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92. Hon'ble Mr. Justice Vikram D Chauhan

(2022)02ILR A1
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.02.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 90 of 2022

Ram Prakash Mani Tripathi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Arvind Kumar Tiwari

Counsel for the Opposite Parties:
G.A.

A. Anticipatory Bail - The Court granted bail to the applicant on considering the facts of the case and the assurance given on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and to abide by the condition imposed by the Court. (Para 18)

Anticipatory Bail Application Allowed. (E-10)

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

1. The Court convened through video conferencing.

2. Heard Shri Arvind Kumar Tiwari, the learned counsel for the applicant and Shri Girjesh Kumar Dwivedi, learned A.G.A.-I for the State.

3. This Court vide order dated 24.01.2022 granted time to the learned A.G.A. to seek instructions in the matter.

4. Today, when the case was taken up, learned A.G.A. informs that inspite of information to the officials concerned, he has not received instructions till date. It appears that the authorities are not interested to furnish any instructions in this matter.

5. The applicant-**Ram Prakash Mani Tripathi**, has moved the present application under Section 438 of Cr.P.C. praying for grant of anticipatory bail in Case No. 540/2018 (Chet Ram Versus Brijesh Kumar and others), under Section 304 I.P.C., Police Station Ikauna, District Shravasti.

6. Learned counsel for the applicant submits that on 22.08.2016 Deshraj son of Ram Roop (real brothr of complainant Chet Ram) lodged an F.I.R. against the applicant and other co-accused namely Boudh Prakash, Raman Mani, Vivek Motilal, Dharm Chandra, Manohar Lal, Rudra Narayan, Rahul Mani and Devmani bearing Case Crime No. 1453/2016, under Sections 395, 397, 323, 504 and 506 I.P.C., Police Station Ikauna, District Shravasti.

7. Learned counsel for the applicant further submits that on 24.08.2016 the complainant has given telephonic information to the police that applicant, Boudh Prakash, Raman Mani, Vivek, Moti Lal, Dharm Chandra, Manohar Lal, Rudra Narayan, Dev Mani and Rahul Mani came to the complainant's house in the morning at 7.00 a.m.. They were armed with Lathi and Danda and beaten his father, namely Ram Roop badly, consequently the father of the complainant died. When the complainant's family member raised the alarm all the accused persons ran away.

8. Learned counsel for the applicant further submits that upon the telephonic information the police reached on spot and the dead body of the deceased was sent for

post portem examination, in which the autopsy surgeon has opined that the cause of death could not be ascertained, hence viscera was preserved. He further submits that the Investigating Officer of the Case Crime No. 1453/2016 extended Section 304 I.P.C. in the matter, but after receiving the viscera report from the Forensic Science Laboratory, the Investigating Officer filed a charge-sheet under Sections 323, 504, 506 I.P.C. in case Crime Crime No. 1453/2016 against the applicant and Baudh Prakash, Moti Lal, Dharmchandra, Devi Mani and Rahul Mani and rest of the named accused were not charge sheeted.

9. Learned counsel for the applicant further submits that on the application filed under Section 156 (3) Cr.P.C. dated 20.12.2016, the Chief Judicial Magistrate Shravasti passed an order for registration of the F.I.R., as a result of which on 07.03.2017, a First Information Report in Case Crime No. 857/2017, under Sections 147, 148, 302 and 120-B I.P.C. has been lodged at Police Station Ikauna, District Shrawasti against the applicant and other co-accused persons. He further submits that the Investigating Officer after recording the statements of the complainant and mother of the complainant and the doctor, who had conducted post-mortem and some independent witness, filed the final report and had denied about happening of any incident on 24.08.2016.

10. Learned counsel for the applicant further submits that against the final report, the complainant Chet Ram had filed protest petition, which was treated as complaint case and the same has been registered as Complaint Case No. 540/2018 (Chet Ram Versus Brijesh Kumar and others).

11. Learned counsel for the applicant further submits that learned Chief Judicial Magistrate, Shrawasti vide its order dated 10.10.2019 summoned the applicant and other co-accused persons for facing trial under Section 304 I.P.C. in Complaint Case No. 540/2018 (Chet Ram Versus Brijesh Kumar and others).

12. Learned counsel for the applicant further submits that against the summoning order dated 10.10.2019 filed a revision No. 85 of 2019, which was dismissed by the learned Session Judge, Shrawasti vide order dated 25.01.2021.

13. Learned counsel for the applicant further submits that challenging the orders dated 10.10.2019 and 25.01.2021, the applicant and other co-accused persons filed a petition under Section 482 Cr.P.C. before this Hon'ble Court bearing Criminal Case No. 908/2021, which was disposed of by this Hon'ble Court vide order dated 23.02.2021 with a direction to the trial court that if the applicant appear and surrender before court below within 30 days from today and apply for bail, , their prayer for bail shall be considered and decided expeditiously in accordance with law.

14. Learned counsel for the applicant further submits that the applicant is innocent and has not committed any offence as alleged by the prosecution. The applicant has falsely been roped due to village party bandi and previous enmity. He further submits that the nothing incriminating has been found or recovered against the applicant during course of the investigation and the police has filed the final report after proper investigation.

15. Learned counsel for the applicant further submits that the co-accused, Rudra Narayan had been enlarged on bail by a coordinate Bench of this Court vide order

dated 12.05.2021 passed in Bail Application No. 4662 of 2021. The case of the applicant is not on the worse footing than that of the co-accused Ram Narayan, who had been granted bail by this Court, in view thereof, the applicant is also entitled to get the benefit of anticipatory bail.

16. It is further submitted that applicant is not required for any custodial investigation. There is no possibility of the accused-applicant of fleeing away from the judicial process or tampering with the witnesses. The applicant has no criminal history. The applicant is a permanent resident of the District Shrawasti and there is no chance of his absconding. The applicant undertakes to furnish adequate surety for his release, if he is granted anticipatory bail. He also undertakes to cooperate with the investigation and shall not misuse the liberty of anticipatory bail granted to him.

17. Sri Girjesh Kumar Dwivedi, the learned A.G.A.-I opposes the submissions advanced by the learned counsel for the accused-applicant, however, he accepts that at this stage custodial investigation of the applicant is not required and also he could not dispute the contention made by the learned counsel for the applicant that other similarly situated co-accused has been granted benefit of bail by this Court.

18. Considering the submissions advanced by the learned counsel for the parties and after going through the contents of F.I.R., and other documents, and the submissions regarding legality and illegality of the allegations made in the F.I.R. which have also been placed forth before the Court, the circumstances which according to the counsel led to the false implication of the accused have also been touched upon at length was considered and the assurance given on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him, this Court is of the view that the applicant is entitled for interim protection.

19. Till the next date of listing, it is provided that in the event of arrest of the accused-applicant, namely, **Ram Prakash Mani Tripathi**, involved in Case No. 540/2018, under Section 304 I.P.C., Police Station Ikauna, District Shravasti, he shall be released forthwith by the Station House Officer of the police station concerned, on his furnishing a personal bond of Rs.50,000/- with the following conditions:-

(i) That the accused-applicant shall make himself available for interrogation by the police authorities as and when required and will cooperate with the investigation;

(ii) That the accused-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; and;

(iii) That the accused-applicant shall not leave the country without the prior permission of the Court.

20. However, it is directed that the accused-applicant will join and participate in each and every aspect of investigation and will lend due assistance to the Investigating Agency, even with regard to the discovery of facts, if and when required so by the Investigating Agency.

21. List on 24.03.2022.

22. In the meanwhile, learned A.G.A may file counter affidavit.

23. The applicant, if so advised, may file rejoinder affidavit within one week thereafter.

(2022)02ILR A4
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.02.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Misc. Bail Application No. 2046 of 2021

Virendra Singh ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Anoop Vajpayee, Atul Kumar Yadav, Devendra Pratap, Manoj Kumar Misra, Rajat Pratap Singh

Counsel for the Opposite Party:
Govt. Advocate

A. Bail - The Court on considering the facts of the case granted bail to the applicant subject to the conditions laid imposed on him. (Para 13)

Bail Application Allowed. (E-10)

List of Cases cited:

1. Prahlad Singh hati Vs NCT, Delhi & anr. 2001 4 SCC 280 *(followed)*

2. Dataram Singh Vs State of U.P. & ors. (2018) 3 SCC 22 *(followed)*

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. Called on. Learned counsel Sri Rajat Pratap Singh, Advocate appeared physically in hearing of the Crl. Misc. Bail Application No. 2046 of 2021. Learned Additional Government Advocate Sri Ravish Chandra Mishra, Advocate for and on behalf of the State is also present.

2. The present bail application is moved on behalf of the accused-applicant-Virendra Singh, involved in Case Crime No. 397 of 2020, under Section 306 IPC, registered at Police Station Behta Gokul, District Hardoi.

3. The occasion to present the bail application before this Court has arisen on rejection of first bail plea before the Ist Additional Sessions Judge, Hardoi on 18.12.2020.

4. Counter and rejoinder affidavit in the matter have duly been exchanged between the contesting parties. The case is ripe for hearing.

5. Heard the learned counsel for the parties and perused the First Information Report, statements on record and other materials as well as counter affidavit filed by the learned AGA.

6. Briefly stating the case emerging from the First Information Report lodged by Smt. Rajrani w/o late Jaswant Singh with regard to her daughter Sanju Devi married to accused-applicant Virendra that on 21.10.2020 the complainant on information of unnatural death of her daughter when went to the house of in-laws of the deceased, she found her daughter hanging from ceiling.

7. Learned counsel submits that the accused-applicant is languishing in jail since 15.11.2020 for no fault of him. The present accused-applicant has no role and involvement in the aforesaid unnatural death of his wife as complained of by her mother-in-law either by instigation and abatement to commit suicide or otherwise. In para 10 and 11 of the bail application he has submitted the explanation for committing suicide by the deceased, his wife Sanju Devi which is quoted hereunder:

"10. That by the passage of time, when the husband and in-laws of Arti Devi came to know about the aforesaid incident then they started extending threat to desert Arti Devi, giving divorce to her.

11. That due to the aforesaid reason, the deceased was very much frustrated and in the night of 20/21.10.2020, when the frustration of the deceased reached at its peak then she committed suicide by hanging in hut, situated outside the house of applicant."

8. The aforesaid explanation finding place in para 10 and 11 of the affidavit in support of the bail application finds corroboration from the postmortem report on record wherein there is only ligature mark is reported in the ante-mortem injury seen on the body of the deceased. There is no other external injury showing any cruelty or otherwise. Further corroboration of the argument of the learned counsel that the wife of accused-applicant Sanju Devi committed suicide by reason of her daughter's bad luck and threats having been given by her in-laws when they came to knowledge about the fact of her elopement with some other person, namely, Pushpendra Rathore, earlier to marriage. An FIR to this effect was also lodged by the deceased against Pushpendra Rathore and other co-accused in Case Crime No. 317 of 2018, under Sections 363, 366 IPC and Sections 7/8 of Protection of Children from Sexual Offences Act, 2012. After recovering by the police from the accused Pushpendra Rathore, the girl was handed over to the complainant, the deceased in the present case who got her married but her in-laws when came to know about her earlier case, they became rude to the daughter of the deceased. Due to this situation, under the deep sympathy and pathetic, the wife of the present accused-applicant and mother of the daughter in hot water caused the suicide by her on 21.10.2020.

9. Learned AGA from the counter affidavit and other materials on record could not show the fact of active instigation for abatement on the part of the present accused-applicant to his wife, the deceased, Sanju Devi or any cruelty on his part under compulsion of which the deceased committed suicide.

10. The argument of learned AGA that the instance of cruelty and instigation as well as the abatement by the present accused-applicant to her wife to commit suicide coming from the statement of the brother of the deceased and other native villagers is not able to be considered at this stage because they being not member of the family and inmates of the house cannot see directly the incident of instigation as alleged in their statements or such statements need corroboration from some material evidences proved in the course trial.

11. The case of present accused-applicant is distinguished from that of co-accused Rahul. The present accused-

applicant deserves to be granted bail in view of the parameters laid by the Hon'ble Apex Court in the case of **Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280),** which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

12. Keeping into mind the valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence as, held in the judgment of Hon'ble the Supreme Court in **Dataram Singh Vs. State of U.P. and Others reported in [(2018) 3 SCC 22],** I find force in the submission of learned counsel for the accused-applicant to enlarge him on bail.

13. Considering the facts and circumstances of the case, perusing the record and also considering the nature of allegations, arguments advanced by learned counsel for the parties and without commenting anything on merit of the case, I find it to be a fit case for granting bail.

14. Let applicant-**Virendra Singh** be released on bail in Case Crime No. 397 of 2020, under Section 306 IPC, registered at Police Station Behta Gokul, District Hardoi, on his furnishing a personal bond worth Rs. 50,000/- and two surety bonds by two different sureties whose social status and economic capacity as to the surety will be subject to the satisfaction and verification of the court concerned, subject to following additional conditions which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order

to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(2022)02ILR A7
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.01.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Misc. Bail Application No. 3069 of 2021

Indrapal ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Amar Nath Dubey, Sanjay Kumar

Counsel for the Opposite Party:
G.A.

A. Bail - The Court enlarged the applicant on bail while keeping in mind the fundamental principle is not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence. (Para 11)

Bail Application Allowed. (E-10)

List of Cases cited:

1. Prahlad Singh Bhati Vs NCT, Delhi & anr. 2001 4 SCC 280

2. Dataram Singh Vs St. of U.P. & ors. (2018) 3 SCC 22

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Heard learned counsel for the applicant Sri Amar Nath Dubey, Advocate and learned A.G.A. for the State Sri Raveesh Chandra Mishra through video conferencing and perused the record.

3. The present bail application is filed on behalf of the accused-applicant involved in Case Crime No.296 of of 2020 under Sections 302, 307, 324, 109, 120-B, 34 I.P.C., Police Station - Raniganj, District-Pratapgarh.

4. The occasion of present bail application arisen on rejection of bail plea of applicant by learned court of Sessions Judge, Pratapgarh vide order dated 12.1.2021.

5. According to the prosecution story a First Information Report lodged by a constable of Police Station Raniganj, Pratapgarh with regard to an incident taken place on 13.6.2020 when a police party containing Constable Shubham Kharwar and Head Constable Satish Mishra brought the accused-applicant in their custody in the police station and said the accused applicant Indrapal to sit there and wait for further action. Meanwhile, another police party brought the deceased Mithailal Pal and his opponents in their custody and they also made the accused persons in their custody to sit there for further action. It is

reported that the accused-applicant Indrapal suddenly picked up a spade kept in a corner of the Police Station for cleaning purposes and made a fatal blow on the deceased, 'Mithailal Pal' consequent upon which he suffered serious injuries and brought to the Swaroop Rani Medical College, Prayagraj and thereafter to Shakuntala Nursing Home, Prayagraj where he died. According to the First Information Report the offender of the incident is Indrapal and in result of his offence the deceased Mithailal Pal died on.

6. Learned counsel for the bail applicant drew attention toward several facts:-

(i) The First Information Report reveals that the spade was snatched from the hands of Indrapal in the course of incident dated 13.6.2020 at about 2:00 a.m. when he made a fatal blow on the Mithailal Pal.

(ii) To the contrary of the above fact extract of the case diary made Annexure No.7 to the supporting affidavit of the application reveals that the spade used in the offence by Indrapal was recovered on 13.6.2020, hidden below a quilt used by the accused-applicant, Indrapal in the lockup.

(iii) After the arrest and having been committed to the accused-applicant Indrapal to prison, the jail superintendent vide letter dated 4.1.2021 was informed by the Director/Chief Superintendent of Mental Hospital, Varanasi that he is undergoing treatment for mental disease since 26.12.2020 (Annexure No.11 to the application).

(iv) Learned counsel for the applicant lastly drew attention towards the Annexure No.8, a report wherein the Supervisor of Shakuntala Hospital, Civil Lines, Prayagraj reveals, on 13.6.2020 at about 22:30 p.m. in the night, the aforesaid Mithailal Pal was brought in the hospital in severely wounded condition sustained in his family dispute and violent fracas therein, though kept in the treatment but at 7:00 p.m. he died on.

7. As such, learned counsel for the applicant submitted that the prosecution story is not constant and stagnant on a single prosecutions story with regard to the death of Mithailal Pal, firstly about the sudden violent attack by the present accused applicant upon Mithailal who was brought on the Police Station Raniganj in another case with which the present accused applicant who was brought by another police party in some other case had no concern with his family dispute of the deceased alongwith his opponents, secondly, the recovery of weapon of killing Mithailal Pal i.e., Spade (Fawda) is doubtful, thirdly, the First Information Report of death occurred in Shakuntala Hospital, Prayagraj in the course of treatment on 13.6.2020. The story is narrated that Mithailal Pal was seriously wounded in a violent fracas by reason of a family dispute. Moreover, learned counsel for the applicant submitted that in the absence of any prima facie case specifically against the accused-applicant, he cannot be kept in the prison for time infinite as he is in jail since 14.6.2020.

8. Learned A.G.A. in protest of the bail application submitted that the accused applicant was seen on the spot of incident, his presence on the spot of incident is admitted and the witnesses have seen him blowing the fatal blow of spade on Mithailal Pal (deceased). Moreover, the post-mortem report has also verified the death of Mithailal Pal by reason of the injuries caused by sharp edged weapon.

9. Learned counsel for the bail applicant submitted that the present accused-applicant has no criminal antecedent and is a common man from the facts and circumstances emerging out of the prosecution case, there is a doubt with regard to the commission of crime committed by present accused-applicant personally and there is no satisfactory evidence on record as to the involvement and role in causing death of Mithailal Pal. There is no motive setforth on the part of present accused-applicant nor he was connected with any dispute in the family of Mithailal Pal and his opponents.

10. In the case of ***Prahlad Singh Bhati Vs. NCT, Delhi and another- (2001 4 SCC 280)***, Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

11. Keeping into mind the valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence as, held in the judgment of Hon'ble the Supreme Court in ***Dataram Singh Vs. State of U.P. and Others reported in [(2018) 3 SCC 22],*** I find force in the submission of learned counsel for the accused-appellant to enlarge him on bail.

12. Considering the facts and circumstances of the case available on the record, and the nature of allegations advanced by learned counsel for the parties and looking into the alleged complicity of the applicants accused in the offence, the gravity of offence, severity of punishment etc., without expressing any opinion on the merit of the case, I find it to be a fit case for granting bail.

13. Let applicant ***(Indrapal)*** involved in Case Crime No.296 of of 2020 under Sections 302, 307, 324, 109, 120-B, 34 I.P.C., Police Station - Raniganj, District-Pratapgarh be released on bail on his furnishing personal bond of Rs. 50,000/- by two different sureties of the like amount to the satisfaction of the court below, the social and economic status of whom to be verified by court below subject to following additional conditions, which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through their counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuse the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicants 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.

(2022)02ILR A10
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.01.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Misc. Bail Application No. 12245 of 2019

Bablu Second Bail Application ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Neeta Singh Chandel

Counsel for the Opposite Party:
G.A.

A. Bail - The applicant planned and premeditated the murder of his wife in connection with the demand of dowry. On observing the cruel nature and instinct of the applicant in case of his release on bail certainly would adversely affect the witnesses, the Court rejected the bail application of the applicant. (Para 11)

Bail Application Rejected. (E-10)

List of Cases cited:

1. Prahlad Singh Bhati Vs NCT, Delhi & anr. 2001 4 SCC 280

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out through video conferencing in virtual hearing.

2. Heard learned counsel for the applicant Ms. Neeta Singh Chandel, Advocate, learned A.G.A. for the State Sri Raveesh Chandra Mishra, Advocate through video conferencing and perused the record.

3. The present bail application is moved on behalf of the accused-applicant involved in Case Crime No. 308 of 2013, under Sections 498-A, 304-B, 201 I.P.C. and Section 3/4 D.P. Act, Police Station-Itaunja, District- Lucknow.

4. Briefly stating, it is argued by the defence that in the prosecution case there is some ambiguity and anomaly in between the version of the First Information Report as to the manner of causing death of the deceased by her in-laws. But this is not so, as the same is amply elucidated from the statement recorded in the proceeding under investigation. Initially the aggrieved father of the deceased "Pinky" (wife of the present accused-applicant, Bablu) reported on 28.12.2013 in Police Station- Itaunja, Lucknow that he came to know about her daughter Pinky was done to death cruelly in connection with demand of dowry which remained unfulfilled and her body was secretly burnt in collusion with Gram Pradhan, Bhagwati.

