastava in G.D on 06.03.80.

31. P.W.-6 Sub-Inspector Kripa Shankar Dubey deposed that he was posed in Sadar Malkhana and four packets were submitted by Constable Jubair in sealed condition on 06.03.80 which was again sent to forensic science laboratory through Constable Ayodhya Prasad on 19.03.80 which was endorsed in G.D by Constable Mewa Lal.

32. P.W.-7 Mohd. Jubar Khan C.P. 471 stated that he submitted four packets (two bundle and two packets) in Sadar Mal Khana in sealed position. The said witnesses proved G.D. No. 17.

33. After conclusion of the prosecution witnesses statements of accused under Section 313 Cr.P.C was recorded. The accused adduced D.W.-1 Kashi Ram who stated on oath in the Court that accused Moharram Ali was lame and physically impaired since birth due to paralysis. So far as the evidence of this witness is concerned he deposed only regarding Moharram Ali who had already died during the pendency of the appeal and the appeal has been abated against him. No other defence evidence is adduced.

34. According to the FIR Sifat Ahmad, Abrar Ahmad, Nizamuddin, Ejaz Ahmad, Shahnawaz and Shabbir witnessed the incident. Nizamuddin who is an ocular witness has appeared as prosecution witnesses and stated that he himself had seen the incident of murder of Haji Ashraf Khan by the accused persons in front of house of Jagjeevan. The witnesses stated that he was coming from village Mehmoodpur after getting his fawda sharpen by ironsmith. He also stated that there is no ironsmith in his own village Sipahiya, therefore, most of the fellow villagers got their work done in Mehmoodpur therefore, he himself came to Mehmoodpur for sharpening his axe The witnesses prove the place of occurrence and provided the correct location of Sipahiya, Mawai, Naya Purwa and Malwanala. He also stated on oath that village Mehmoodpur is about ½ Km away from Naya Purwa in the north and is about 1 Km away in the south of Naya Purwa he further stated that village Sipahiya is about 2 km away in the west of Madhwa Nala. A person who wants to reach village Sipahiya from Mehmoodpur will certainly have to go through village Naya Purwa where the occurrence happened. This witnesses is a farmer and he needs agricultural tools ready. He is not a chance witness and was present on the spot. This witnesses stated on oath that the house of Jagjeevan Ram

was locked and house of Babu Ram was closed from inside at the time of incident and after the incident, residents of both the house came outside.

35. It is argued on behalf of the appellants that there are two ways to reach police station. In his cross-examination, P.W.-2 stated that one can reach to police station from village Sipahiya through fields on the bank of Madhuwanala also, but this is a very inconvenient way especially in the rainy season.

36. It is also clear from the evidence that at the time of incident, it was a rainy season and the mud on road do not allow any person to walk in. If there is any other alternative route to police station it is very natural that the person will move through the convenient route. P.W-2 Nizamuddin stated that there were seven witnesses present at the time who were trying to challenge the accused orally but none of them was courageous enought to intervene in the fight because accused were having axe, spear and knife in their hands and were assaulting the deceased collectively. The evidence of this witness inspire confidence to the extent that he was present at the spot and his presence was very natural.

37. Learned counsel for the appellant argued that the witness Ejaz, Sifat, Abrar, Shahnawaz, Shabbir, Jagjeevan Ram and other eye-witnesses were not produced by prosecution. Learned A.G.A replied that it is not the number of witnesses which is to be countered but it is the reliability and veracity of witnesses which has to be considered.

38. Supreme Court in the case of **Sunil Kumar Vs. State Government of NCT of Delhi** reported at **(2003) 11 SCC 367** has held thus:

"It is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth is cogent, credible and trustworthy or otherwise."

39. Similarly in the case of **Gulam Sabar Vs. State of Bihar** reported at **(2014) 3 SCC 401:**

"19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise."

40. So far as witnesses Jagjeevan Ram is concerned P.W.-2 has clarified that his house was locked at the time of incident, therefore, it cannot be said that Jagjeevan Ram witnessed the incident. So far as other independent witnesses are concerned, there is no evidence on record to show that any person of naya purwa has witnessed this incident. On the contrary P.W,-1 stated that the names of witnesses of Naya Purwa have not been mentioned in the FIR as they have not witnessed the incident. There is no evidence on record to show that any person witnessed the incident of marpit near "Phool ka talab' where the incident of marpit took place. P.W.-2 stated that witness of Naya Purwa came after the incident.