5. A criminal case was lodged on the aforesaid information bearing First Information Report No.308 of 2013 in Police Station- Itaunja, Lucknow under Sections 498-A, 304-B, 201 I.P.C. and Section 3/4 D.P. Act. The Investigating Officer found out that the victim namely "Pinky", daughter of complainant, Babulal was burnt and her dead body was buried at a secret place by the accused-applicant and his family members for vanishing of the evidences. On information to the above effect brought by the Senior Superintendent of Police before the District Magistrate Lucknow on 01.01.2014, the office of the District Magistrate Lucknow issued a letter dated 04.01.2014 for permission to excavate the place of burrial and exhume the dead body of the deceased, Pinky. The dead body was exhumed from the place of burial and inquest proceeding was done before the witnesses. The dead body was observed with peeled off skin at several places, teeth and nails were loosened from their sockets in easily detachable condition. Soil and mud was present on clothes and person of the dead body at several places.

Antemortem Injuries reported in the course of post-mortem are as under:-

(i) ***Contusion 9.00 cm x 6.00 cm present on right side head just above and behind right ear,*** *on opening ecchymosis present underneath the injuries menining congested, brain liquefied and mixed with clotted blood.*

(ii) Post mortem injuries soft to ***deep burn present on all over body except top of head,*** *skin is blackened and peeled of at places, burn area yellowish in colour when skin is peeled of. No redline of demarcation seen at junction of burned and unburned area. No Int.part on the body.*

6. The accused-applicant and other in-laws were not present at the time of inquest whereas father of the victims "Pinky" is mentioned as witnesses, the body was sent for the post-mortem as the witnesses could not ascertained the actual cause of death, dead body was in rotten condition. The post-mortem was done on 7.1.2014, doctors opined **death about one month ago due to coma as a result of anti-mortem head injuries,** however, viscera was preserved and sent to Forensic Science Laboratory for chemical examination.

7. In the aforesaid facts and substances on record, reading over the first information report and the statement of the complainant recorded by Investigating Officer under Section 161 Cr.P.C., it comes out that the deceased, Pinky was married about three years ago from the date of incident with the present accused-applicant, resident of village Soraon situated under Police Station- Itaunja, District Lucknow. Just after the marriage was solemnized, the in-laws of the deceased, Pinky began to insist for additional dowry and to transfer a considerable amount of money from the

deposits of father. Since the demand could not be fulfilled by reason of poverty and indigency of father, they severally used to beat his daughter, Pinky. On information as to the excessive cruelty committed with his daughter, complainant Babulal went to the in-laws' house of daughter in village Soraon and prayed them not to commit such cruelty as it is beyond his capacity to pay additional dowry by reason of his poverty. When they convinced about the poverty and incapacity of the father to give additional dowry, they all collusively killed her and secretly cremate her body.

8. Learned counsel submitted that the First Information Report which is foundation of the entire prosecution case is false and fabricated due to which no independent witnesses could be obtained by it during the proceeding of recovery and preparation of recovery memo. Apart of this technical challenge against the prosecution case entire affidavit filed in support of the bail application has no explanation as to the circumstance of death why and under which the death of the deceased Pinky was occurred. Secondly, why without informing the father, body of the deceased Pinky was secretly burnt. Thirdly, no explanation as to the ante-mortem injuries found on the body of deceased Pinky which was recovered by exhuming the same from place of burial. The post-mortem report has also reported about the rotten condition of dead body exhumed from the place of burial as the clothes on the body and body itself was wrapped with mud and soil which corroborates the fact of concealing the dead body by burial after death caused by head injury and burning.

9. In the case of ***Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280),*** Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

10. The facts that the accused-applicant is found to have committed willingly the death of his wife after beating her brutally in connection with the demand of dowry soon before her death is prima facie established from the ante mortem injuries found on the person of the deceased reported in post mortem examination report of the dead body. The dead body was burnt and buried at a secret

place is also prima facie established, moreover, no information of death was given to the father and other family members of the deceased which reflects the criminal mens rea of the accused. He further contended that the body was recovered only on exhuming the dead body from the place of burial with the permission of District Magistrate on information of witnesses during the investigation. These all established that the death of deceased, Pinky was a result of planned and premeditated murder.

11. In the aforesaid circumstances, the brutality with wife a 22 years old lady and mother of an one year's infant child in causing her death, beating her cruelly by the present accused applicant "her husband" is not only grave in nature but heinous also, and is evident of callous greed of a heartless husband and self centered irresponsible father of the infant child. All the witnesses have not been examined as offered by the prosecution in charge sheet and still a material number of witnesses remain to be examined. The cruel nature and instinct of the applicant in case of his release on bail certainly would adversely affect the witnesses.

12. At this stage, the prosecution has succeeded successfully to prima facie establish its case against the present accused-applicant who is the main accused of the case.

13. In the aforesaid circumstances, the application for release of bail does not deserves to be allowed, accordingly, the same is hereby ***rejected.***

(2022)02ILR A13
ORIGINAL JURISDICTION
CRIMINAL SIDE

DATED: LUCKNOW 31.01.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Misc. Bail Application No. 12668 of 2019

Satendra Kumar ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sunil Kumar Singh, Mohd. Afgan Khan, Prashant Singh Atal, Rama Pati Shukla, Saroj Kumar Shukla, Satya Bhushan Verma

Counsel for the Opposite Party:
G.A.

A. Bail - The applicant planned and premeditated the murder of his wife in connection with the demand of dowry. On observing the cruel nature and instinct of the applicant in case of his release on bail certainly would adversely affect the witnesses, the Court rejected the bail application of the applicant. (Para 20)

Bail Application Rejected. (E-10)

List of Cases cited:

1. Prahlad Singh Bhati Vs. NCT, Delhi & anr. 2001 4 SCC 280

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out through video conferencing.

2. Learned counsel for the bail-applicant, Sri Rama Pati Shukla, Advocate and learned A.G.A. for the State, Sri Anurag Singh Chauhan, Advocate are connected through video conferencing in virtual hearing of the case.

3. The present bail-application is moved on behalf of accused-applicant-Satendra Kumar, involved in Case Crime No.356 of 2019, under Sections 498-A, 304B of I.P.C. and Section 3/4 of Dowry Prohibition Act, registered at Police Station Mishrikh, District Sitapur.

4. The occasion of present bail-application has arisen on rejection of bail-plea of the accused-applicant by learned Sessions Judge, District Sitapur vide order dated 04.12.2019.

5. Counter affidavit and rejoinder affidavit have already been exchanged between the contesting parties to the case, as such, the case is ripe for hearing.

6. Reading over the first information report, learned counsel for the bail-applicant submits, the prosecution case as emerging from the first information report is, the informant's sister was recurrently being subjected to cruelty in connection with demand of the dowry just after few days from marriage by her in-laws namely husband-Satendra Kumar (the present accused-applicant), father-in-law, Babu Ram, mother-in-law i.e. wife of Babu Ram and brother-in-law, Yatendra Kumar. They used to abuse and beat her badly in connection with demand of the dowry. On the date of incident, all of them, after beating badly, committed her death by hanging.

7. Learned counsel for the bail-applicant in this connection argued, after registering first information report, police started investigation and recorded the statements of complainant and witnesses with which prosecution finds no support. It is further submitted that the relations between the husband i.e. the present accused-applicant and the wife i.e. the deceased were very sweet and the alleged allegation is totally false. It is also submitted that the deceased has herself committed suicide.

8. Apart from the aforesaid submissions, learned counsel for the bail-applicant seeks benefit of parity on the basis of order of the co-ordinate Bench of this Court dated 03.12.2019 granting bail to the brother-in-law, namely, Yatendra Kumar and prayed to grant bail to the present accused-applicant, the husband of the deceased also.

9. Protesting the bail plea as argued by learned counsel for the bail-applicant, learned A.G.A. for the State submitted that the present accused-applicant is a person of mischievous character. On the basis of instructions received to him, the counter affidavit filed on behalf of the State have the statements of the complainant and other witnesses recorded under Section 161 Cr.P.C. In the aforesaid statement (annexure no.5) in very clear unambiguous words the complainant has stated her sister deceased-Kalpana Kamle married with the present accused-applicant and just after the marriage the in-laws started demanding dowry. In connection therewith the deceased was being subjected to physical and mental cruelty by them.

10. Learned A.G.A. further argued, admittedly death of the deceased occurred unnaturally in the matrimonial home within a short span of five months from the date of marriage and as there is allegations as to the demand of dowry and subjecting the deceased to the cruelty by the in-laws in connection therewith soon before her death, the bail-applicant cannot take plea of his innocence on the ground that he himself

has not done any cruelty against the presumption of dowry death under Section 498-A of the I.P.C. with the aid of Section 113-B of the Indian Evidence Act, 1872 and consequently for dowry death under Section 304-B of the I.P.C. The unnatural death of wife in the matrimonial home itself is implicit of cruelty done alongwith wife though this is a matter of trial to see whether the death was suicidal or homicidal.

11. Learned A.G.A. further submitted that the circumstances are distinguishably enough to dis-entitle the present accused-applicant, from benefit of parity as well as grant of bail at this stage.

12. Heard the learned counsel for the bail applicant, learned A.G.A. for the State and perused the record.

13. Obviously, the case in hand is of dowry death as the sister of complainant, namely, Kalpana Kamle (deceased), who was married with the present accused-applicant, Satendra Kumar on 09.03.2019 was died on 15/16.07.2019 unnaturally in the matrimonial home. Just after the marriage, the present accused-applicant, Satendra Kumar (husband of the deceased) started demanding pressingly additional dowry with other in-laws in the form of material domestic equipments like fridge, colour L.E.D. T.V., expensive motor cycle and cash of Rs.1,00,000/-. When the deceased and her family members expressed their inability to fulfill their demand of additional dowry, they used to beat severally the deceased with lathi and danda and warned her if the demand of dowry is not fulfilled, they will done her to death. On 15/16.07.2019, they brutally beaten her in connection with their demand of dowry with lathi, danda and hanged her from the ceiling fan tied with saree in her neck.

14. The Statement made to the police under Section 161 Cr.P.C. also discloses the fact of demand of dowry and cruelty in connection therewith. The cruelty in itself soon before death of the deceased, Kalpana Kamle is evident from the anti mortem injuries reported in post mortem report, which is referred hereinbelow:-

"A ligature mark 3.0 cm x 2.5 cm present on around the next, above thyroid cartilage. Infront of neck passing obliquely abraded & back alongwith line of mandible, with the gap 06 cm. present on lateral aspect of Rt. Side of neck, situated in below chin, 06 cm. below left ear and 0.5 cm. from Rt. Ear, on dissection subcudmacus tainis under the ligature mark white,k hard & gllasting.

(2) Abrassion 2 cm. x 1.0 cm. present on midlib le on rt. Shoulder leg. Destome is 4.5 cm.

(3) Contusion 2.5 cm. x 2.0 cm. present on Mead in aspect of left arm 10 cm. below from lyt. Shoulder joint.

(4) Lacerated and on and aspect of cythand (Midregeon) size is 1.0 cm. x 0.5 cm. x muscle deep.

(5) Contusion 4.5 cm. x 3.0 cm. present on Rt. Knee joint."

15. The complaint of the complainant with regard to causing death of the deceased, Kalpana Kamle by her in-laws beating her brutally from lathi and danda is thus well established from the prima facie evidence collected in the course of investigation.

16. Another fact important for the culpable mind and guilty conduct of the in-laws is evident from the inquest report done

before the inquest witnesses in which, none of the member of in-laws family is mentioned in the list of witnesses and even their presence is not noted at the time of inquest. They had fled from there house after the incident.

17. The marriage was solemnized on 09.03.2019 and the deceased was done to death in the night of 15/16.07.2019 in the manner stated hereinabove i.e. death was caused unnaturally within short span of time from the date of marriage i.e. within five months approximately. The deceased was a young lady of 22 years in age and was brutally murdered in connection with demand of dowry as established by the prima facie prosecution evidences. There is no explanation in the affidavit in support of the bail application as to the facts, circumstances and reason of brutality found on the person of the deceased as anti mortem injuries by the present accused-applicant. The applicant, who is husband of the deceased, entrusted with physical, mental and social security, comfort and welfare of his wife, does not deserves to be granted bail as the circumstances, character and behavior of the accused are peculiar.

18. In ***Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280),*** Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

19. The personal liberty of the accused should always be weighed in the light of brutality, gravity and seriousness of offence. On the parameters discussed by Hon'ble the Apex Court in the aforesaid case of ***Prahlad Singh Bhati Vs. NCT, Delhi and another (Supra)***, the accused-applicant against whom, the prima facie case of the prosecution is fully established cannot claim personal liberty as an innocent. Moreover, in the light of nature and instict of the accused-applicant and his family members, who dare even to kill a young lady for their selfishness and their self centered greed of dowry, they may reasonably be apprehended to adversely influence the witnesses against them so as to ensure their acquittal from a heinous charge. They are well aware with the severity of punishment and gravity of their offence, which may lead to their fleeing from the process of the Court.

20. Keeping in view that the nature of offence under Section 498-A coupled with Section 304-B which bears a reverse burden of proof upon the present accused-applicant, as a husband, trusted by wife to have responsibility of protecting her from every risk of life and limb, allegedly committed the cruelty with wife in connection with demand of dowry and done her to death in the matrimonial home, his misdoings, as emerging from the statements of witness annexed with the counter affidavit are also sufficient together to show, he is capable of tampering the evidences and affect the witness adversely.

21. The trial court while deciding the case on merit, need not to sway with the observation made in this order and shall rely upon the facts proved in due course of examination during trial.

22. On the basis of above discussions, I find no force in the submission of learned counsel for the bail-applicant and the bail-application is ***rejected*** at this stage.

(2022)02ILR A17
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.02.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Misc. Bail Application No. 14632 of 2021

Chandrakala ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Surya Kant Singh

Counsel for the Opposite Party:
G.A. (Raveesh Chandra Mishra)

A. Bail - The Court on considering the facts of the case granted bail to the applicant subject to the conditions laid imposed on him. (Para 13)

Bail Application Allowed. (E-10)

List of Cases cited:

1. Prahlad Singh Bhati Vs NCT, Delhi & anr. 2001 4 SCC 280 *(followed)*

2. Sanjay Chandra Vs Central Bureau of Investigation 2012 1 SCC 40 (Spectrum Scam Case) *(followed)*

3. Dataram Singh Vs St.of U.P. & ors. (2018) 3 SCC 22 *(followed)*

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. Case is called out.

2. Heard learned counsel for the applicant, Sri Surya Kant Singh, Advocate, learned A.G.A. for the State, Sri Raveesh Chandra Mishra, Advocate through video conferencing and perused the record.

3. The present bail application is moved on behalf of the accused-applicant involved in Case Crime No. 358 of 2021, under Sections 498-A, 304 I.P.C. and Section 3/4 D.P. Act, Police Station-Cornailganj, District- Gonda.

4. The prosecution case as emerged from the First Information Report lodged on the complaint of one "Nandlal', brother of the deceased, Sanju who died in the incident in question on 29.09.2021. The deceased wife of Vinod Kumar is stated to have married 12 years ago from the date of incident with the said Vinod Yadav s/o Ramchandra Yadav r/o of village Nakhara, Police Station- Colonelganj, District-

Gonda. During the wedlock of Vinod Yadav and complainant's sister Sanju two children were begotten. The complainant reported that on 29.9.2021 he came to know that her sister was not well and died in the course of treatment. He further revealed that father-in-law, Ramchandra Yadav, mother-in-law (the present accused-applicant) and brother of the father-in-law used to beat the deceased Sanju in connection with demand of the dowry and also on the date of incident she was beaten by them due to which she sustained injuries.

5. Complainant further stated that his brother-in-law Vinod Yadav brought his wife Sanju to the hospital for treatment who was badly injured and died there on the same day i.e., 29.9.2021. This complaint was made on 8.10.2021 almost after ten days. In support of the bail application the deponent on the affidavit has annexed the application dated 29.9.2021 addressed to the Station House Officer, Police Station-Karnailganj, District-Gonda by aforesaid Vinod Yadav s/o of Ramchandra Yadav to the effect that his wife, with whom he was married 12 to 13 years ago, fell seriously ill in the morning on 29.9.2021. He brought her for treatment in the hospital where she died but since his in-laws were suspecting otherwise on receiving information of death he requested to post-mortem of the dead body.

6. Learned counsel for the applicant in the context of the above facts and circumstances submitted that present accused-applicant (mother-in-law of the deceased) has no connection with the deceased since last 12 to 13 years as Vinod Yadav along with the deceased wife was living separately with their two children in another house. It is further stated by the learned counsel for the applicant that the accused-applicant having no concern with the affairs of Vinod Kumar and his deceased wife, does not know about the incident how and under what circumstances the wife of Vinod Kumar namely Sanju was died on 29.9.2021. It is further argued that the Vinod Yadav is the only person who was in immediate nexus with the deceased as her husband. After ten days from the incident so as to escape from the liability in collusion with his brother-in-law, he falsely implicated the present accused-applicant, her husband and brother of her husband as in-laws of the deceased.

7. Para 11 and 13 of the affidavit filed in support of the bail application is relevant in this regard and are being reproduced hereunder:-

"11. That the accused/applicant with her husband and alogwith three sons out of which two are minor are living separately since 5 years from the deceased, in this regard the village pradhan has also given certificate on 19/11/2021 regarding family partition with the deceased family, and the said is also evident from the family register of the deceased as well as accused/applicant's family. The copy of the certificate dated 19/11/2021 and family register of the deceased and the accused/applicant, aadhar are being annexed as Annexure No.7 and 8 to this affidavit.

13. That the marriage of the deceased was solemnized before 13 years with son of the accused/applicant and two children were also born with the deceased, the accused/applicant and her husband has not made any demand of dowry and also not committed any offence till date, no any complaint has been made by the complainant as well as deceased against the accused/applicant and her husband."

8. On the aforesaid contention, learned counsel prayed to grant order of release on bail to the present accused-applicant.

9. To the contrary, learned A.G.A. argued that in-laws of the deceased except her husband were demanding dowry and when the said demand were not fulfilled, they brutally beaten the deceased on 29.9.2021 by reason of which she sustained serious injuries and died in the course of treatment in the hospital, therefore, the case against the present accused-applicant and other in-laws made under Section 498-A, 304 of the I.P.C. as well as under Section 3/4 of Dowry Prohibition Act is made of. Learned A.G.A. in support of his contention relied on the post-mortem report, wherein it is opined by the doctor who done autopsy on the dead body cause of death is hemorrhage and shock due to ante mortem injuries. Ante-mortem injuries reported in the post-mortem report are given hereunder:-

"1. Incised wound 2 cmx 1 cm over left side of neck, skin deep 7 cm below left ear.

2. Contusion 13 cm x 10 cm right side of lower chest with ..... side 5th to 10th rib natur with lacerated liver.

3. Contusion 6cm x 2 cm over left side of .....

4. Contusion 3 cm x 1 cm over left elbow.

5. Contusion 7 cm x 3 cm left side of scapula.

6. Mutliple contusion 9 cm x 3 cm left side back of leg."

10. Learned A.G.A. further pressed the above ante mortem injuries as the incriminating facts against the present accused-applicant showing the cruelty in connection with their demand of the dowry with the deceased.

11. Considered the arguments made by the learned counsels for and against each other. The case in hand is peculiar enough for the reason, the brother-in-law of Vinod Yadav lodged complaint against the in-laws except him though he was husband of the deceased with allegation of demand of dowry and of subjecting the deceased to cruelty in connection therewith. In affidavit support of the bail application the fact of separate living of Vinod Yadav along with deceased and their children stated in very clear terms. In support of the fact of separate living as deposed in the affidavit, the copy of the Parivar Register of House No. 312 with entry as to it belonging to Vinod Yadav with Sanju and Ankit. Whereas copy of Parivar Register of House No. 311 of Ramchandra Yadav with inmates Chandrakala, Bhagyamati, Rohit, Ajay and Rahul is placed on record. Therefore, the fact of separate living of the deceased along with husband and her children is prima facie established by affidavit in support of the bail application and annexures made thereto.

12. Vinod Kumar, husband of the deceased himself has moved an application to the Station House Officer, Police Station- Cornailganj, District- Gonda on 29.9.2021 informing him that his wife Sanju with whom he had married 12 to 13 years ago fell ill in the morning of 29.9.2021 and he brought her for treatment to the hospital where in the course of treatment she died, even he himself present at the time of inquest wherein death was opined by the witnesses as told to them by reason of illness and unwellness. It is the post-mortem report only which disclosed the ante-mortem injuries on the person of

the dead body. Thereafter the complaint of deceased brother namely Nandlal was moved with a delay of ten days from the date of incident. Para 8 of the affidavit in support of the bail application thus corroborats the sequence of events appearing from the proceeding of investigation as stated hereinabove. Para 8 of the affidavit is reproduced hereunder:-

8. That after ten days, the brother of the deceased with collusion of deceased's husband, he had made a complaint for lodging the first information report against the accused/applicant (mother-in-law), fahter in law and cousin father in law and the same was registered. Thereafter, the Investigating officer had recorded the statement under Section 161 Cr.P.C. of complainant Nandlal and his father Babulal on 09/10/2021 but both have not supported the prosecution story. The typed copy of the statement of complainant Nandlal and his fahter Babulal dated 09/10/2021 under Section 161 Cr.P.C. is being annexed herewith as Annexure No.5 and 6 respectively to this affidavit.

13. This is also noteworthy here that throughout the married life of Vinod Yadav and wife Sanju for a considerable period of 12 to 13 years there is nothing on record of prosecution to show any complaint with regard to demand of dowry and cruelty committed with the deceased, Sanju had ever been made. Even the parents of deceased have not complained of any such incriminating incident against the present accused-applicant and other in-laws.

14. So far as ante mortem injuries found on the person of the dead body of the deceased Sanju are concerned, by reason of separate living of the deceased with her husband as established prime facie from evidences on record seems not possible to have been caused by a cruel act done by the present accused-applicant or other in-laws because in matrimonial house of the deceased which is a separate house than that of the present accused-applicant, the deceased have been in immediate nexus of her husband Vinod Yadav is the only person to explain how and under what circumstances such injuries were caused to the deceased while she was alive with him in the matrimonial house. This is also relevant to refer the application dated 29.9.2021 addressed to the Station House Officer, Police Station Cornailganj, District-Gonda in which the husband of the deceased Vinod Yadav have stated clearly that his wife fell seriously ill on 29.9.2021 and he brought her to the hospital for treatment where she died. It seems that the fact of injuries sustained by the deceased is willingly and knowingly concealed purposely by the husband of the deceased.

15. On the discussions made hereinabove the prima facie case of prosecution as to the commission of offence under Section 498-A, 304 I.P.C. read with Section 3/4 D.P. Act is not found to have established prima facie by evidence on record produced by the prosecution.

16. To the contrary learned counsel for the applicant by reason of her separate living than that of the deceased have no concern with the incident dated 29.9.2021 as prima facie established from the evidence on record produced by the prosecution itself found prima facie no involvement in the offence.

17. In ***Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280),*** Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behavior, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

18. The purpose of the bail is neither to punish the accused-appellant by keeping him in jail or to teach him a lesson but the object of the bail is to ensure the presence of the accused-appellant during the trial. Hon'ble the Supreme Court in para 21, 22 and 23 of the judgment given in the case of ***Sanjay Chandra Vs. Central Bureau of Investigation*** reported in ***[(2012 1 SCC 40)-(Spectrum Scam Case)]***, has laid down certain objects of bail under Section 437 & 439 of the Cr.P.C. which are as follows:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

19. Keeping into mind the valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence as, held in the judgment of Hon'ble the Supreme Court in ***Dataram Singh Vs. State of U.P. and Others*** reported in ***[(2018) 3 SCC 22],*** I find force in the submission of learned counsel for the accused-appellant to enlarge him on bail.

20. Let applicant **(Chandrakala)** involved in Case Crime No. 358 of 2021, under Sections 498-A, 304 I.P.C. and Section 3/4 D.P. Act, Police Station- Cornailganj, District- Gonda be released on bail on her furnishing personal bond of Rs. 50,000/- by two different sureties of the like amount, the social and economic status of whom to be on the satisfaction and verification of the court concerned subject to following additional conditions, which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that she shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through her counsel. In case of her absence, without sufficient cause, the trial court may proceed against her under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuse the liberty of bail during trial and in order to secure her presence, proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against her, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicants is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against her in accordance with law.

(2022)02ILR A22
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Bail Application No. 36790 of 2021

Sujay U. Desai ...Applicant
Versus
Serious Fraud Investigation Office, CGO Complex, Delhi ...Opposite Party

Counsel for the Applicant:
Ms. Gunjan Jadwani, Sri Kartikeya Saran, Mr. Amar Gahlot, Sri Anurag Khanna(Senior Adv.)

Counsel for the Opposite Party:
A.S.G.I., Sri Manoj Kumar Singh

A. Criminal Law - Criminal Procedure Code, 1973 - Section 439 - The Company Act, 2013 - Section 212(6)(ii) -The offence committed by the applicant is an economic offence of huge magnitude affecting economy of

the nation and the interest of public/State. The Court cannot come to the conclusion that the applicant if released on bail is not likely to commit any offence under the Act and moreover, twin condition for grant of bail as envisaged under Section 212(6) (ii) of the Company Act, 2013 are not satisfied. Further, the court opined that the applicant is not entitled to get bail even under Section 439 Cr.P.C. even if the bail application is not tested on the touchstone of twin conditions as enumerated in Section 212(6) (ii) of the Company Act, 2013 for the reason that offence committed by the applicant is an economic offence which affects the economy of the nation. (Para 15)

Bail Application Rejected. (E-10)

List of Cases cited:

1. P. Chidrambaram Vs Directorate of Enforcement (2019) 9 SCC 24

2. Y.S. Jagan Mohan Reddy Vs Central Bureau of Investigation 2013 (7) SCC 439

3. Anil kumar Yadav Vs State (N.C.T.) of Delhi & anr. 2018 (1) CCSC 117

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Mr. Anurag Khanna, learned Senior Counsel assisted by Mr. Kartikeya Saran, Ms. Gunjan Jadwani and Mr. Amar Gahlot, learned counsel for the applicant and Mr. S.P. Singh, learned Solicitor General of India assisted by Mr. Manoj Kumar Singh, learned counsel for the respondent.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant seeking enlargement on bail in Sessions Trial No.577 of 2020 (Serious Fraud Investigation Officer vs. Rotomac Global Pvt. Limited and 68 others) arising from Complaint filed under Section 212 (14) of the Companies Act, 2013 in respect of offences under Sections 36(c) r/w/s. 447, 448 of the Companies Act, 2013 and Section 211 r/w/s 628 of the Companies Act, 1956.

3. It transpires from the record that initially the applicant moved an interim bail application before the Apex Court by filing Writ Petition (Criminal) No.126 of 2020, which came to be disposed of directing the applicant to approach this Court by filing bail application and, thereafter, the applicant approached this Court by filing bail application under section 439 Cr.P.C. being Criminal Misc Bail Application No.12047 of 2020, which came to be disposed of by order dated 05.05.2020 whereby the prayer for interim bail of the applicant was rejected and liberty was granted to the applicant to move regular bail application. However, in the meantime, the order dated 05.05.2020 has also been challenged by the applicant before the Apex Court by filing SLP Criminal No.2393 of 2020, which came to be disposed of vide order dated 28.05.2020 as not maintainable and liberty was granted to the applicant to file a regular bail application. Hence, the present bail application has been filed seeking regular bail under Section 439 Cr.P.C. read with Section 212(6) of the Companies Act, before this Court.

4. The encapsulated facts of the case are that the applicant is said to have been arrested in pursuance of the arrest order dated 19.03.2020 by the Arresting Officer, who is Assistant Director of Ministry of Corporate Affairs for the offence under Sections 447 and 448 of the Companies Act, 2013. Copies of grounds of arrest were also served on the applicant on 19.3.2020.

In pursuance of Order No.03/117/2018-CL-II (NR) dated 21.02.2018 and Order No.7/117/2108/CL-II dated 22.08.2019 under Sections 447 and 448 of the Companies Act, 2013 issued by the Ministry of Corporate Affairs, Government of India (hereinafter referred to as the MCA) which in exercise of power under Sections 212 (1) (c) of the Companies Act, 2013 had ordered for investigation into affairs of Rotomac Global Pvt. Ltd. (hereinafter referred to as the 'RGPL') and 10 others and **Frost International Ltd. (hereinafter referred to as 'F.I.L.')** by the Serious Fraud Investigation Office-respondent (hereinafter referred to as 'the SFIO') in the public interest. Pursuant to the order of MCA, the Director SFIO vide Order No. SFIO/Inv./AOI/2018-19 dated 20.06.2018 had appointed a team of officers for carrying out investigation into the affairs of the Company. The applicant is alleged to be the Director and CEO of M/s F.I.L. Public Limited Company incorporated under the Companies Act.

5. During investigation, it is found that the applicant and similarly placed co-accused, out of whom some are of foreign entities, who are said to be the Directors in different companies, used to run a fraudulent Merchanting Trade (MT) business and submitted false/deceptive statements/financials to different Banks to avail credit facility in the form of opening of Letter of Credit and thereby caused loss to the Public Sector Banks.

6. It also revealed that out of the documents required for opening the Letter of Credit, applicant along with similarly placed other co accused persons knowingly submitted Letter of Credit opening request along with false/deceptive and misleading documents so as to induce the banks to rely upon the said documents and to give credit facility to them in the form of opening of Letter of Credit. It is also found that financial statements submitted to the Bank for opening, continuation and enhancement of Credit facilities do not reflect the true and fair accounts of their affairs. It also revealed that the accused persons secured financing for their MT Business and under the guise of MT Business, accused is said to have violated the regulations/guidelines issued by Reserved bank of India. It is also found that the accused, who is the Director of the company caused huge loss amounting to Rs.7820/- crores to the Public Sector Banks in connivance with other foreign entities co-accused and others Directors-co accused. It is also found that the applicant abused their position as Promoter-Director of Frost International Limited (FIL) to cause wrongful loss of Rs.4041/- crores to public Sector Banks. Applicant along with other Directors utilized the corporate identity of the FIL to perpetrate fraud of rotating the funds obtained through Letter of Credit. It is further alleged that in furtherance of their dishonest intention, applicant along with others manipulated the books of FIL by showing fake and unrecoverable MT trade receivable to the tune of Rs.3537.74 crores to deceive the public sector Banks and allured them to obtain credit facilities. It is further alleged that the applicant along with other Directors were also indulged in speculative currency trading with banks money and ultimately public money which resulted in heavy losses. The applicant along with others have also done siphoning of money to the tune of Rs.845 crores which is standing in the books of FIL in furtherance to the perpetration of the above mentioned fraud.

7. It is submitted by learned Counsel appearing for the applicant that applicant is in jail since 19.3.2020. He has cooperated

with the investigating agency. There is no need for his further interrogation, as investigation by SFIO has already been completed. Since number of witnesses disclosed in the charge sheet are living out of the Country, it will not be possible to conclude the trial expeditiously. It is further submitted that there is bleak chance for early conclusion of trial. Entire prosecution case rests upon documentary evidence. There is no chance of tempering or influencing the evidence and witnesses by the applicant.

8. It is further submitted that no purpose would be served by keeping the applicant behind the bar as applicant is ready to abide the conditions imposed by the Court. It is further contended that present prosecution was started against the applicant on the basis of false facts and no manipulation has been done by the applicant in the books of account. No active role is assigned to him. It is further submitted that he has not flouted any guidelines issued by R.B.I. It is further submitted on the aforesaid basis that since no prima facie case is made out against the applicant, he is entitled for bail.

9. In rebuttal to the aforesaid contentions, the bail is opposed by learned counsel appearing for SFIO by submitting that applicant was the Director of the FIL and was directly associated with the MSL also. False receivable amount was shown in the books of account furnished before the Bank and due to that reason banks issued letter of credits for use in foreign countries. In fact Company concerned engaged in Merchanting Trade business was in loss and due to that reason advance taken through letter of credits could not be repaid and it become NPA. Referring to total amount of NPA, it was further submitted that the applicant and its company furnished false books of accounts and caused huge loss not only to the Bank concerned, but interest of public at large also affected, therefore, prayed that the bail application of applicant is liable to be rejected.

10. It is further submitted that applicant along with other co accused persons under the garb of Merchantile Trade have fraudulently induced the Banks & Public Financial Institutions to obtain credit facilities. He had knowingly falsified the books of account and the financial statements of F.I.L. deliberately concealing material facts thereby inducing BFIs to fraudulently extending credit facilities to F.I.L. which ultimately remained outstanding as account of F.I.L. became N.P.A. He submitted that the offence committed by the applicant being the Director and the Managing Director of F.I.L., has come into light during the investigation, is of grave nature. In support of his arguments, learned counsel also relied upon the cases of ***P. Chidrambaram vs. Directorate of Enforcement (2019) 9 SCC 24 and Y.S. Jagan Moham Reddy vs. Central Bureau of Investigation, 2013 (7) SCC 439,*** in which the Court has observed that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail.

11. I have considered the rival submissions advanced by the learned counsel for the parties and have gone through the entire material available on record.

12. Perusal of the record discloses that the applicant has been arraigned as an accused no.44 in the complaint filed by the SFIO. Applicant is stated to be the

Managing Director, Signatory of the financial statements of Frost International Limited, which is a company engaged in the business of commodities and merchant trading. The FIL had secured the credit facilities by way of margin money / FD's as well as other collaterals. It also revealed that since its incorporation in 1995 till February, 2018, FIL had duly serviced all its loans and obligations towards Banks and other creditors in a timely manner and over a period of time, Banks have increased the sanction limit from time to time. Later on, on the basis of complaint, Banks initiated action against FIL based on R.B.I. Circular dated 12.2.2018 and also before the National Company Law Tribunal, Mumbai under the Insolvency and Bankruptcy Code. FIL had challenged the said RBI Circular before Apex Court and the NCLT proceeding was stayed and Circular was quashed. Thereafter, Banks stopped FIL's credit limits and the money received as advance from the buyers for future supplies were adjusted by the Banks against the devolved Letters of Credits. It has also been averred that applicant under the garb of MT conducted moping of interest arbitrage thereby, fraudulently inducing the public sector Banks to obtain credit facilities to FIL. Applicant had knowingly falsified the books of accounts and the financial statements of FIL deliberately concealing material facts thereby including public sector Banks to fraudulently credit facilities to FIL which ultimately remained outstanding at Rs.4041 Crores as account of FIL became NPA. Applicant is also stated to be indulged in speculative currency trading unrelated to MT being undertaken by RGC thereby gambling with Banks money which resulted in huge loss. Applicant was instrumental in holding the currency losses in the books of accounts under the garb of debit notes. These debit notes were raised against foreign parties and made part of trade receivable. Later on, these debit notes were adjusted against the payment received from the LC rotated funds. Falsified financial statements of FIL signed by the applicant was filed with ROC and was submitted to public sector Banks depicted false MT trade receivables. The applicant provided false and bogus documents to the Banks.

13. Allegation against the applicant is also that he abused his position as promoter-directors of FIL to cause wrongful loss of Rs.4041 Crores to public sector Banks. He utilized the corporate identity of FIL to perpetrate fraud of rotating the funds obtained through Letter of Credits discounting for mopping the interest arbitrage available between LC issuance and discounting charges and that between the interest on fixed deposits. This whole conspiracy was played under the garb of doing MT.

14. The applicant used the corporate identity of FIL to rotate LC funds for mopping the interest arbitrage and showed it in the books as Merchanting Trade business. Since it was not actually into MT business the corresponding sales and purchase shown in the financial statements and books of accounts is false. Since mopping of interest was done by keeping the rotated funds obtained through LC discounting in Fixed Deposits to camouflage the same the interest income from FD was shown as part of revenue from operation in the financial statements to give a false picture of profitability of MT business. A large amount of these fictitious trade receivables were standing against their undisclosed related parties. The sum and substance of the outcome of the investigation conducted in the matter and

the facts mentioned in the complaint for prosecution are that concerned Companies were engaged in fraudulent Merchanting Trade and caused wrongful loss to the Public Sector Bank to the tune of Rs.7820 Crores approximately applying different modus operandi including siphoning of Bank funds through Merchanting Trade; falsification of financial statement of the Companies involved in the matter by not showing true and fair views.

15. Considering the role of the applicant as alleged against him, nature and gravity of the offence and also the evidence available on record in support thereof, prima facie, it appears that huge amount received by the applicant through Letter of Credit has become NPA due to non-payment of advance taken by the Company on account of falsification in the books of account furnished by the company before the Bank concerned, therefore, the allegations levelled against the applicant and the company concerned cannot be overlooked at this stage. This court is further of the opinion that on the basis of allegations appearing on record, it cannot be held that there are no reasonable grounds to believe that the accused is not guilty of the offences alleged against him and that he is not likely to commit any offence under the Act while on bail and thus, twin conditions for grant of bail as envisaged under Section 212(6) (ii) of the Company Act, 2013 are not satisfied. This court is further of the opinion that the applicant is not entitled to bail even under Section 439 Cr.P.C. even if the bail application is not tested on the touchstone of twin conditions as enumerated in Section 212(6) (ii) of the Company Act, 2013 for the reason that offence committed by the applicant is an economic offence which affects the economy of the nation.

16. In ***Y. S. Jagan Mohan Reddy Vs Central Bureau of Investigation, (2013) 7 SCC 439,*** the Hon'ble Supreme Court has held that while granting bail, the court has to keep in mind the factors like the nature of accusation, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused during the trial, reasonable apprehension of the witnesses being tampered with, the large interests of the public/State and other similar considerations.

17. As discussed above, there are serious allegations against the applicant. The offence committed by the applicant is an economic offence of huge magnitude affecting the economy of the nation and interest of public/State and, therefore, requires a stringent approach for grant of bail. The offence has been committed with prior planning with an eye on personal profit totally disregarding the interest of the community and causing damage to the economy and ignoring national interest. The applicant was instrumental in submissions of false and fabricated documents and siphoning of funds of the company to the tune of several crores and indulging in fraudulent and deceptive methods, and thus, keeping in mind the nature of accusation as discussed in detail in earlier paras and the material brought on record against the applicant by SFIO, this court is not inclined to release the applicant on bail even under Section 439 Cr.P.C.

18. In the end, it is contended by learned counsel for the applicant that the applicant is suffering from diabetes and various other ailments and, therefore, on

that ground, he should be released on bail and also looking to the present Covid-19 pandemic.

19. However, he has failed to bring on record any document which may reveal that accused is not getting proper medical treatment or care in jail or he requires such treatment which can only be provided if he is released on bail. In the absence of any documentary evidence to the above effect, this court is of the opinion that the applicant who is involved in serious economic offence cannot be granted bail on the above mentioned medical grounds. The mere fact that the accused is in custody for more than one and half years, may not be a relevant consideration to release such accused on bail ***(Anil Kumar Yadav vs. State (N.C.T.) of Delhi and another, 2018 (1) CCSC 117.***

20. Keeping in view the modus operandi adopted by the Companies concerned for obtaining the Letter of Credit, the amount of NPA, the nature and gravity of the allegations/offences levelled against the applicant which not only shake the conscience of the society but also the public at large, evidence collected during investigation, complicity of accused and without expressing any opinion on the merits of the case, prima facie the court is not inclined to grant bail to the applicant. The bail application is liable to be rejected and the same is, accordingly, ***rejected.***

21. However, it is expected that the trial court shall make all sincere endeavours to expedite the proceedings of the trial and conclude the same as expeditiously as possible, in accordance with law, within a period of six months.