41. It is argued that P.Ws. 1 and 2 are interested witnesses as P.W.-1 is the son of deceased and P.W.-2 is the brother of the

deceased. But the witnesses appeared in court and deposed about the incident. In lengthy cross-examination no material contradiction could be extracted. Therefore they cannot be disbelieved merely because they are interested witnesses.

42. In ***Kartik Malhar Vs. State of Bihar (1996) 1 SCC 614***, the Hon'ble Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relative were not independent witnesses. Speaking through Vivian Bose, J., the Court observed :

We are unable to agree with the learned Judges of High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan [1952] SCR 377= AIR 1952 SC 54. We find, however, that it is unfortunately still persist, if not in the judgments of the Courts, at any rate in the arguments of counsel."

In this case, the Court further observed as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

In another case of ***Mohd. Rojali Versus State of Assam: (2019) 19 SCC 567,*** *the Hon'ble Apex Court in this regard has held as under:-*

"As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now wellsettled that a related witness cannot be said to be an "interested' witnesses merely by virtue of being a relative of the victim. This court has elucidated the difference between "interested' and " related' witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see ***State of Rajasthan v. Kalki (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 Scc 107;*** *and* ***Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298)****. Recently, this difference was reiterated in* ***Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549,*** *in the following erms, by referring to the three Judge bench decision in State of Rajasthan v. Kalki*

(supra): "14. "Related" is not equivalent to "interested". A witness may be called "interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case cannot be said to be "interested"..."

11. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal case was made by this Court in ***Dalip Singh v. State of Panjab 1954 SCR 145****, wherein this Court observed:*

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

12. In case of related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and conistent. We may refer to the observations of this Court in ***Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199;***

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witnesses cannot be ignored or shown out solely because it comes from the mouth of a person who is closely related to the victim."

43. It is argued on behalf of the appellants that the presence of complainant on the place of occurrence is highly improbable. He is the son of the deceased. He did not try to save his father and allowed his father to die in this marpit. His conduct is not natural and convincing but according to prosecution story all the six accused having deadly weapons attaked them when he was going alongwith the deceased and Ejaz to the police station Mawai to lodge FIR in the police station about the incident that took place in the forenoon of that day regarding the obstruction in the flow of parnala by constructing wall by accused. He is the natural witnesses who have accompanied his father while going to police station for lodging the FIR. There is no evidence on record to show that deceased had any other son alive who might have accompanied him. Therefore, it is very natural conduct of complainant that he was going to lodged FIR with his father (now deceased) and close relatives who described the incident in the court on oath.

44. It is stated that there are certain infirmities in the statement of witnesses. P.W.-1 complainant and P.W.-2 Nizamuddin have stated in their statement that they were going on foot to lodge the FIR and it is admitted by them that there were cycles in the house of the deceased. Therefore, it is the contention of learned counsel that there is no sense of going on foot while they

have cycle in their homes. Normally, persons having cycles would prefer to go on cycles. This argument of learned counsel is based on assumption. The incident took place during the rainy season. There were muddy roads everywhere. Complainant went to the police station along with his son and Ejaz and other persons with him. Therefore, it is a convenience of complainant to walk on foot or on cycle. It cannot be insisted upon that he must use cycle while going to police station. Therefore, this argument do not appeal to the Court. The FIR discloses the manner of assault. Hence the contradiction is of trivial in nature and does not adversely affect the evidence of prosecution. Furthermore the fact has been proved by evidence. It is admitted fact that in the forenoon of 07.08.1979 at about 10 p.m. the incident took place at the door of the complainant. A report was lodged by Smt Majid wife of Habbu who is the father of the accused Mustakim regarding the incident for which the deceased was going to lodge first information report. Therefore, it is admitted that the incident occurred in the forenoon of 07.08.1979 and report thereof was lodged in the police station. If the incident of forenoon is correct, then the subsequent event of this incident may also be presumed to be true.