(2022)02ILR A28

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.02.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

Capital Sentence No. 1 of 2000
and other connected cases

State of U.P. ...Appellant
Versus
Krishna Murari @ Murli & Ors.
...Respondents

Counsel for the Appellant:
From Addl. Session Judge, G.A., Shitla Prasad Tripathi, Shiv Ganesh Singh, Umesh Pratap Singh

Counsel for the Respondents:
G.A., Anuj Pandey, I.D. Shukla, S.K. Merotra

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 148, 302, 120B-challenge to-conviction- death penalty-rarest of rare case-no evidence on record to establish that it was a pre-planned and premeditated murder -PW-1 and PW-2 failed to narrate the specific role of assault of weapon by the appellants upon the deceased persons-no criminal history of the appellants-crime has been committed by the appellants by Gandsa and Banka blows, but there is no evidence to show or suggest the reason for the appellants to commit the said offence-Trial court awarded death sentence but no rarest of rare case is made out-Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the 'rarest of rare cases' as indicated in Bacchan Singh's case -every murder is brutal, and the difference between the one from the other may be on account of

mitigating or aggravating features surrounding the murder-Hence, the death sentence is liable to be converted into life imprisonment.(Para 1 to 78)

B. Doctrine of rarest of rare was established in the case of Bacchan Singh's Case. Apex Court, in this case, endeavoured to cut out a doctrine particularly for offences culpable with death to decrease the ambiguity for courts. The Ratio Decidendi of Baccahan Singh case is that the death sentence is constitutional if it is prescribed as an alternative for the offence of murder. "the rarest of rare case dictum serves as a guideline in enforcing Section 354(3) and establishes the policy that the life imprisonment is the rule and death sentence is an exception. The Court held that a death sentence would be awarded only, "when a murder is committed in an extremely brutal, grotesque, diabolical, revolting manner so as to arouse intense and extreme indignation of the community. (Para 77)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Micheal @ Nai Micheal Vs St. Crl. A. (MD) No. 178 of 2010

2. Jaikaran & anr Vs St. of U.P., CRLA No. 431 of 1990

3. Jaikam Khan Vs St. of U.P.,CRLA No. 434-436 of 2020

4. Amar Singh Vs The St.(NCT of Delhi) CRLA No. 335 of 2015

5. Yogesh Singh Vs Mahabeer Singh (2017) 11 SCC 195

6. Shio Shanekar Dubey Vs St. of Bih. (2019) 6 SCC 501

7. Sudhakar @ Sudharshan Vs St. reptd. by the Insp. of Police , Sri Rangam Police Station Trichy,T.N. (2018) 5 SCC 435

8. Ram Singh Vs St. of Raj. (2012) 12 SCC 339

9. Bipin Kumar Mondal Vs St. of W. B. (2010) 12 SCC 91

10. Machhi Singh & ors. Vs St. of Punj. (1983) SCC 470

11. Dalbir Kaur Vs St. of Punj. (1976) 4 SCC 158

12. Piara Singh & ors. Vs St. of Punj.(1977) 4 SCC 452

13. Anil Phukan Vs St. of Assam (1993) 3 SCC 282

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

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

16. Solanki Chimanbhai Ukabhai Vs St. of Guj. (1983) 2 SCC 174

17. Mani Ram Vs St. of Raj. (1993) Supp (3) SCC 18

18. St. of Har. Vs Bhagirath (1999) 5 SCC 96

19. Dhirajbhai Gorakhbhai Nayak Vs St. of Guj.(2003) 5 SCC 223

20. Thaman Kumar Vs St.of U.T. of Chandigarh (2003) 6 SCC 380

21. Krishnan Vs St. (2003) 7 SCC 56

22. Khambam Raja Reddy & anr. Vs Public Prosecutor, H.C. of A.P., (2006) 11 SCC 239

23. St. of U.P Vs Dinesh (2009) 11 SCC 566

24. St. of U.P. Vs Hari Chand (2009) 13 SCC 542

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

26. Bhajan Singh @ Harbhajan Singh & ors. Vs St. (2011) 7 SCC 421

27. Hari Shankar Vs St. of U.P. (1996) 9 SCC 40

28. Bikau Pandey & ors. Vs St. of Bih. (2003) 12 SCC 616

29. St. of U.P. Vs Kishanpal & ors. (2008) 16 SCC 73

30. Abu Thakir & ors. Vs St. of T.N. (2010) 5 SCC 91

31. Bipin Kumar Mondal Vs St. of W.B. (2010) 12 SCC 91

32. Lokhan Sao Vs St. of Bih. (2008) 16 SCC 73

33. Darya Singh Vs St. of Punj. (1968) AIR SC 328

34. Raghubir Singh Vs St. of U.P. (1972) 3 SCC 79

35. Appabhai & anr. Vs St. of Guj. (1988) Supp(1) SCC 241

36. Pala Singh Vs St. of Punj. (1972) 2 SCC 640

37. Sarwan Singh Vs St. of Punj. (1976) 4 SCC 369

38. Anil Rai Vs St. of Bih. (2001) 7 SCC 318

39. Munshi Prasad & ors. Vs St. of Bih. (2002) 1 SCC 351

40. Aqeel Ahmad Vs St. of U.P. (2008) 16 SCC 372

41. Dharamveer Vs St. of U.P. (2010) 4 SCC 469

42. Sandeep Vs State of U.P. (2012) 6 SCC 107

43. Pedda Narayan Vs St. of A.P. (1975) 4 SCC 153

44. Khujji Vs St. of M.P. (1991) 3 SCC 627

45. Kuldip Singh Vs St. of Punj. (1992) Supp (3) SCC 1

46. George & ors. Vs St. of Ker. & anr.(2008) 4 SCC 605

47. Suresh Rai Vs St. of Bih. (2000) 4 SCC 84

48. Amar Singh Vs Balwinder Singh (2003) 2 SCC 518

49. Radha Mohan Singh Vs St. of U.P. (2006) 2 SCC 450

50. Sambhu Das Vs St. of Assam (2010) 10 SCC 374

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

52. Machhi Singh Vs St. of Punj. (1983) 3 SCC 470

53. Ramanresh & ors. Vs St. of Chhattisgarh (2012) 4 SCC 257

54. Dharam Deo Yadav Vs St. of U.P. (2014) 5 SCC 509

55. Kalu Khan Vs St. of Raj. (2015) 16 SCC 492,

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

(1) The six accused persons, namely, **Krishna Murari Verma alias Murli, Kashi Ram Verma, Raghav Ram Verma, Ram Milan Verma, Ram Kripal Verma and Ram Tilak Verma,** were tried by the X Additional District & Sessions Judge, Faizabad in Sessions Trial No. 85 of 1995 : *State Vs. Krishna Murari and others*, arising out of Case Crime No. 156 of 1994, under Sections 148, 302, 120B I.P.C., Police Station Tarun, District Faizabad.

(2) Vide judgment and order dated 21.12.1999, X Additional District & Sessions Judge, Faizabad, while acquitting accused Ram Tilak Verma and Ram Kripal Verma of the charge of offence punishable under Section 120-B I.P.C, convicted and sentenced other accused persons, namely, Krishna Murari Verma alias Murli, Kashi Ram Verma, Raghav Ram Verma and Ram Milan Verma in the manner as stated hereinbelow :-

"(i) Under Section 302 I.P.C. read with Section 149 I.P.C. to be hanged separately till they are dead ; and

(ii) Under Section 148 I.P.C. to undergo imprisonment for one year R.I."

(3) Aggrieved by the aforesaid judgment and order of their conviction and sentence, four accused persons, namely, Krishna Murari Verma alias Murli, Kashi Ram Verma, Raghav Ram Verma and Ram Milan Verma, have preferred, in this Court, four separate criminal appeals, bearing Nos. 25 of 2000, 26 of 2000, 27 of 2000 and 28 of 2000, respectively, from jail and Criminal Appeal No. 14 of 2000 through their counsels, whereas informant/revisionist Rama Kant Verma has filed Criminal Revision No. 14 of 2000 against the judgment and order dated 21.12.1999 of acquittal of Ram Kripal Verma and Ram Tilak Verma.

(4) Capital Sentence Reference No. 1 of 2000 arises out of the Reference made by the learned trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of four convicts/appellants Krishna Murari Verma alias Murli, Kashi Ram Verma , Raghav Ram Verma and Ram Milan Verma.

(5) Since the above-captioned capital sentence reference, appeals and revision arise out of a common factual matrix and impugned judgment dated 21.12.1999, we are disposing them of by this judgment.

(6) It is pertinent to mention here that vide judgment and order dated 21.12.2000, a Co-ordinate Bench of this Court, while dismissing the criminal revision no. 14 of 2000 preferred by the informant Rama Kant Verma and rejecting the Reference, allowed the above-mentioned criminal appeals preferred by convicts/appellants.

(7) Feeling aggrieved by the aforesaid judgment and order dated 21.12.2000, informant Rama Kant Verma and the State had preferred Criminal Appeal Nos. 934-939 of 2001 : *Rama Kant Verma Vs. State of U.P. and others* and Criminal Appeal Nos. 1202-1206 of 2001, respectively, before the Hon'ble Supreme Court and the Hon'ble Supreme Court, vide judgment and order dated 02.12.2008, allowed the aforesaid criminal appeals and remitted the matter to the High Court for hearing the cases afresh and dispose them of in accordance with law.

(B) FACTS

(8) In the intervening night of 10/11.11.1994, at about 02:30 a.m., informant Rama Kant Verma and his cousin Girish Chandra Verma son of Ram Naresh Verma were sleeping in the room of the Tube-well by closing the door of it. His grand-father Shri Sukai Verma son of Pachu and his uncle Shri Ram Naresh Verma son of Sri Sukai Verma were sleeping under the Chhappar (thatch) near the tube-well and his another uncle Shri Ram Dev Verma son of Shri Sukai Verma was sleeping under the southern Chhappar (thatch). His younger brother Uma Kant Verma (P.W.2) was sleeping inside the Saria for looking after the cattle.

His grand-father (Sukai Verma) and his uncle (Ram Naresh Verma) raised alarm and asked for help, then, he (Rama Kant Verma) and his cousin (Girish Chandra Verma) came out of the tube-well room after opening its door and saw that Krishna Murari Verma alias Murli son of Ram Jagat Verma, Kashi Ram Verma son of

Tidi Verma armed with Gandasa and Raghav Ram Verma son of Nanhaku, Ram Milan Verma son of Ram Awadh armed with Banka, and 2-3 other persons, who had muffled/covered their faces by means of cloth, were beating and cutting the head of his grand-father Sukhai Verma and his uncle Ram Naresh Verma with Gandasa and Banka.

Ram Dev, another uncle of the informant, was sleeping south of the tube-well under the Chhappar. Rama Kant (P.W.1), Uma Kant (P.W.2) and Girish (deceased) tried to rescue the deceased persons, but the assailants attacked Girish (deceased) and Ram Dev (deceased) also with their weapons. Rama Kant (P.W.1) and Uma Kant (P.W.2) escaped and ran into the field of sugarcane and also they raised alarm. It was night time 2.30 a.m. on 11.11.1994 (in intervening night of 10th and 11th November, 1984). Due to their cries and alarm, Ram Tej, father of informant, and several villagers came with lathis and torches. The assailants ran away towards the south.

It was further alleged that the four appellants were seen and identified by Rama Kant (PW l), Uma Kant (PW 2), Ram Tej and villagers in the light of the torches and the electric light. It was also alleged that litigation regarding land had been going on between the victims and appellant Krishna Murari alias Murli. The cattle of Krishna Murari were sent to Ram Kripal ten days before the occurrence and he had also sent his family out of the village to his wife's house in another village. Rama Kant further alleged that in the morning Daljeet Singh (PW3), Jaising Mau and Hari Om (PW4) told him that on 10.11.94 at 9.00 p.m. the appellants were seen by them, consuming non-vegetarian food alongwith Ram Tilak and Ram Kripal at the shop of Ram Kripal. Rama Kant therefore, alleged his suspicion against Ram Kripal and Ram Tilak as the persons who were instrumental in the commission of this crime conspiring with the appellants. All four victims had died instantaneously on the spot. Then in the morning, the informant scribed his F.I.R. (Exhibit Ka-1). Along with Manik Ram Verma , Munna Lal Verma, one other person and the informant P.W.1 (Rama Kant Verma) proceeded to Police Station Tarun, where he lodged his F.I.R.

(9) The evidence of H.C. Ram Harsh Yadava P.W. 12 shows that on 11.11.1994, he was posted as Head Moharrir at Police Station Tarun. On the basis of the written report of Rama Kant Verma (P.W.1), he registered the F.I.R. and prepared the chik F.I.R on 11.11.1994 at 06:30 a.m. and on its basis, Case Crime No. 156 of 1994, under Sections 147, 148, 149, 302, 120B I.P.C. was registered against the accused persons Krishna Murari alias Murali, Kashi Ram Verma, Raghav Ram Verma, Ram Milan, Ram Kripal Verma and Ram Tilak Verma at police station Tarun, district Faizabad.

(10) It is pertinent to mention that a perusal of the chik F.I.R. also shows that the distance between the place of incident and the police station was 6 kilometres.

(11) The investigation of the case was entrusted to the Station Officer of the Police Station Tarun, namely, Sudhakar Pandey (PW 10), who, in his examination-in-chief, had deposed before the trial Cout that on 11.11.1994, he was posted as Station Officer at Police Station Tarun and case crime no. 156 of 1994 was registered on 11.11.1994, at 06:30 a.m. in his absence and at the time of registering the case, he was busy in his duty at Ayodhya in "*चौदह कोसी परिक्रमा*" and on receiving information of this case, he reached

Police Station Tarun and obtained a copy of the FIR and other relevant papers from the Police Station and reached the spot of occurrence in village Barauli at about 9.00 a.m., wherein he found that SSI Sri Ramjirai, police station Bikarpur, SI Riaz Khan of P.S, Haiderganj, and SI Sifate Haider (PW13) of Police Station Tarun were already reached there along with other police personnel. Thereafter, he directed S.I. Riaz Khan to get the inquest proceeedings of the deceased Sukai Verma and Ram Naresh and S.I. Sifate Haider (P.W.13) to get the inquest proceedings of the deceased Ram Dev and Girish Chandra Verma. On his direction and under his supervision, the inquest reports of the deceased Sukai Verma, Ram Naresh, Ram Dev and Girish Chandra Verma were prepared by them. After that, the dead bodies were sealed in a separate clothes and sent the dead bodies for post mortem examination to Faizabad by Constable Ramjeet Rawat and Constable Chandra Prakash Singh. He prepared the duplicate C.D. of Panchayatnama. Thereafter, he took down the statements of Rama Kant Verma (P.W.l), Uma Kant Verma (P.W.2), Manik Lal Verma (P.W.7) and Munna Lal Verma (P.W. 8). He, thereafter, inspected the place of occurrence at the instance of the witnesses of fact and prepared the site map (Ext. Ka 6). He found the dead body of Sukai on a Cot upon which कथरी and चद्दर were sheeting and one रजाई was also there, on which stained blood of the deceased was present and blood was splattered on the wall at the head of the cot. After scratching the blood stained brick of the wall, he sealed it in a separate container and cloth was sealed in a separate container and prepared its recovery memo (Ext. Ka.7).

Similarly, the dead body of Ram Naresh Verma was on a cot with an Angocha, a Kathri, a Chadar, another coloured chadar and one bush-shirt stained with blood. There were stains of blood on the wall and the memo (Ex Ka 8) thereof was also prepared and articles with blood on walls were sealed separately.

In the same manner, dead body of Ramdev was found on the Cot with kathri, chadar, banyan and gamchha stained with blood, and blood was also found on the ground near the Cot. These articles were sealed and blood stained and sample earth were taken and sealed them separately and recovery memo (Ex.Ka9) was prepared by him. The bedding consisting of Kathri, Rajai and two chadars and Tehmad of deceased Girish was found on the cot stained with blood.

The dead body of Girish was found in a pit (gaddha) where his blood had also fallen. Blood stained and plain earth were taken into possession and were sealed separately by the I.O. and memo of this and other articles were prepared (Ext. Ka 10). Then statements of witnesses of recovery were taken down.

On the same day, he searched for the accused persons but they were not present at their homes. When he returned from there, an information was received from an informer and on this information, he arrested accused Kashi Ram Verma, Raghava Ram and Ram Tilak on the same day and recorded their statements. He was, after that, transferred from Tarun P.S, on 13.11.94.

In his cross-examination, P.W.10 has deposed before the trial Court that firstly, he came to the police station from Ayodhya at 08:40 a.m. and reached the place of occurrence at 08:55 a.m. He did not record the statement at the police station and when he reached the place of occurrence, S.I. who was present there, was asked by him to do panchayatnama. Approximately, three hours have taken for preparation of panchayatnama. After

completing panchayatnama, he prepared the duplicate C.D. of panchayatnama, recorded the statements of the witnesses and prepared the site plan. About 3:00 p.m., he has prepared the site plan. Thereafter, he prepared the recovery memo as deposed in his examination-in-chief. He stayed at the place of occurrence till 05:00 p.m. and sent the dead bodies for post-mortem at 12:15 p..m. by a tractor. Along with the dead bodies of the deceased, some persons were also gone. He restrained the informant and his brother. The informant and his brother were along with him at the time of inspection of the place of occurrence. He found the dead bodies of the deceased, except deceased Girish on the cot. He also found the blood beneath one cot but he did not find any blood beneath the other Cot. He did not find any blood in the field. He denied the suggestion that he falsely implicated the accused persons on the dictate of the informant.

P.W.10 has further deposed in his cross-examination that he did not mention the distance from the place of incident to police station, F.I.R. number and weapon of assault in the panchayatnama but he mentioned only case crime number in the Panchayatnama. He further deposed that on 11.11.1994, he recovered a live cartridge of 315 bore during the inspection of the place of occurrence near the cot of Sukai and he took it and prepared recovery memo (Ext. Ka. 38), in which the signatures of witnesses Ram Shanker and Manik Ram were taken.

(12) The evidence of P.W.13 S.I. Sidne Haider shows that on 11.11.1994, he was posted as II officer at police station Tarun District Faizabad. Before the incident i.e. 08.11.1994, he was busy in his duty at Ayodhya in "*चौदह कोसी परिक्रमा*" and on 11.11.1994, he received information of this case and on receiving it, he reached the Police Station Tarun, from where he reached the place of occurrence village Barauli, Police Station Tarun, wherein police personnel of police station Haiderganj and police station Bikapur and other employees were present at the place of occurrence. At that time, Sri Riyaz Khan had prepared the panchayatnama of the deceased Sukhai and Ram Naresh. SO Sudhakar Pandey had also reached there and on his direction, he prepared the panchayatnama of accused Ram Dev and Girish Chandra. He filled the panchayatnama of the deceased Ram Dev at 09:00 a.m. and thereafter, sealed the dead body of deceased Ram Dev in a cloth and prepared the document in this regard (Ext. Ka.18). On the dead body of the deceased Ram Dev, one blood stained dhoti and a wrist watch on the left hand were present. Thereafter, he prepared the photo lash of the deceased Ram Dev (Ext. Ka. 20). Subsequently, he conducted the panchayatnama of the deceased Girish Verma. He started to conduct the panchayatnama of the deceased Girish Verma on 11.11.1994 at 10:40 a.m. On the dead body of the deceased Girish Verma, he found a sweater, on which blood was present. One bushart and a underwear were also present on the dead body of the deceased Girish Verma. He thereafter sealed the dead body of the deceased Girish Verma in a cloth and prepared the documents in this regard. After completion of all formalities, the dead bodies of the deceased were sent for post-mortem along with Constable Ram Deen and Chandra Prakash.

In cross-examination, P.W.13 has stated that while conducting Panchayatnama, he did not write the number of chik FIR regarding the incident nor wrote thereon the titled "State vs.

Whose". He further deposed that while filling panchayatnama, he did not give the description of the used weapon. In the panchayatnama, the distance from the place of occurrence to the police station has not been mentioned, for which he did not state any reason. He did not find any mud or clay on the body of the deceased Girish and if it is found, the same would have been written in the Panchayatnama.

(13) The evidence of P.W.14-Constable Ram Narayan Pandey shows that he was posted along with S.I. Riyaz Khan at police station Haiderganj in 1996-97. He had seen S.I. Riyaz Khan for reading and writing and he knows his handwriting and signature very well. Ext. Ka. 25 form no. 13 is in his handwriting and his signature. S.I. Riyaz Khan died on 08.01.1997. The sample seal (Ext. Ka.26) is in the handwriting and signature of Sri Riyaz Khan. Photo lash (Ext. Ka.27), Ext. Ka. 28 and Ext. Ka. 29 are in the handwriting and signature of late Riyaz Khan. Panchayatnama (Ext. Ka 30) is in the handwriting and signature of Late Riyaz Khan. The sample seal of deceased Sukai Verma (Ext. ka. 31) is in the handwriting and signature of late Riyaz Khan. Photo lash of the deceased Sukai (Ext. Ka.32) and letters to CMO (Ext. Ka. 32 and 33) are in the handwriting and signature of Late Riyaz Khan.

(14) After transfer of S.I. Sudhakar Pandey (P.W.10) from police station Tarun, the investigation was conducted by his successor Ashutosh Sharma (PW 11), who arrested Ram Milan and recorded the statements of remaining witnesses and then submitted charge-sheet (Ext. Ka.15) against the six named persons.

In cross-examination, P.W. 11 has deposed that he took the investigation of the case on 14.11.1994.

(15) Going backward, the post-mortem of the dead bodies of deceased Ram Dev, Ram Naresh, Sukhai and Girish was conducted on 12.11.1994, at 11:00 a.m., 11:45 a.m., 12:30 p.m. and 01:00 p.m., respectively, in District Hospital, Faizabad by Dr. O. P .Khattri (PW-9), who found the ante-mortem injuries on their person as enumerated hereinbelow :-

"Ante-mortem injuries of the deceased Ram Dev, aged 65 years :-

1. Abraded contusion 4 cm x 1 cm on the right side fore-head 6 cm away from the eye-brow.

2. Abraded contusion 4 cm x 1.5 cm on the right side forehead 1 to 1½ cm below injury no.1.

3. Incised wound 7 cm x 3 cm bone on the right side of face at the root of the nose upto right ear. Clear cut margins.

4. Incised wound 14 cm x 4 cm x bone deep on right side face 1 1/2 cm away from injury no.3 on left side of face. Bone cut. Parellel to injury no.3 from left to right. Clear cut margins. Bone cut.

5. Incised wound 6 cm x 1 cm x bone deep on right side of face 1 cm below injujry no.4.

6. Incised wound 7 cm x 2 cm x bone deep on right side of face 1 cm below injury no.5. Jaw fractured.

7. Incised wound 7 cm x 1.5 cm x muscle deep on the upper left side Neck 4 cm below the jaw. Spindle shaped. Clear cut margins.

8. Incised wound 7 cm x 1.5 cm x muscle deep on right side Neck parallel to injury no.7 and 1.5 cm below injury no.7.

9. Stab wound 2 cm x 1 cm x lungs deep on right side clavicle clear cut margins. Bone fractured. Going downwards

10. Incised wound 7 cm x 7 cm x bone deep on the right shoulder. Humerus bone fractured.

11. Incised wound 10 cm x 1 cm x bone deep on left fore-arm. Bone clear cut underneath.

12. Incised wound 1.5 cm x 1 cm x bone deep on the left fore-arm 1 cm above injury no.11.

13. Incised wound 1.5 cm x 1 cm x muscle deep above 1 cm from injury no.12.

14. Incised wound 1 cm x 0.5 cm x muscle deep left hand, 1 cm above injury no.13.

15. Incised wound 4 cm x 1 cm x bone deep on right fore-arm. Bone underneath clear cut. Wound was on the back of the upper part of the forearm."

As per the opinion of Dr. O.P. Khattri (P.W.9), deceased Ram Dev died due to shock and haemorrhage on account of ante-mortem injuries.

"Ante-mortem injuries of deceased Ram Naresh, aged 55 years

1. Incised wound 8 cm x 1 cm x bone deep on left side head 5 cm from ear. Spindle shaped. Clear cut margins.

2. Incised wound 14 cm x 2.5 cm x bone deep on left side head 1 cm above the eye brow. Spindle shaped.

3. Incised wound 1 cm x 2 cm on left side of head 2 cm below injury no.2.

4. Incised wound 8 cm x 1 cm x bone deep left side face 2 cm above the middle of jaw. Vertically.

5. Incised wound 17 cm x 2.5 cm x muscle deep left side Neck in the middle. Blood vessel and trachea cut.

6. Incised wound 16 cm x 4 cm x muscle deep on left side Neck. 2.5 cm below injury no.5.

7. Incised wound 6 cm x 2 cm x bone deep lower fore-arm (right). Bone underneath cut.

8. Incised wound 4 cm x 1.5 cm x muscle deep on right hand 2 cm below injury no.7.

9. Incised woound 4 cm x 1 cm x bone deep left fore-arm 4 cm above the joint of wrist.

10. Incised wound 5 cm x 4 cm x bone deep left wrist.

11. Incised wound 5 cm x 1.5 cm x bone deep left hand.

12. Incised wound 4 cm x 1 cm left hand. 1.5 cm below injury no.11.

13. Incised wound 3 cm x 1.5 cm x bone deep left hand 2 cm below injury no.11

As per the opinion of Dr. O.P. Khattri (P.W.9), deceased Ram Naresh died due to shock and haemorrhage on account of ante-mortem injuries.

"Ante-mortem injuries of deceased Sukhai, aged 80 years

1. Incised wound 23 cm x 7 cm x bone deep on right side of neck starting from the upper lip to the back of Neck. AI bones vervical verterae cut.

2. Incised wound 6 cm x 3 cm x bone deep right fore-head 3 cm above the right eye brow.

3. Incised wound 8 cm x 3 cm x muscle deep on right side face. Extending from the middle of nose upto right ear below 4 cm. Margins clear cut. Spindle shape.

4. Incised wound 4 cm x 1 cm x bone deep on right fore-head. Rt. Clavicle, Right side 2nd to 7th ribs fractured.

Membrances of Lungs torn. Right lung cut 7 cm x 4 cm.

As per the opinion of Dr. O.P. Khattri (P.W.9), deceased Sukhai died due to shock and haemorrhage on account of ante-mortem injuries.

"Ante-mortem injuries of deceased Girish, aged 18 years

1. Incised wound 14 cm x 8 cm x muscle deep on back of head 7 cm above the 7th cervical bone. Brain matter was coming out.

2. Incised wound 10 cm x 1.5 cm x bone deep on left side of head 7 cm above the left ear. Spindle shape.

3. Incised wound 5 cm x 2 cm x bone deep lower part of left fore-arm. There was cut of bone 2 cm above the ulna bone.

4. Incised wound 2 cm x 1 cm x muscle deep front of left hand.

5. Incised wound 3 cm x 1 cm x muscle deep front of left hand.

6. 3 incised wounds 10 cm x 7 cm on right shoulder. The biggest wound being 6 cm x 1 cm and smallest 2 cm x 1 cm x skin deep.

7. Incised wound 2.5 cm x 2 cm muscle deep on right upper arm 3 cm below injury no.6.

8. Incised wound 2.5 cm x 2 cm x bone deep right upper arm 4 cm above the elbow.

9. Incised wound 4 cm x 0.1 cm x muscle deep on right fore-arm 6 cm away from the elbow.

10. Incised wound 4 cm x 1.5 cm x muscle deep on right fore-arm on inferior side 4 cm above the elbow.

11. Several incised wounds in an area of 10 cm x 6 cm exterior of right hand skin deep. Smallest 2 cm x 1 cm x skin.

12. Incised wound 7 cm x 4 cm x muscle deep on right palm.

13. Incised wound 4 cm x 2 cm x bone deep right palm.

14. Incised wound 4 cm x 2 cm x bone deep right palm upto index finger.

15. Incised wound 7 cm x 3 cm x bone deep left knee exterior side.

As per the opinion of Dr. O.P. Khattri (P.W.9), deceased Girish died due to shock and haemorrhage on account of ante-mortem injuries.

(16) It is significant to mention here that Dr. O.P. Khattri (P.W.9) in his deposition before the trial Court had reiterated the aforesaid cause of death of deceased Ram Dev, Ram Naresh, Sukhai and Girish and deposed that on 12.11.1994 when he was posted as Medical Officer in District Hospital, he conducted the post-mortem of the dead bodies of the deceased Ram Dev, Ram Naresh, Sukhai and Girish, which were brought by Constable Chandra Prakash and Ramdeen Rawat of police station Tarun in sealed clothes. He deposed that on internal examination of the dead body of deceased Ram Dev, he found that the right clavicle 4 ribs (3 to 7) on right side chest were fractured; lung was cut; semi-digest food was present in the stomach; and faecal matter was in intestines. On internal examination of the dead body of the deceased Ram Naresh, he found that left clavicle was fractured; right side ribs (3rd to 6th) were fractured; both bones of right hand were fractured; semi-digested food was in the stomach; faecal matter was also in intestines. On internal examination of dead body of deceased Sukhai, he found that right clavicle, right side 2nd to 7th ribs were fractured; membrances of lungs were torned; right lung cut 7 cm x 4 cm; semi digested food

and faecal matter was found in stomach and intestines. On internal examination of dead body of deceased Girish, he found that occipital bone back side fractured upto 3 inches; brain matter was coming out; semi digested food and faecal matter were found present.

(17) The case was committed to the Court of Sessions by the learned Chief Judicial Magistrate, Faizabad, where the accused Krishna Murari alias Murli, Kashi Ram Verma , Raghava Ram Verma , Ram Milan were charged for offence punishable under Sections 302, 149, 148 I.P.C. and against accused persons Ram Kripal Verma and Ram Tilak Verma were charged under Section 120-B I.P.C. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(18) During trial, in all, the prosecution examined fourteen witnesses, namely, P.W. 1-Rama Kant Verma, who is the informant; P.W.2 Uma Kant Verma, who is the brother of the informant; P.W.3 Daljeet Singh, P.W.4 Hari Om Singh, P.W.5 Amar Jeet Singh, P.W.6 Mithai Lal, P.W.7 Manik Ram, and P.W.8 Munna Lal, who were examined to prove the factum of occurrence and the circumstances; P.W.9 Dr. O.P. Khattri, who conducted the post-mortem of the dead bodies of four persons; P.W.10 Sudhakar Pandey and P.W. 11 Ashutosh Sharma, who were the Investigating Officers of the case; P.W.12 Ram Harsh Yadava, who was the Head Moharrir and was examined to prove FIR and GD; and P.W.13 Sibte Haider and P.W.14 Ram Narain Pandey, who were examined to prove the inquest reports of the four persons. In defence, Head Constable Nahar Singh of the C.B.C.I.D. Dog Squad Head Quarter, Lucknow was examined as D.W.1.

(19) We would first like to deal with the evidence of informant Rama Kant Verma P.W.1. Since in paragraph-8, we have set out the prosecution story primarily on the basis of recitals contained in his examination-in-chief, for the sake of brevity, the same is not reiterated. P.W.1 Rama Kant Verma had deposed before the trial Court that the incident is of intervening night of 10/11.11.1994 at about 02:30 a.m. He was sleeping in Tubewell's room. Alongwith him, his cousin Girish Chandra Verma was also sleeping. They were sleeping afer closing the door of the tubewell room from inside. The name of the father of Girish Chandra Verma is Ram Naresh Verma. His grand-father Sukai and his uncle Ram Naresh were sleeping under the Chhappar on separate cots on the west side of the tube-well. Ram Dev Verma was sleeping under the Chhappar situated on the south-west side of the tube-well. His brother Uma Kant Verma (P.W2) was sleeping on the cot in the west of the Sariya on the way (rasta) adjacent to the Chhappar where Ram Naresh, Sukhai were sleeping. His uncle Sukhai and Ram Naresh raised alarm बचाओ बचाओ *(save, save)*. On hearing this, he and his brother Girish awoke and saw on opening the door that Krishna Murari @ Murli son of Ram Jagat and Kashi Ram son of Tidi armed with Gandasa, and Raghav Ram son of Nanku and Ram Milan son of Ram Awadh armed with Banka were cutting his uncle and grand-father. Besides these, 2-3 other persons who had covered their faces by cloth were also cutting his uncle and his grand-father with Gandasa (halberds). They (Girish and Rama Kant Verma) raised the alarm and ran to save their lives. Then, all the appellants had also assaulted his brother Girish. Thereafter, Ram Dev Verma was assaulted by these assailants with Gandasa (halbreds) and Banka. He, thereafter, ran

towards the northern side of tubewell in the sugarcane field to save his life and his brother Uma Kant Verma ran into the field adjacent to the Sariya by raising alarm. The electricity is available to his tubewell. On a branch of "Neem' tree situated in the south-west of the tubewell, electricity bulb was burning and on its south direction of a branch of another Neem tree, electricity bulb was burning. He saw the occurrence in the light of electricity bulb and identified the accused persons very well. Thereafter, on hearing the alarm, his father Ram Tej, Manik Ram (PW7), Munna Lal (PW 8), Lallan Prasad Tiwari, Babu Lal Harijan and others came with Lathi and torch. On arriving of these witnesses, all the accused ran towards south direction. On account of the assault of these accused persons, his uncle Ram Naresh Verma, his grand-father Sukai, Ram Dev and his brother Girish Chandra Verma died instantaneously.

Before the incident i.e. since 1990, civil litigation of land was going on between the father of Krishna Murari, namely, Ram Jag and his family members Ram Dev, Ram Tej, Ram Naresh. He did not go to lodge the FIR in the night due to fear. In the morning, when he was going to Police Station Tarun on a bicycle along with P.W. 7- Manik Ram, P.W. 8-Munna Lal Verma and one another person, then, on the way, Daljeet Singh Master (P.W.3) of village Jaisingh Mau and Hari Om Singh (P.W.4) of village Tikri met him, then, he narrated the whole incident happened at home to them, thereupon, they told him that last evening at about 9 PM in the night, at the shop of Ram Kripal Verma in Lal Ganj Bazar, he had seen Ram Tilak Verma alongwith Krishna Murari and 2-3 other persons were consuming non-vegetarian food. On their information, he was convinced that Ram Tilak Verma, Ram Kripal Verma, Krishna Murari took the food and committed the murder of his family members. He wrote the written report of the incident at Tarun Bazar, reached the Police Station Tarun at about 6:30 a.m. and handed over the written report to the Munshi. It was marked as Ext. Ka. 1.

Amar Jeet Singh and Mithai Lal came to his residence after 3-6 days of occurrence. They told him that in the night of occurrence, they had also heard alarm coming from Barauli and on hearing it, they were standing near their house. After some time, they had seen that Ram Tilak and Ram Kripal armed with Gandasa and Banka, respectively, were coming from Barauli and blood was in their hands and weapons. On lighting the torch, they (Ram Tilak and Ram Kripal) asked who were there, then, they (Amarjeet Singh and Mithai Lal) hid by fear.

Mithai Lal Verma (PW 6) and Amar Jeet Singh (PW 5) were the residents of village Balli Kripal Pur and Amar Jeet is also his distant relation. They had come to his place for mourning. Thereafter, he went to Police Station Turun and told these facts to the Inspector but the Inspector told him that he had already taken the statements of Mithai Lal (P.W.6) and Amar Jeet Singh (P.W.5). Accused had a gang and they all are clever, on account of which, Manik Ram, Munna Lal, Babulal Harijan, Daljit Singh, Amarjeet and Mithai Lal got scared by the accused persons and met them.

In cross-examination, P.W.1-Rama Kant Verma had deposed before the trial Court that he had orally stated the Inspector about the factum as stated by witness Amarjeet and Mithai Lal. The witnesses Amarjeet and Mithai Lal came to his residence after 5-6 days of the incident. He further deposed that he did not remember whether Amarjeet and Mithai

Lal were coming at his house on the 2nd, 3rd, and 4th day of the incident. He further deposed that he did not recognize Ram Kripal Verma and Ram Tilak Verma at the time of occurring the incident, because of which, he did not name them in the FIR. During the incident, he did not sustain any injury. His brother Uma Kant Verma was also not assaulted by the accused persons. During the incident, witnesses Manik Ram, Munna Lal, Babulal Harijan and his father Ram Tej were not assaulted by the accused persons.

P.W.1 has further deposed that he knew accused Ram Tila prior to the incident as he was a Master of Junior High School situated at Vankatta. Before the incident, he had no enmity with accused Ram Tilak. He also knows accused Ram Kripal prior to the incident and he had no enmity with the accused Ram Kripal prior to the incident. Accused Ram Tilak was arrested on the date of incident. He also deposed that in the examination-in-chief, though he had stated that the accused persons are having a gang and they are clever, this fact was not stated to the Inspector and the reasons for not saying this to Inspector have not been stated.

P.W.1 has also stated that he did not remember as to whether the night of the incident had moonlight or darkness but it was slightly cold. He did not remember whether electricity light is prevailing at the shop of Ram Kripal or near the shop of Ram Kripal. P.W.1 has further deposed that he saw the shop where Daljeet Singh, on the date of incident, had narrated the factum at Lalganj Bazar but he did not remember whether there was light or not. He had seen the house of witness Amarjeet. He did not see the house of witness Mithai Lal and accused Ram Tilak but he knows that they are the residents of village Kripalpur. He never went to the house of Ram Tilak. He did not tell whether any person of his family went to the house of Ram Tilak or not. He had listened that gangster case was going on in the Court against Ram Kripal. The Inspector recorded his statement at his residence after panchayatnama. He went from house at 05:00 a.m. for lodging the report. When he left the house, the sun was not coming out. When he went to lodge the report, there was neither light nor dark. He was going on a cycle for lodging the report. 12-15 minutes were taken for reaching the place from home where he met with witness Daljeet Singh. Thereafter, he talked with Daljeet Singh for about 10-12 minutes. Witnesses Daljeet Singh and Hari Om Singh were met on the way and told him about accused Ram Tilak and Ram Kripal. These witnesses did not come with him to the police station for lodging the report. After talking with them for 10-12 minutes, he moved forward. The facts, which Daljeet Singh and Hari Om Singh stated, were not noted by him. 25-30 minutes had taken for writing the written report. 20-25 minutes had taken for reaching Tarun from the place where he met with Daljeet. A bench was lying in a shop of Tarun Bazar, upon which he sat and wrote down the report. At the time of writing report, Manik Ram, Munna Lal and one person were present there. Witnesses Manik Ram and Munna Lal did not see the incident. He reached the police station at 06:30 p.m.

P.W.1 had also stated that when he came from the police station, the police were already present at the place of occurrence. The Inspector had reached the place of occurrence at about 09:00-09:45 a.m. The dead bodies of the four deceased persons were sent for post-mortem between 2:30 p.m-3:00 p.m.

P.W.1 has stated that he saw the accused persons running away. He further

stated the villagers did not see the accused persons running away and none of the villagers had told him that they saw Ram Tilak and Ram Kripal running away. On the night of incident, he was having torch but he did not remember whether it was written in the FIR. Thereafter, FIR was read, then, P.W.1 has stated that he did not say any reason as to why the factum that he was having torch, was not written in the F.I.R. In the statement recorded under Section 161 Cr.P.C., the factum that he was having torch on the night of incident, has not been written. He has also stated that he did not tell whether his brother Uma Kant was having torch on the night of incident. Though he showed the torch to the Inspector but he did not tell as to whether the Inspector has written it or not. There is no record concerning the recovery memo of his torch or the torch of his brother Uma Kant.

P.W.1 had also stated that two electricity bulbs hanging and lighting on the branches of two neem trees, have not been written in the FIR. He did not explain why this fact has not been written in the FIR. The electricity bulb was lighting at the tube-well but if this fact has not been written in the FIR, he could not tell the reason. He did not think it appropriate to mention the names of the person(s), who was carrying the torches at the time of the incident as he thought that these were small things. They did not recognize the accused, who covered their faces with cloth, at the time of incident. He also deposed that his brother Uma Kant, his father Ram Tej and witnesses of his village did not tell him that they saw accused Ram Tilak and Ram Kripal at the time of incident, until submission of charge-sheet. He further stated that his house was situated at the distance of about 200-250 meters from the place of occurrence in the middle of village on the western side. In the said house, women of his family were sleeping and no male member of the family was sleeping there at the time of incident. He had two tubewells; one is at the place of the incident; and the other is situated in the outskirt of his village. The distance between the two tubewells is 400 meter. His father was sleeping on the second tubewell and he did not sleep on the tubewell situated at the place of occurrence. The tubewell, which is situated at the place of occurrence, was in the name of Sukhai and second tubewell was in the name of Ram Dev. There was only field in the sorrounding of the place of occurrence and there was no residential area there. The residential area is started by moving 70 metre on foot on western-northern side from the place of occurrence. In the middle of this residential area, his house is situated. After the incident, about 50-100 persons were gathered there and they all reached at the place of occurrence at about 03:00 am- 03:45 am. In his village, about 50-55 houses were built and the population of his village was about 250 people. When the accused persons fled away from the place of occurrence, villagers were coming with lathis and torches.

P.W.1 had stated that at the time of incident, he and his brother Uma Kant hid in a field of sugarcane and both of them were hiding at different places in the field of sugarcane. The sugarcane field is situated at 5-6 steps north side from the place of occurrence. Both of them were not burning their torches and only they raised alarm "Save save'. His brother Uma Kant hid at a distance of 6-7 steps where he hid.

P.W.1 had further stated that he, his brother Uma Kant and his cousin brother Girish went to the tubewell at about 09:00-09:45 p.m. after taking dinner from his house and others Sukai, Ram Naresh,

Ramdev and Ram Tej went to the tubewell at about 10:45 p.m. After 5-6 minutes, Ram Tej went to another tubewell. His grandfather Sukai, uncle Ram Naresh and uncle Ram Dev were murdered on the cots, whereas Girish was killed outside the tubewell's pit and thrown into the pit. Girish was not killed on Cot. Girish was killed outside the tubewell.

(20) P.W 2 Uma Kant Verma, the brother of P.W.1, also stated that the incident is of the night of 10.11.1994 at 2:30 p.m. He was sleeping in front of Sariya on the way (rasta) adjacent to the Chhappar. On the western side of Sariya, there is a field of sugarcane. His Chhappar of ओसारा is adjacent to eastern side of his Sariya. The way, upon which he was sleeping, was in between the Sariya and Chhappar towards north-south. This way (rasta) leads up to the northern chak road. In the east of the Sariya, there is his Osara having two rooms in which chaff/straw and grains are being kept. On that night, his uncle Ram Naresh and grand-father Sukai were sleeping on the separate Cots in that Osara (ओसारा). There is tube-well on the east side of Osara, and in between a Rasta runs which also leads to the chak-road. On the night of incident, his brother Rama Kant and his cousin Girish Chandra Verma were sleeping inside the tube-well, whereas in the south of Chhappar, which also belonging to him, his grand-father Ram Dev was sleeping. There is a neem tree in the western side of his tubewell. On the date of incident, one electricity bulb was burning on the branch of the neem tree connected with tube-well. In the south direction of the Chappar, in which his grand-father Ram Dev was sleeping, there is an open ground and thereafter, his chappar is there. The eastern side of this chappar, there is a neem tree. On the date of incident, an electricity bulb was burning in a branch of the tree, which was also connected to the tubewell.

This incident is of intervening night of about 02:30 a.m. He heard the noise of बचाओं बचाओ (save-save) and on hearing this noise, he woke up. This noise was of his uncle Ram Naresh and his grand-father Sukai. On woke up, he saw that appellants Krishna Murari and Kashi Ram armed with Gandasa and Raghava Ram and Ram Milan armed with Banka were causing hurt to his grand-father Sukai and his uncle Ram Naresh and apart from them, there were 2-3 other persons also who had covered their faces. They were also causing hurt to Ram Naresh and Sukai. At that time, his brother Rama Kant and his cousin Girish came out of the room of tubewell. They all raised alarm. Thereafter, the said accused persons ran towards his brother Rama Kant and cousin Girish for assaulting and started assaulting. In the western-southern side of the tubewell of Girish, Ram Dev was sleeping and they all ran for assaulting and started assaulting. Thereafter, he (P.W.2) and Rama Kant (P.W.1) ran towards north in the sugar-cane field by raising alarm and hiding in the sugarcane. On raising alarm and hearing noise, his father Tej Ram Verma, Manik Ram. Munna Lal, Lallan Prasad Tewari, Babu Lal and other persons of his village came with lathi and torch whereupon the accused ran towards south. On the assault of the accused, his uncle Ram Naresh, his grand-father Sukai, Ram Dev and cousin Girish Chandra Verma died on spot.

Prior to the incident i.e. since 1990, litigation of land is going on in between Krishna Murari and his family. There was enmity in respect of land, on account of which, the accused persons killed the members of his family, which

was seen and recognized by him in the light of the electricity bulb very well. On account of fear, FIR of the incident was not lodged in the night, however, his brother went to lodge the FIR at about 5 A.M. in the morning. Accused persons Krishna Murari, Kashi Ram, Raghav Ram and Ram Milan belong to his village. In the morning after the occurrence, he came to know that Krishna Murari had shifted his cattle to Ram Kripal's house and his family members are also not in the house. This incident had occurred in connivance with Ram Kripal. Ram Kripal has talking terms with Krishna Murari and they are friends. A gangster case is going on against Ram Kripal. Accused persons had a gang.

In his cross-examination, P.W.2 stated that after the incident, all the family members were gathered and talked to each other regarding the incident. He did not remember whether the conversation with regard to lodging the report took place amongst them or not. However, a conversation took place between his brother and family members with regard to lodging of a report against whom. The conversation about lodging the report against Krishna Murari, Kashi Ram, Ram Milan and Raghav took place and not against any other persons. He did not remember whether conversation about lodging the report against Ram Kripal and Ram Tilak happened or not.

P.W.2 has further deposed that his uncle Ram Dev was killed on the cot. Accused had assaulted Ram Dev for about 1/2-1 minute. When his grandfather and uncle were assaulted, Girish and Rama Kant had came out from the tubewell room. His grandfather and his uncle were assaulted at a distance of 5-7 steps from the tubewell. After coming out from tubewell room, they an towards the field of sugarcane and not standing there. He also ran towards the field of sugarcane but he ran in other way. When Sukai and Ram Naresh were beaten, they ran towards the field of sugarcane. After hiding themselves in the field of sugarcane, how much time the accused stayed at the place of the incident, he did not tell because nothing was visible from the field of sugarcane.

P.W.2 had further deposed that his brother was going on by a cycle to lodge the report. He did not remember whether any person along with his brother went to lodge the report or not. The accused who inovlved in the incident did not hide their faces. Accused came to the place of incident silently and they did not challenge anyone.

P.W.2 had further stated that the Inspector had seen the place where he was sleeping and at the time of performing the Panchayatnama of the deceased, he was present there. At the time of Panchayatnama, he told the Inspector about the electricity bulb burning at the time of incident. When the police came to the place of incident in the morning, witnesses Munni Lal, Manik Ram, Munna Lal, Babu Lal and his brother Rama Kant were present. He stated the weapons of assault used in the commission of crime to the Inspector during investigation. He further stated that at the time of the incident, Sukai, Ram Dev, Ram Naresh, Girish, Rama Kant and Uma Kant were sleeping at the same tubewell, whereas Ram Tej was sleeping at the second tubewell which is situated at a distance of 15 meters from the place of occurrence. In the house situated in the village, only women were sleeping and not a single man was sleeping there. He also stated that ten minutes would take to reach from his house to tubewell. He has stated to the Inspector about burning of electricity bulbs at two places hanging on neem trees and if it is not written in his

statement, he cannot tell the reason for not writing the same in his statement. Neither he nor his brother was having a torch at the time of incident. Except the light of electricity bulb, there was no other source of light.

(21) P.W. 3-Daljeet Singh had deposed before the trial Court that he knows Rama Kant of Barauli village and four members of his family were killed prior to 2½- 3 years in the night. On the next day of the incident, he did not meet Rama Kant in the morning. However, he had gone to his house only the next day in the morning on knowing the incident where 40 - 50 persons were coming and going. He further stated that he did not tell Rama Kant that prior to one day of the incident, Ram Kripal, Ram Tilak and Krishna Murari were present at the shop of Ram Kripal. He has also not told to Rama Kant that he and Hari Om Singh were staying in front of the shop of Ram Kripal for filling air in his motorcycle.

In his cross-examination, Ram Kripal had a fair price shop on the road of Lalganj Market. When he went to the house of Rama Kant in the morning, then the Inspectors and Police were present there and at that time, the Inspector had neither interrogated him nor recorded his statement. Thereafter, statement recorded under Section 161 Cr.P.C. by the Inspector was narrated to him (P.W.3), then, he stated that he never made any such statement. He further stated that he did not know about the incident nor the accused person(s) involved in the incident.

(22) P.W.4-Hari Om Singh also deposed before the trial Court that he is the resident of village Tikari, Police Station Tarun, District Faizabad. Before the incident, he was doing the work of Jeevan Bima Nigam Ltd. He knows Rama Kant Verma of Barauli village and the incident of killing the family members of Rama Kant was happened in the year 1994 and for this he had knowledge. After the night of incident, he was going to Sultanpur in the morning and when he reached his house, four persons were enjoying the bone fire sitting beneath Chapper situated in front of his house; name of such persons did not remember by him; they had stated him about killing of four persons of the family of Rama Kant; and at that time, it was about 05:00 a.m. After knowing this incident, he went to Sultanpur and when he reached Jaisingh Mau village, then, Daljeet Singh Master met him there. On seeing Daljeet Singh Master, he stayed there, then, Daljeet Singh Master had also told him the hearing about this occurrence. When he and Daljeet Master were talking to each other, at that moment, Rama Kant and 2-3 other persons had met him and told about the occurrence. Daljeet Singh Master had informed that a day before Krishna Murari etc were sitting at the shop of Ram Kripal and were talking. He has also told him that when he was returning at 09:00 p.m. in the night from Faizabad, he also saw that 3-4 persons were sitting at the shop of Ram Kripa but he did not know who were sitting there. No other person was sitting on his motorcycle. Master Daljeet was talking to some person just near the shop of Ram Kripal. He stayed there on account of filling the air in his motorcycle. The filling of air shop was at a distance of 5-6 latha in front of the road and shop of Krishna Mururi. He went to the air filling shop but the shop was closed. Thereafter, he returned from there and on the way, Master Daljeet Singh met him, he told him that he was returning from Faizabad. Thereafter, they went to their house. He had not gone

to the shop of Ram Kripal. He did not see Ram Kripal, Krishna Murari and Ram Tilak at the shop of Ram Kripal.

In his cross-examination, P.W.4 stated that when he reached Rama Kant's tubewell where the incident occurred, Master Daljeet was present. First of all, the Inspector interrogated Daljeet Singh and thereafter the Inspector interrogated him. Ram Kripal is the friend of Krishna Murari and both of them were often seen roaming around on a motorcycle. He further deposed that before the incident, he did the insurance of Rama Kant and one of his brothers. He denied the suggestion that on account of relation with Rama Kant, he has been made the witness in the instant case.

(23) PW5 Amar Jeet has deposed that he did not meet any one at about 3 a.m. on that morning and he came to know about this incident only in the morning when Ram Sumer had told the incident.

In his cross-examination, P.W.5 has deposed that he is the relative of Rama Kant. He came to know about the murder of family members of Rama Kant at about 08:00 a.m. He reached at the house of Rama Kant at about 09:00 a.m. He was stayed at the house of Rama Kant for about one hour and at that time, he did not know as to who had killed the family members of Rama Kant. Within an hour, someone told him there who had killed them.

(24) P.W.6-Mithai Lal had deposed before the trial Court that he did not hear any noise at the time of occurrence from the place of occurrence.

(25) PW.7 had deposed before the trial Court that he did not hear any noise at the time of occurrence and did not go to the tube-well room and did not see any one running.

(26) PW.8 Munna Lal also deposed before the trial that he did not hear any noise and did not see any one running.

In his cross-examination, P.W.8 has deposed that on the night of incident, he was at his house in the village and about 05:30 a.m., news was spread in the village that family members of Rama Kant and Uma Kant were killed in the night by someone and the name of killer was not taken by anyone.

(27) From the defence side, Head Constable Nahar Singh was examined as D.W.1. In his deposition, he has stated that on 11.11.1994, he was posted as Constable in the Dog Squad of C.B.C.I.D. Headquarter, Lucknow. On demand of the police of police station Tarun, District Faizabad in relation to Case Crime No. 156 of 1994, under Sections 302/120 I.P.C., he reached with dog at Faizabad at about 03:00 p.m. Thereafter, he reached at about 04:00 p.m. with local police at the place of occurrence, where dog Neera was given the smell of the mark of foot. On smelling, dog Neera went near the tubewell, took a round there and returned without success. He proved the relevant entries and report in this respect Ext. Kha.1 and 2. He has further deposed that in cases where the accused are named in the FIR, there is no necessity to bring the dogs to trace the culprits. He stated that the dog squad is required only when the culprits have to be traced.

(28) In the statement under Section 313 Cr.P.C., all the accused persons claimed to be innocent and denied the allegations levelled against them and stated that witnesses Rama Kant Verma and Uma Kant

Verma had falsely implicated them on account of enmity.

Accused Krishna Murari alias Murli had stated in his statement under Section 313 Cr.P.C. that civil litigation was going on between him and the informant; unknown miscreants had killed the deceased in the night; no one had seen incident; when the son of the informant went to the place of the incident, then, he found that his family members were killed; and after that, on consultation and on account of enmity, he was falsely implicated in the case so that he would not pursue civil litigation.

Accused Raghava Ram Verma had stated in his statement under Section 313 Cr.P.C. that Uma Kant Verma, at page-8 of his statement before the trial court, has deposed that his brother Rama Kant Verma, on consultation with the family members in the morning, lodged the report against him, Krishna Murari, Ram Milan and Kashi Ram.

Accused Kashi Ram has stated in his statement under Section 313 Cr.P.C. that Rama Kant Verma and Uma Kant Verma, after consultation with the family members, had falsely implicated him, Krishna Murari, Raghavaram and Ram Milan and witnesses had not given any evidence.

Accused Ram Tilak Verma has stated in his statement under Section 313 Cr.P.C. that there was no evidence against him.

Accused Ram Kripal Verma has stated in his statement under Section 313 Cr.P.C. that no circumstantial or oral evidence has been given against him by any witnesses and no witness has given against him direct evidence. At the time of the incident, he was the owner of fair price shop and sugarcane situated at Walikripalpur and on account of this reason, the police and other persons have falsely implicated them.

(29) The learned trial Court believed the evidence adduced by Rama Kant Verma (P.W.1) and Uma Kant Verma (P.W.2) and disbelieved the defense plea and convicted and sentenced Krishna Murari alias Murli, Raghava Ram, Kashi Ram and Ram Milan and acquitted Ram Kripal Verma and Ram Tilak Verma in the manner stated in paragraph-2.

(30) Hence, these appeals, revision and reference.

(C) CONVICTS/APPELLANTS' ARGUMENTS

(31) On behalf of the convicts/appellants, Shri Umesh Pratap Singh and Sri Shitla Prasad Tripathi, learned Counsel have argued that

(I) The FIR is ante-timed. According to him, FIR number, distance of police station from the place of occurrence, weapon of assault, title of the case have not been mentioned in the four Inquest Reports prepared by the two police officers under the supervision and direction of the Investigating Officer Sri Sudhakar Pandey (P.W.10) as is evident from the depositions of P.W.10-Sudhakar Pandey and P.W.13-Sifate Haider. Further, DW-1 Nahar Singh, Head Constable, C.B.C.I.D. Dog Squad, Lucknow has stated before the trial Court that on 11.11.1994, at about 11:00 p.m., a demand was made from Faizabad for Dog Squad and he reached Faizabad at 3:00 p.m. and after that, he reached the place of occurrence with sniffer dog Neera at about 04:00 p.m. He, thereafter, gave the sniffer dog the smell from the spot but the dog

went upto the tube-well, took a round there and returned without success. D.W.1 had further stated that in cases where the accused are named in the FIR, there is no necessity to bring the dog to trace the culprits and dog squad is requisitioned only when the culprits have to be traced. In these backgrounds, his submission is that the FIR of the incident was not in existence from the time of inquest report till the returning of sniffer dog from the place of occurrence as P.W.2-Uma Kant Verma, in his cross-examination, had categorically stated before the trial Court that after the incident, all the family members had gathered and talked to each other in respect of the incident and conversation took place with his brother to the family members in respect of lodging of report against whom person(s) and further P.W.2 has stated that a conversation was going on in respect of lodging report against Krishna Murari, Kashi Ram, Ram Milan and Raghav and not against other persons. In support of his submission, he has placed reliance upon the judgment of the Madras High Court in the case of **Micheal alias Nai Micheal Vs. State** passed in Crl. A. (MD) No. 178 of 2010 on 03.09.2010.

(II) P.W.10-Sudhakar Pandey has deposed before the trial Court that he recorded the statements of witnesses Daljeet Singh and Hari Om Singh at the time of panchayatnama when they reached the place of occurrence and, whatever he found the evidence in the statements of Daljeet Singh and Hari Om Singh, on that basis he arrested Ram Tilak. In addition to that, there was no other evidence against Ram Tilak for arresting him, whereas as per the F.I.R., Ram Tilak was named accused, which establishes that the FIR is ante-timed.

(III) The entire case rests on the ocular testimony of P.W.1 and P.W.2, who are said to have witnessed the incident. Both of them are interested witnesses. The presence of P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma is highly doubtful. P.W.1, in his cross-examination, had deposed before the trial court that during the incident, no injury on his body of any types had occurred; his brother Uma Kant Verma did not sustain any type of injury during the incident by the accused persons; during incident, witnesses of the case Manik Ram, Munna Lal, Babu Lal Harijan and his father Ramtej were also not sustained any type of injury from the side of accused persons. According to him, P.W.2-Uma Kant, in his examination-in-chief, at one place, had stated that thereafter, the accused ran for assaulting his brother Rama Kant and his cousin Girish and assaulted them. Later on, P.W.2, in cross-examination, had stated that his brother Rama Kant was not assaulted. P.W.2, in cross-examination, has also stated before the trial Court that some persons were stayed whole night at the tubewell and some persons had gone from there; they did not try to go to the police station in the night with their assistance; Chaukidar neither came there nor he was called. He also stated that P.W.2-Uma Kant Verma had stated that though Ram Dev stood, he did not run, whereas P.W.1 had stated that Ram Dev also stood from cot. P.W.2 had further stated that when his grand-father and his uncle were beaten, at that time, he and Girish (deceased) were coming out from tubewell and his uncle and grand-father was beaten at a distance of 5-7 steps from tubewell and after coming out from tubewell, they, while raising the alarm, ran towards the field of sugarcane and not standing there. P.W.1 has stated that accused persons while leaving Ram Naresh and Sukai, ran towards him and he, thereafter, ran towards the northern side.

P.W.1 had later on stated that the accused ran towards Ram Dev and Girish. In these backgrounds, his submission is that the presence of P.W.1 and P.W.2 during the incident are doubtful and their statements are contradictory.

IV The medical evidence does not support the prosecution story. As per the statement of P.W.1, P.W.2 and the F.I.R., the incident was in the night of about 02:30 p.m. P.W.1 and P.W.2 have stated that deceased Girish after taking dinner at about 09:15 p.m. and other deceased at 10:15 p.m., came at the tubewell. P.W.9-Dr. O.P. Khatri has stated that half digested food was found in the stomach of the four deceased, which could be of three to four hours. His submission is that from the statements of P.W.1, P.W.2 and P.W.9, it transpires that all the deceased had eaten before 10:00 O'clock in the night and the maximum time of three hours of the above meal is added to it, then, the incident will be around 01:00 a.m. in the night and if one hour survival time is excluded as stated by P.W.9, then, the incident took place at 12:00 O'clock in the night, which creates reasonable doubt the presence of P.W.1 and P.W.2 at the place of occurrence during the incident. In this regard, he has placed reliance upon the judgments of this Court passed by a Co-ordinate Bench of this **Court in Criminal Appeal No. 431 of 1990 :** ***Jaikaran and another Vs. State of U.P., decided on 15.05.2018.***

V. While passing the impugned judgment, the learned trial Court has committed an error in adopting two separate parameters, by one way acquitted two accused persons, namely, Ram Tilak Verma and Ram Kripal Verma and by the other way, convicted and awarded the appellants capital sentence on the same set of facts and evidences. In this regard he has invited our attention towards the judgment of the Apex Court in **Criminal Appeal No. 434-436 of 2020 : Jaikam Khan vs. The State of Uttar Pradesh, decided on 15.12.2021** and has stated that the Apex Court in the aforesaid judgment held in para-81 about choosing between two or more possibilities, and preponderates of one over the other etc. He has also placed reliance upon the judgment of the Apex Court in **Amar Singh Vs. The State (NCT of Delhi)** : Criminal Appeal No. 335 of 2015, decided on 12.10.2020.

VI The prosecution has failed to prove the motive of the appellants to commit the murders of the deceased but from the evidence of the prosecution, it is established that the informant P.W.1 Rama Kant Verma had falsely implicated the appellants in the instant case. The evidences of the prosecution show that a litigation was pending between the victims and one of the appellant, namely, Krishna Murari and there was no enmity with the other appellants and two acquitted persons, however, P.W.1 and P.W.2, in their cross-examination, has admitted the facts that there occurred some quarrel in between Ram Milan, appellants and prosecution witnesses with respect to the taking of water of the fields. It has also been admitted that motor of Raghav Ram had been stolen and in that theft case, Raghav Ram and Kashi Ram had made complained against Uma Kant Verma P.W.2 and in that case, police made inquiry and came to the residence of Uma Kant Verma and had left after inquiry without doing anything against Uma Kant Verma . According to him, these four appellants are not related closely or distantly to each other and there was no reason for these persons to have united to commit the murder of four persons in a pre-planned manner.

VII The beneficiary of the incident appears to be the prosecution side

and not the appellants and two acquitted persons. He argued that Sukai had three sons, namely, Ram Naresh (deceased), Ram Dev (deceased), Ram Tej (father of P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma) and Girish (deceased) is the son of Ram Naresh (deceased) Ram Dev (deceased) had three married daughters. Therefore, the property left by Sukai and his two deceased sons came to be vested in Ram Tej, father of P.W.1 and P.W.2.

VIII The statement recorded under Section 313 Cr.P.C. has not been considered by the trial Court. The investigation of the case is also tainted as weapon of assault has not been recovered by the Investigating Officer; statement under Section 161 Cr.P.C. of P.W.10 Sri Sudhakar Pandey and Constable Ram Harsh Yadav, who had scribed the chik F.I.R., has not been found in the case diary; father of P.W.1 has not been examined as prosecution witness while as per FIR he was eye-witness; no injury has been found on the person of P.W.1 and P.W.2; the prosecution has not explained the delay for sending G.D. before Circle Officer after three days; darkness found in the fields; no nearest villagers were examined by the Investigating Officer nor produced before the trial Court for his/her examination; recovery memo of bed sheets of the cots of the deceased have not been examined by the Investigating Officer during trial proceedings nor produced.

IX Lastly, it has been argued that the appellants are more than 70 years old and are languishing in jail for more than 17 years without committing any offence, hence the impugned judgment is liable to be quashed.

(D) RESPONDENT/STATE ARGUMENTS

(32) On behalf of the State, Shri Vimal Kumar Srivastava, learned Government Advocate assisted by Shri Chandra Shekhar Pandey, learned Additional Government Advocate has argued that

I. Though the deceased are the family members of P.W.1 and P.W.2 and are related to each other, their testimony cannot be discarded merely because the relationship can never be a factor to affect the credibility of witnesses. His submission is that P.W.1 and P.W.2 have established their presence at the place and time of occurrence and their statements are trustworthy. In support of this contention, he has placed reliance upon **Yogesh Singh Vs. Mahabeer Singh** : (2017) 11 SCC 195, **Shio Shanekar Dubey Vs. State of Bihar : (2019) 6 SCC 501, Sudhakar alias Sudharshan Vs. State represented by the Inspector of Police, Sri Rangam Police Station Trichy, Tamil Nadu : (2018) 5 SCC 435.**

II. The failure of the prosecution to recover the weapon from the accused persons/appellants is not fatal to the prosecution case as the statements of eye-witnesses P.W.1 and P.W.2 have been clear and consistent while describing the sequence of events that had taken place on the day of the occurrence. There is no material discrepancy or contradiction in the statements of P.W.1 and P.W.2 as they had identified the appellants, who committed the murders of the deceased with Gandasa and Banka, which also corroborates with the medical evidence. In support of this assertion, he has placed reliance upon **Ram Singh Vs. State of Rajasthan** : (2012) 12 SCC 339.

III. The statements of P.W.1 and P.W.2 show that appellants committed the murder of the four deceased persons in the

night of 10.11.1994 at about 02:30 a.m. with Gandasa and Banka and the medical evidences have also supported the prosecution case. There is direct evidence against the appellants for murdering of the deceased. The trial Court has rightly discarded the plea of the appellants. His submission is that as the ocular testimony of P.W.1 and P.W.2 are reliable and trustworthy, it cannot be discarded only because of absence of motive. In this regard, he has placed reliance upon the judgment of the Apex Court in **Bipin Kumar Mondal Vs. State of West Bengal :** (2010) 12 SCC 91.

IV. So far as the sentence is concerned, while placing reliance upon **Machhi Singh and others Vs. State of Punjab** : (1983) SCC 470, he argued that the trial Court has rightly sentenced the appellants for capital punishment as the prosecution has fully established that this case falls under the category of *"rarest of rare cases'.*

(E) REVISIONIST/INFORMANT

(33) None responds on behalf of the revisionist/informant nor learned Counsel for the respondents no. 1 and 2/acquitted persons in Criminal Revision No. 14 of 2000.

However, learned Government Advocate appearing on behalf of the State has stated that no appeal against the acquittal of Ram Kripal and Ram Tilak have been filed on behalf of the State. His submission is that the trial Court, after appreciating the evidence on record, has rightly acquitted Ram Kripal and Ram Tilak as the charge against them is only of conspiracy for committing murders, which the prosecution has not proved.

(F) DISCUSSION/ANALYSIS

(34) We have heard Sri Umesh Pratap Singh and Sri Shitla Prasad Tiwari, learned Counsel appearing on behalf of the convicts/appellants, Sri Vimal Kumar Srivastava, learned Government Advocate assisted by Sri Chandra Shekhar Pandey, learned Additional Government Advocate for the State/ respondent at length and have carefully gone through the impugned judgment and order of conviction and sentence passed by the learned trial Court. We have also re-appreciated the entire evidence on record, particularly the depositions of PW1 Rama Kant Verma and PW2 Uma Kant Verma. We have also considered the ante-mortem injuries found on four deceased persons.

(35) It would become manifest from the aforesaid that the learned trial Court has based the conviction of appellants and acquittal of Ram Tilak Verma and Ram Kripal Verma on the ocular testimony of the informant Rama Kant Verma PW-1 and Uma Kant Verma PW-2, who are the family members of the deceased. Submission of learned Counsel for the convicts/appellants that the testimonies of P.W.1 and P.W.2 cannot be relied upon as they are interested and family members of the deceased and further their presence at the place of occurrence is doubtful.

(36) Undisputedly, both P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma, who are eye-witnesses, are family members of the deceased. It is settled law that merely because the witnesses are interested and related witnesses, it cannot be a ground to disbelieve their testimony. However, the testimony of such witnesses has to be scrutinized with due care and caution and upon scrutiny of the evidence of such witnesses, if the Court is satisfied that the evidence is creditworthy, then, there is no

bar on the Court in relying on such witness. (See **Dalbir Kaur Vs. State of Punjab** : (1976) 4 SCC 158, **Piara Singh and others Vs. State of Punjab** : (1977) 4 SCC 452, **Anil Phukan Vs. State of Assam** : (1993) 3 SCC 282, **Sudhkar alias Sudharshan Vs. State Represented by the Inspector of Police, Sri Rangam Police Station Trichy, Tamil Nadu** : (2018) 5 SCC 435, **Sheo Shankar Dubey Vs. State of Bihar** : (2019) 6 SCC 501.

(37) In **Kartik Malhar Vs. State of Bihar :** (1996) 1 SCC 614, the Apex Court has held that a close relative who is a very natural witness cannot be regarded as an interested witness. Paras-15 and 16 of the report are reproduced as under :-

"15. As to the contention raised on behalf of the appellant that the witness was the widow of the deceased and was, therefore, highly interested and her statement be discarded, we may observe that a close relative who is a natural witness regarded as an interested witness. The term "interested" postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some animus or for some other reason. In ***Dalbir Kaur and Others v. State of Punjab,*** (1976) 4 SCC 158, it has been observed as under :

"Moreover a clause relative who is a very natural witness cannot be regarded as an interested, witness. The term 'interested postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or for some other reason. Such is not the case here,"

In **Dalip Singh v. State of Punjab,** AIR (1953) SC 364, it has laid down as under :

"A witness is normally to be considered independent unless he or she springs from sources which are likely lo be tainted and that usually means unless the witness has cause such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is 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 any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often but 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."

(38) Thus, it will be necessary to scrutinize the evidence of P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma with more care, caution and circumspection.

(39) It transpires from the depositions of P.W.1-Rama Kant Verma that all four convicts/appellants and 2-3 unknown persons who covered their faces came to the tubewell of the informant's family in the intervention night of 10/11.11.1994 at 02:30 p.m. According to him, at that time, he was sleeping along with his cousin brother Girish Chandra Verma inside the tube-well room by shutting its door; his uncle Ram Naresh (father of Girish Chandra Verma) and his grand-father Sukai were sleeping on separate cots under the

Chhappar situated in the direction of west of tube-well; another uncle Ram Dev was sleeping under the Chhappar situated on South side of the tube-well; and his brother Uma Kant (P.W.2) was sleeping west side of Sariya on the way (rasta), which is adjacent to the Chhappar where Ram Naresh and Sukai were sleeping. According to him, on the alarm of his grand-father Sukai and his uncle Ram Naresh बचाओ–बचाओ (save save), he (P.W.1) and his cousin brother awoke and opened the door of tubewell and saw that Krishna Murari alias Murli and Kashi Ram armed with Gandasa and Raghav Ram and Ram Milan armed with Banka were causing hurt to Ram Naresh and Sukai and 2-3 persons who had covered their faces by means of cloth were causing hurt to them by means of Banka and Gandasa both. On seeing this, he and his cousin brother Girish raised alarm. They ran to help his grand-father Sukai and cousin Ram Naresh, whereupon all the appellants started causing hurt to Girish and thereafter the appellants caused hurt to Ram Dev by means of Gandasa and Banka. After that, he ran inside the northern side of sugarcane field whereas his brother Uma Kant Verma (P.W.2) ran into the field, which is adjacent to Sariya and is towards north. According to him, the electricity bulb was burning on the Neem tree situated south-west of the tube-well. There was another neem tree on which also electricity bulb was hanging and was burning. He saw the occurrence in the light of the electricity bulb and identified the four appellants. On alarm, Ram Tej, Manik Ram (P.W.7), Munna Lal (P.W.8), Lallan Prasad Tiwari, Babu Lal Harijan and several villagers came armed with lathies and with torches. Thereafter, all the appellants/miscreants ran away towards south. All the four injured persons died on the spot due to injuries. He further stated that he did not go to lodge the FIR immediately due to fear in the night. In the morning, he went to police station Tarun on a bicycle along with P.W.7 Manik Ram, P.W.8 Munna Lal Verma and one another person. While they were on their way to police station, then, Daljeet Singh (P.W.3) of village Jaisingh Mau and Hari Om Singh (P.W.4) of village Tikri told him that last evening at about 09:00 a.m., on the shop of Ram Kripal Verma in Lal Ganj Bazar, he had seen Ram Tilak Verma along with Krishna Verma and 2-3 other person taking non-vegetarian food. He stated that on this information, he was convinced that the conspiracy was hatched by Ram Tilak, Ram Kripal and Krishna Murari etc. to commit the murders. He reached the police station at 06:30 p.m. and handed over written report (Ext. Ka.1) to the police.

(40) According to P.W.2-Uma Kant Verma, who is brother of P.W.1- Rama Kant Verma , at the time of the incident i.e. in the night of 10/11.11.1994. at about 02:30 a.m., he was sleeping in front of Sariya on the way (rasta) adjacent to the Chhappar and that in the western side of Sariya, there is a field of sugarcane and that his Chhappar of ओसारा is adjacent to eastern side of his Sariya. According to him, the way, he was sleeping, was in between the Sariya and Chhappar in north-south and that this way (rasta) leads up to the northern chak road. He has stated that in the east of the Sariya, his Osara has two rooms in which chaff/straw and grains are being kept and on that night, his uncle Ram Naresh and grand-father Sukai were sleeping on the separate Cots in that Osara (ओसारा). There is tube-well east of Osara, and in between a Rasta runs which also leads to the chak road. He further stated that on the night of the incident, his brother Rama Kant and his cousin Girish Chandra Verma were sleeping inside the tube-well,

whereas in the south of the Chhappar, which also belonged to him, his grand-father Ram Dev was sleeping. There is a neem tree in the western side of his tubewell. On the date of the incident, an electricity bulb was burning in a branch of the neem tree, which was connected with tube-well. In the south direction of the Chapper, in which his grand-father Ram Dev was sleeping, there is an open ground and thereafter, there is his chapper. The eastern side of this chapper, there is a neem tree. On the date of the incident, an electricity bulb was burning in a branch of the tree, which was also connected with the tubewell. He listened the noise of बचाओं बचाओ (save-save). On this noise, he woke up and saw that appellants Krishna Murari and Kashi Ram armed with Gandasa and Raghava Ram and Ram Milan armed with Banka were causing hurt to his grand-father Sukai and his uncle Ram Naresh and apart from them, there were 2-3 other persons also who had covered their faces. They were also causing hurt to Ram Naresh and Sukai. At that time, his brother Rama Kant and his cousin Girish came out of the room of tubewell. They all raised alarm. Thereafter, the accused persons ran towards his brother Rama Kant and cousin Girish for assaulting and started assaulting. In the western-southern side of the tubewell of Girish, Ram Dev was sleeping and they all ran for assaulting and started assaulting. Thereafter, he (P.W.2) and Rama Kant (P.W.1) ran towards north in the sugar-cane field by raising alarm and hiding in the sugarcane. On alarm and noise, his father Tej Ram Verma, Manik Ram. Munna Lal, Lallan Prasad Tewari, Babu Lal and other persons of his village came with lathi and torch whereupon the accused ran towards south. On the assault of the accused, his uncle Ram Naresh, his grand-father Sukai, Ram Dev and cousin Girish Chandra Verma died on the spot.

(41) Both P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma have stated that on the date of occurrence i.e. in the intervening night of 10.11.1994, at 02:30 a.m., Rama Kant Verma (P.W.1) was sleeping along with cousin Girish Chandra Verma (deceased) inside tube-well room after shutting its door; his uncle Ram Naresh Verma (deceased) and his grand-father Sukai (deceased) were sleeping under Chhappar on separate cots west of the tube-well; uncle Ram Dev (deceased) was sleeping under the chhappar south of the tube-well; and Uma Kant Verma (P.W.2) was sleeping west of the Sariya on the Rasta (way), which is adjacent to the chhappar where Ram Naresh (deceased), Sukai (deceased) were sleeping. Both these witnesses i.e. P.W.1 and P.W.2 have further stated that appellants Krishna Murari alias Murli and Kashi Ram were armed with Gandasa and appellants Raghava Ram and Ram Milan were armed with Banka. They all and 2-3 other persons who had covered their faces by means of cloth and armed with Banka and Gandasa were causing hurt to their uncle Ram Naresh (deceased) and their grand-father Sukai (deceased). They also stated that on seeing causing hurt, both Girish (deceased) and Rama Kant (P.W.1) raised alarm and ran to help Ram Naresh (deceased) and Sukai (deceased) and thereafter, all the appellants were causing hurt to Girish (deceased) by means of Gandasa and Banka and thereafter, they ran inside the sugar-cane field. They also stated that they saw the incident in the light of electricity bulb, hanging in the branches of two Neem trees. They also stated that appellants and other assailants ran away, after assaulting Ram Naresh, Sukai, Ram Dev and Girish,.

(42) We have gone through the evidence of Rama Kant Verma (P.W.1) and Uma Kant Verma (P.W.2) and find them to be wholly truthful witnesses. Since they have furnished the same manner of assault and while dealing with their evidence, we have found that their version in relation to the assault on the deceased is in consonance with medical evidence. Further, we find that they have explained their presence at the place of the incident. They have stated that they were sleeping there on the date and time of the incident.

(43) It is pertinent to mention that although P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma were extensively cross-examined, nothing could be extracted there from which could impair their credibility.

(44) Earlier we have reproduced the ante-mortem injuries suffered by the deceased Ram Dev, Ram Naresh, Sukai and Girish and seen that Ram Dev sustained two abraded contusion on the right side forehead, twelve incised wounds on his face, neck, shoulder, fore-arms and one stab wound on lungs. His right clavicle, 4 ribs (3 to 7) on right side chest were found fractured; lung was also found cut; semi digested food was present in the stomach; faecal matter was present in the intestines.

The deceased Ram Naresh sustained thirteen incised wounds on head, face, neck, arms, wrist and hand. His left cervical was found fractured; Right side ribs (3 to 6th) were found fractured; semi-digested food was present in the stomach; faecal matter was also found in intestines.

The deceased Sukai sustained four incised wounds on neck and fore-head. His right clavicle and right side 2nd to 7th ribs were found fractured; membrances of lungs were torned; right lung 7 cm x 4 cm were cut; semi digested food and faecal matter was found in stomach and intestines.

The deceased Girish sustained fifteen incised wounds on the head, hand, palm, knee, index finger. His occipital bone back side was fractured upto 3 inches; brain matter was coming out; semi digested food and faecal matter were found present.

(45) Dr. O.P. Khatri (P.W.9) opined that all the dececeased died due to shock and haemorrahage as a result of ante-mortem injuries. According to him, the ante mortem injuries suffered by the deceased were sufficient in the ordinary course of nature to cause death. It has also been stated before the trial Court by P.W.9 that the deceased could have died on 11.11.1994 at 02:30 a.m.; incised wound was found on the lungs of the deceased Ram Dev; because of injury no.9, collor bone of the deceased Ram Dev was found fractured; injury no.9 of the deceased Ram Dev could be attributable by Banka; injuries no. 1 and 2 of Ram Dev could be attributable by banka or part of pool of Gandasa; and all the ante-mortem injuries sustained by other deceased persons could be attributable by Banka or Gandasa. P.W.9-Dr.O.P. Khatri was extensively cross-examined but nothing could be extracted there from which could impair credibility of the evidence of the eye-witnesses P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma. Both these witnesses have consistently stated that the deceased died on the spot as a consequence of the said injuries. Thus, we are of the considered view that there is no material discrepancy in the medical and ocular evidence. There is no reason to interfere with the judgments of the trial Court on this ground.

(46) In any event, it has been consistently held by the Apex Court that the

evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. [See **Solanki Chimanbhai Ukabhai Vs. State of Gujarat**, (1983) 2 SCC 174; **Mani Ram Vs. State of Rajasthan,** 1993 Supp (3) SCC 18; **State of Haryana Vs. Bhagirath,** (1999) 5 SCC 96; **Dhirajbhai Gorakhbhai Nayak Vs. State of Gujarat,** (2003) 5 SCC 223; **Thaman Kumar Vs. State of U.T. of Chandigarh,** (2003) 6 SCC 380; **Krishnan Vs. State,** (2003) 7 SCC 56; **Khambam Raja Reddy & Anr. Vs. Public Prosecutor, High Court of A.P.,** (2006) 11 SCC 239; **State of U.P. Vs. Dinesh,** (2009) 11 SCC 566; **State of U.P. Vs. Hari Chand,** (2009) 13 SCC 542; **Abdul Sayeed Vs. State of M.P.,** (2010) 10 SCC 259 and **Bhajan Singh @ Harbhajan Singh & Ors. Vs. State,** 2011) 7 SCC 421].

(47) In the present case, we do not find any major contradiction either in the evidence of the witnesses or any conflict in medical or ocular evidence that could tilt the balance in favour of the convicts/ appellants. The minor improvements, embellishments etc. apart from being far yield of human faculties are insignificant and ought to be ignored since the evidence of witnesses otherwise overwhelmingly corroborates each other in material particulars.

(48) It has been argued by the learned Counsel for the convicts/appellants that there was no immediate motive with the appellants to commit the murder of the deceased.

(49) However, the Trial Court found that there was sufficient motive with the accused persons/appellants to commit the murder of the deceased since 1990, litigation of land is going on between the family of the deceased and Krishna Murari. The long nursed feeling of hatred and the simmering enmity between the family of the deceased and the accused persons most likely manifested itself in the outburst of anger resulting in the murder of the deceased. We are not required to express any opinion on this point in the light of the evidence adduced by the direct witnesses to the incident.

(50) It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, if there is direct trustworthy evidence of witnesses as to the commission of an offence, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [See **Hari Shankar Vs. State of U.P.**, (1996) 9 SCC 40; **Bikau Pandey & Ors. Vs. State of Bihar**, (2003) 12 SCC 616; **State of U.P. Vs. Kishanpal & Ors.,** (2008) 16 SCC 73; **Abu Thakir & Ors. Vs. State of Tamil Nadu**, (2010) 5 SCC 91 and **Bipin Kumar Mondal Vs. State of West Bengal;** (2010) 12 SCC 91].

(51) The next submission of the Counsel for the appellants is that the Investigating Officer has not recovered any weapon of assault as alleged by the prosecution i.e. Gandasa and Banka. We feel no need to address this issue since it had already been validly discarded by the trial Court while convicting the appellants.

In any case, it is an established proposition of law that mere non-recovery of weapon does not falsify the prosecution case where there is ample unimpeachable ocular evidence. (See **Lokhan Sao Vs. State of Bihar :** (2008) 16 SCC 73, **Abu Thakir Vs. State of T.N.** : (2010) 5 SCC 91, and **Bipin Kumar Mondal Vs. State of West Bengal :** (2010) 12 SCC 91.

(52) The next line of contention of the learned Counsel for the appellants is that no independent witnesses were examined to prove the prosecution case even though as per the prosecution case itself, number of villagers came on the spot on hearing the hue and cry. We are not impressed by this submission in the light of the observations made by the Apex Court in **Darya Singh Vs. State of Punjab** : AIR 1968 SC 328, wherein the Apex Court has observed as under :-

"12. It is well-known that in villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers arc generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks. It is quite true that it is the duty of a citizen to assist the prosecution by giving evidence and helping the administration of criminal law to bring the offender to book, but it would be wholly unrealistic to suggest that if the prosecution is not able to bring independent witnesses to the Court because they are afraid to give evidence, that itself should be treated as an infirmity in the prosecution case so as to justify the defence contention that the evidence actually adduced should be disbelieved on that ground alone without examining its merits."

(53) Similarly, in **Raghubir Singh Vs. State of U.P.,** (1972) 3 SCC 79, the Apex Court has held that the prosecution is not bound to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. In this connection, general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when tempers on both sides are running high, has to be borne in mind.

(54) Further, in **Appabhai and Anr. Vs. State of Gujarat,** 1988 Supp (1) SCC 241, the Apex Court has observed that :

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused."

(55) The other submission of the learned Counsel for the appellants is that

FIR number and distance of police station from the place of occurrence, which find mention in the FIR, have not been mentioned in the four Inquest Reports prepared by the two police officers under the supervision and direction of the Investigating Officer and therefore, his contention is that the FIR was not lodged at 06:30 a.m. but it was ante-timed. According to him, the special report was signed by the Circle Officer only on 15.11.1994 although it is sent allegedly on 12.11.1994 and received in the office on 14.11.1994, hence there is delay in sending the special report to the officer concerned. We are of the view that in any event, in the light of position of law examined above and the observation of the trial Court that it merely shows remissness on part of the Investigating Officer, it should not be treated as fatal to the prosecution case, hence we are not inclined to disbelieve the prosecution story.

(56) At this juncture, it would be relevant to mention that the Apex Court in a catena of decisions has held that although in terms of Section 157 Cr.P.C., the police officer concerned is required to forward a copy of the FIR to the Magistrate empowered to take cognizance of such offence, promptly and without undue delay, it cannot be laid down as a rule of universal application that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable and the trial stands vitiated. When there is positive evidence to the fact that the FIR was recorded without unreasonable delay and investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the Court, then in the absence of any prejudice to the accused, it cannot be concluded that the investigation was tainted and the prosecution story rendered unsupportable. [See **Pala Singh Vs. State of Punjab,** (1972) 2 SCC 640; **Sarwan Singh Vs. State of Punjab,** (1976) 4 SCC 369; **Anil Rai Vs. State of Bihar,** (2001) 7 SCC 318; **Munshi Prasad & Ors. Vs. State of Bihar,** (2002) 1 SCC 351; **Aqeel Ahmad Vs. State of U.P.,** (2008) 16 SCC 372; **Dharamveer Vs. State of U.P.,** (2010) 4 SCC 469; **Sandeep Vs. State of U.P.,** (2012) 6 SCC 107].

(57) Further, the evidentiary value of the inquest report prepared under Section 174 of Cr.P.C. has also been long settled through a series of judicial pronouncements of the Apex Court. It is well-established that inquest report is not a substantive piece of evidence and can only be looked into for testing the veracity of the witnesses of inquest. The object of preparing such report is merely to ascertain the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or caused by animals or machinery etc. and stating in what manner, or by what weapon or instrument, the injuries on the body appear to have been inflicted. [See **Pedda Narayan Vs. State of A.P.,** (1975) 4 SCC 153; **Khujji Vs. State of M.P.**, (1991) 3 SCC 627; **Kuldip Singh Vs. State of Punjab,** 1992 Supp (3) SCC 1; **George and Ors. Vs. State of Kerala and Anr.,** (2008) 4 SCC 605; **Suresh Rai Vs. State of Bihar,** (2000) 4 SCC 84; **Amar Singh Vs. Balwinder Singh,** (2003) 2 SCC 518; **Radha Mohan Singh Vs. State of U.P.**, (2006) 2 SCC 450; **Sambhu Das Vs. State of Assam,** (2010) 10 SCC 374].

(58) In the present case, it is not the case of the convicts/appellants that they have been prejudiced by the alleged delay in dispatch of the FIR to the nearest Magistrate competent to take cognizance of such offence. Moreover, in our opinion, the non-recording of certain relevant entries in

the inquest report do not constitute a material defect so grave to throw out the prosecution story and the otherwise reliable testimonies of prosecution witnesses that have mostly remained uncontroverted.

(59) The learned Counsel for the convicts/appellants has then tried to create a dent in the prosecution story by pointing out inconsistencies between ocular evidence and the medical evidence. However, we are not persuaded with this submission since the trial Court has categorically ruled that the medical evidence was consistent with the ocular evidence and we can safely say that to that extent, it corroborated the direct evidence proffered by the eye-witnesses.

(60) At the cost of repetition, it would be relevant to mention that there is no material discrepancy in the medical and ocular evidence. There is no reason to interfere with the judgments of the trial Court on this ground.

(61) For the reasons above, the evidence of P.W.1-Rama Kant Verma and P.W.2-Uma Kant Verma inspire confidence and their evidence squarely establishes the involvement of appellants Krishna Murari, Raghav Ram, Kashi Ram and Ram Milan in the incident. Therefore, we do not have any reservations in our minds that the learned trial Court acted correctly in convicting Krishna Murari, Raghav Ram, Kashi Ram and Ram Milan for the offence punishable under Section 302 read with Section 149 I.P.C. and Section 148 I.P.C.

(62) So far as Criminal Revision No. 14 of 2000, which has been filed by the informant Rama Kant Verma (P.W.1) against the impugned judgment of acquittal of Ram Kripal and Ram Tilak, is concerned, we find that P.W.1-Rama Kant Verma , in his cross-examination, has stated before the trial Court that he did not recognize Ram Kripal Verma and Ram Tilak Verma at the time of the incident, meaning thereby that the P.W.1-Rama Kant Verma did not see these two accused persons to commit the offence of murder of the deceased. The evidence on record reflects that the allegations levelled by the prosecution against these two persons are that they were conspiring to commit the offence of murder of the deceased on the basis of presumption that these two persons had taken non-vegetarian foods with the convicts/appellants in the bazar. Except for this, there is no evidence against these two persons to commit the offence of murder of the deceased.

(63) On due consideration of the evidence on record, we are of the view that merely taking of non-vegetarian food with the appellants does not constitute conspiracy as the prosecution has failed to adduce any evidence which shows that on the conspiracy/instigation of Ram Kripal and Ram Tilak, appellants/convicts had committed the offence of murder of the deceased persons. Thus, the trial Court has rightly acquitted Ram Kripal and Ram Tilak and there is no illigality or infirmity in the impugned judgment with regard to acquitting Ram Kripal and Ram Tilak, hence Criminal Revision No. 14 of 2000 is liable to be dismissed.

(64) Now, while upholding the conviction of the convicts/appellants, we proceed to consider the question of 'death sentence' awarded to them by the trial Court under Section 302 read with Section 149 IPC.

(65) Capital punishment has been the subject-matter of great social and judicial

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

(66) Before going into the legality and propriety of question of sentence imposed upon the convicts/appellants, it is profitable to look at the various decisions of the Apex Court in the matter. The decision in **Bachan Singh v. State of Punjab** reported in AIR 1980 SC 898 pronounced by the Constitutional Bench of the Hon'ble Apex Court stands first among the class making a detailed discussion after the amendment of Cr.P.C. in 1974. In this case, the Apex Court has held that provision of death penalty was an alternative punishment for murder and is not violative of Article 19 of the Constitution of India. Relevant paragraphs of the said judgment are relevant and the same are reproduced herein below:-

"132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware -- as we shall presently show they were -- of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for presentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of

1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302 of the Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19.

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

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

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

(b) if the murder involves exceptional depravity; or

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

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

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

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

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

204. Dr. Chitaley has suggested these mitigating factors:

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

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

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

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

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

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

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

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

(7) That the condition of the accused showed that he was mentally

defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

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

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

(67) In **Machhi Singh v. State of Punjab** reported in (1983) 3 SCC 470, the Hon'ble Supreme Court has made an attempt to cull out certain aggravating and mitigating circumstances and it has been held that it was only in "rarest of rare' cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. In this judgment the Hon'ble Supreme Court has summarized the instances on which death sentence may be imposed, which reads thus:-

"38. xxxxxxxxxxx

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

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

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

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed herein above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

(Emphasis supplied)

(68) The issue again came up before Hon'ble Apex Court in **Ramnaresh & others v. State of Chhattisgarh** reported in (2012) 4 SCC 257, wherein the Hon'ble Supreme Court reiterated 13 aggravating and 7 mitigating circumstances as laid down in the case of Bachan Singh (supra) required to be taken into consideration while applying the doctrine of "rarest of rare" case. Relevant para of the same reads thus:-

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

Aggravating Circumstances:

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

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

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

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

(5) Hired killings.

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

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

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

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

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

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

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

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

Mitigating Circumstances:

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

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

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

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

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

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

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

(69) In the matter of **Dharam Deo Yadav vs. State of UP** reported in (2014) 5 SCC 509, the Hon'ble Supreme Court has held thus:-

""36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 this Court laid down three tests, namely, Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned counsel appearing for the accused, however, submitted that he had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed

is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric manner and, hence the instant case would not fall under the category of rarest of rare. We find some force in that contention.

Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under the category of rarest of rare case.

Consequently, we are inclined to commute the death sentence to life and award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice."

(70) In **Kalu Khan v. State of Rajasthan** reported in (2015) 16 SCC 492, the Hon'ble Supreme Court has held that:-

"30. In Mahesh Dhanaji Shinde v. State of Maharashtra, the conviction of the appellant-accused was upheld keeping in view that the circumstantial evidence pointed only in the direction of their guilt given that the modus operandi of the crime, homicidal death, identity of 9 of 10 victims, last seen theory and other incriminating circumstances were proved.

However, the Court has thought it fit to commute the sentence of death to imprisonment for life considering the age, socio-economic conditions, custodial behaviour of the appellant-accused persons and that the case was entirely based on circumstantial evidence. This Court has placed reliance on the observations in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi) as follows: (Mahesh Dhanaji case, SCC p. 314, para 35)

"35. In a recent pronouncement in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi), it has been observed by this Court that the principles of sentencing in our country are fairly well settled -- the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question -- Whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the Judge to reach the "truth'."

(71) In the light of the above proposition of law, we are required to scrutinize the case in hand minutely to find out whether the case falls under the category of *"rarest of the rare case"*, whether imposition of death penalty, which is an exception, would be the only appropriate and meaningful sentence and whether imprisonment for life, which is the rule, would not be adequate and would not meet the ends of justice.

(72) While awarding the death sentence to the appellants, the trial Court has drawn a conclusion that the appellants had committed the offence of murder of the deceased with pre-determined mind and pre-planned manner, hence the same comes in the category of 'rarest of rare cases'.

(73) From a perusal of the above, it is clear that the special reasons assigned by the trial Court for awarding extreme penalty of death are that the murder was pre-meditated and pre-planned one, therefore, imposition of lesser sentence than that of death sentence, would not be

adequate and appropriate. In these circumstances, the trial Court held that the balance-sheet of the aggravating and mitigating circumstances was heavily weighed against the appellants making it the rarest of rare cases and consequently awarded the death sentence.

(74) But, having gone through the facts and circumstances of this case, we find that no evidence on record to establish that the convicts/ appellants committed pre-planned and pre-meditated murder of the deceased. At least, no such evidence has been led by the prosecution to establish this fact. It comes out that convicts/appellants were causing injuries to the deceased and when they were doing so, even the witnesses also reached there, but that itself is not sufficient to hold that it is a pre-meditated or pre-planned murder.

(75) It is true that the manner in which crime has been committed by the appellants by Gandasa and Banka blows, is brutal, cruel and gruesome, but there is absolutely no evidence to suggest as to what could be the reason for the appellants to commit the said offence. This could be because of frustration, mental stress or emotional disorder which would be the mitigating circumstances to be taken note of.

(76) It is relevant to mention here that both the eye-witnesses P.W.1 and P.W.2 have stated that at the time of the incident, appellants Krishna Murari alias Murli and Kashi Ram were armed with Gandasa, whereas appellants Raghav Ram and Ram Milan were armed with Banka and apart from them, 2-3 other persons who had covered their faces by means of cloth were also having Banka and Gandasa. As per the prosecution story, all the persons above were causing hurt to the deceased with Banka and Gandasa, on account of which, four deceased persons died on the spot. As per the opinion of P.W.9 Dr. O.P. Khatri, ante-mortem injuries sustained the deceased could be attributable by Banka and Gandasa. But both Rama Kant Verma PW-1 and Uma Kant Verma PW-2 have not been able to specify who amongst appellants and 2-3 unknown persons who covered their faces with the cloth, were responsible for the fatal injuries suffered by the four deceased. P.W.1 and P.W.2 have failed to narrate the specific role of assault of weapon by the appellants upon the deceased persons. Moreso, the appellants did not have criminal history.

(77) After considering the above facts and circumstances of the case,, we are of the view that the instant case does not fall in the category of *'rarest of rare cases'*, warranting capital punishment. Hence, the death sentence awarded to the convicts/appellants under Section 302 read with Section 149 of IPC is liable to be converted into life imprisonment.

(G) CONCLUSION

(78) In the result :-

(A) Capital Sentence No. 01 of 2000 :-

While affirming the conviction and sentence of the appellants for the offence punishable under Section 148 I.P.C. and the conviction of the appellants for the offence punishable under Section 302 read with Section 149 IPC, we set aside the 'sentence of death' awarded to the convicts by the trial Court by means of impugned judgment dated 21.12.1999 and direct that for the murder committed by the convicts **Krishna Murari alias Murli, Raghav Ram Verma, Kashi Ram Verma** and **Ram**

Milan Verma, they are sentenced to life imprisonment instead of death sentence.

Appellants **Krishna Murari alias Murli, Raghav Ram Verma, Kashi Ram Verma** and **Ram Milan Verma** are in jail and shall serve out their sentence.

Subject to this alteration in the sentence, **Capital Sentence No.1 of 2000 is dismissed.**

(B) Criminal Appeal No. 14 of 2000 :-

The appeal is **partly allowed.** Although we maintain the conviction and sentence of appellants **Krishna Murari alias Murli, Raghav Ram Verma** , **Kashi Ram Verma** and **Ram Milan Verma** for the offence punishable under **Section 148 I.P.C.** and their conviction for the offence punishable under **Section 302 read with Section 149 I.P.C** but we set aside their sentence of death on the latter count and instead sentence them to imprisonment for life.

Appellants **Krishna Murari alias Murli, Raghav Ram Verma , Kashi Ram Verma** and **Ram Milan Verma** are in jail and shall serve out their sentence.

(C) Criminal Appeal No. 25 of 2000:

The appeal is **partly allowed**. Although we maintain the conviction and sentence of appellant **Raghav Ram Verma** for the offence punishable under **Section 148 I.P.C.** and his conviction for the offence punishable under **Section 302/149 I.P.C** but we set-aside his sentence of death on the latter count and instead sentence him to imprisonment for life.

Appellant **Raghav Ram Verma** is in jail and shall serve out his sentence.

(D) Criminal Appeal No. 26 of 2000

The appeal is **partly allowed**. Although we maintain the conviction and sentence of appellant **Krishna Murari Verma alias Murli** for the offence punishable under **Section 148 I.P.C.** and his conviction for the offence punishable under **Section 302 read with Section 149 I.P.C** but we set aside his sentence of death on the latter count and instead sentence him to imprisonment for life.

Appellant **Krishna Murari Verma alias Murli** is in jail and shall serve out his sentence.

(E) Criminal Appeal No. 27 of 2000

The appeal is **partly allowed.** Although we maintain the conviction and sentence of appellant **Kashi Ram Verma** for the offence punishable under **Section 148 I.P.C.** and his conviction for the offence punishable under **Section 302/149 I.P.C** but we set aside his sentence of death on the latter count and instead sentence him to imprisonment for life.

Appellant **Kashi Ram Verma** is in jail and shall serve out his sentence.

(F) Criminal Appeal No. 28 of 2000

The appeal is **partly allowed**. Although we maintain the conviction and sentence of appellant **Ram Milan Verma** for the offence punishable under **Section 148 I.P.C**. and his conviction for the offence punishable under Section 302 read with Section 149 I.P.C but we set aside his sentence of death on the latter count and instead sentence him to imprisonment for life.

Appellant **Ram Milan Verma** is in jail and shall serve out his sentence.

(G) Criminal Revision No. 14 of 2000

The instant criminal revision preferred by Rama Kant Verma (informant) is **dismissed.**

(79) Let a copy of this judgment and the original record be transmitted to the

trial court concerned forthwith for necessary information and compliance.

(2022)02ILR A67
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Civil Revision No. 153 of 2019

Shezad & Anr. ...Revisionists
Versus
Shareef ...Respondent

Counsel for the Revisionists:
Sri Mohit Kumar Singh, Sri Gauri Shanker Mishra

Counsel for the Respondent:
Sri S.M. Nazir Abbas Abedi, Sri S.M. Nazir Abbas Abedi

Civil Law - Code of Civil Procedure,1908 - Section 151 - O. 18 R 4 - D.N.A test - Point in issue in original suit was whether the defendant no. 1 is the real son of deceased Mohd. Haneef and has right, title or interest in the disputed property or not - D.N.A. test may be good piece of evidence determining the aforesaid issue - Plaintiff filed application for DNA test - defendants opposed the application on the ground that the Plaintiff has no legal right to got D.N.A. test of defendants, no one can be compelled to under go D.N.A. test against his will & that there is no provision for conducting D.N.A. test - Held - Burden is on the plaintiff to prove his case and if plaintiff wants to produce scientific evidence, it will not be proper to debar him from bringing such scientific evidence on record - If defendant decline to go for the D.N.A. test, Section 114 of the Evidence Act may apply

Dismissed. (E-5)

List of Cases cited:

1. Ashok Kumar Vs Raj Gupta & ors. (Civil Appeal No.6153 of 2021 decided on 1 st October, 2021)

2. Minor Siva Kumar Vs Chandrasekarn 2014 LawSuit (Mad) 2491

3. Dipanwita Roy Vs Ronobroto Roy 2014 LawSuit (SC) 851

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

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

2. This Civil Revision has been filed against the order dated 29.07.2019 passed by Additional Civil Judge, Senior Division, Court No.3, Meerut in O.S. No. 1223 of 2013 (Shareef Vs. Shahazad and others).

3. In brief the facts are that an application 81(C) was moved by the plaintiff under Section 151 and Order 18 Rule IV C.P.C. alleging therein that the plaintiff has filed a suit for a declaratory decree on the ground that plaintiff being son and defendant no.2 being the widow of Mohd. Haneef who has died on 27.08.2012 are the sole legal representatives and owner in possession of the disputed properties described in Schedule I, II and III of the Suit. The defendant no.1 is not the son of plaintiff. He has no right, title or interest in the disputed property. The defendant no.1 is not the son of defendant no.2 Smt. Baano but the son of her brother