45. According to the post mortem report several injuries were found on the person of the deceased out of which seven injuries were lacerated wounds. Three injuries were found on the occipital bone, two on parietal bone, two on lower arm in lateral aspect below the elbow joint in left hand. Two contusions were found on the right hand. Injuries number 1 to 5 are head injuries and hemorrhage were found on the brain and nose. Doctor opined that cause of death was shock and hemorrhage due to ante mortem injuries.

46. According to the prosecution case the accused assaulted the deceased with lathi and ballam. Muntazim attacked with axe. Therefore, the injuries found on the person of the deceased are in consonance with the case of prosecution as well as corroborated by prosecution witnesses.

47. It is argued by the learned counsel for the accused appellant that none of the injuries were found on the face of the deceased. As per the panchnama (Ex. Ka-2) the dead body was found lying keeping the face downwards. The deceased was killed by lathi blows. It is natural conduct of human beings that when he is assaulted by someone, he raises his hands first to save his face or head. It transpires from the post-mortem report that both of his hands were got fractured which goes to show that the deceased himself had sustained blows of lathis on his hand and must have saved his face. Moreover, the incident is witnessed by ocular evidence who proved the incident by their cogent evidence.

48. It is argued by learned counsel for the appellants that the deceased must have been attacked by someone else, at any other place as no witnesses was produced from the place of occurrence. According to the prosecution case Haji Ashraf Khan was injured near "Phool ka talab' and was killed near the gate of Jagjeevan Ram. Investigating Officer Gulab Chand Bhatiya has taken blood from the walls of his house which was sent for forensic science laboratory report. The Forensic Science Laboratory report is on record and human blood was found on the sample. Recovery memo is proved by the investigating officer (Ex. Ka-7). It is proved by prosecution that blood sample was collected from the place of occurrence which was proved in the court, therefore, the place of occurrence cannot be disbelieved to be elsewhere. If the witnesses from Naya Purwa are not

produced before this Court. This fact, alone, cannot change the place of occurrence.

49. So far as the motive is concerned, motive loses its importance when there is ocular evidence. However, in the impugned case the motive is very much clear. There was a dispute regarding flow of parnala and accused closed the parnala of deceased and raised their wall. In the forenoon also the dispute arose regarding the obstruction of flow of water from parnala by the construction of wall and FIR was also lodged by the mother of accused themselves which proved that there was animosity between the parties and due to this animosity accused assaulted the deceased when he was going to lodge FIR in the police station.

50. The learned trial court had discussed the evidence at length. From the perusal of the record of the trial court it transpires that there was a dispute regarding flow of water in parnala which was obstructed by the accused and the quarrel took place in the fore-noon of fateful day. The ocular evidence adduced by the prosecution has proved the prosecution case in court. Motive is well established. Place of occurrence is proved by the prosecution as blood stain earth was collected from the place of occurrence and blood stain were found on kurta, tehmat and gamcha of the deceased.

51. According to the forensic science laboratory report human blood was found in the sample. The injuries found on the body of the deceased are well in consonance with the prosecution case. Accused Mustakim was said to have axe in his hand at the time of incident however, no injury of axe was found on the body of the deceased. It is stated that Mustakim was using the stick of axe and his presence at the place of occurrence was proved.

52. It is also stated that the motive accrue only to accused Israr who has expired during the course of trial but it is admitted in the statement of Section 313 Cr.P.C and during the course of evidence that all the accused formed unlawful assembly and attacked the deceased with common object to kill him. The participation of all the accused is proved in this incident.

53. Learned trial court discussed the evidence of all prosecution witnesses and formal witnesses at length. There is no infirmity or perversity in the judgment and order passed by the learned trial court.

53. Hence, we do not find any reason to interfere with the judgment of the trial court passed in Sessions Trial No.241 of 1982 whereby the accused are convicted by the trial court.

54. The appeal is accordingly, dismissed.

55. The accused appellants-Muntazim, Mustaqim, Rahimuddin and Idris are on bail. Their bail bonds stand cancelled and sureties discharged they are directed to surrender before the concerned Court within a period of two weeks from today failing which they shall be taken into custody by the trial court and be sent to jail to serve out the sentence awarded by the trial court and confirmed by this Court.

56. Let a copy of this judgment as well as lower court record be transmitted to the trial court forthwith for necessary information and compliance.
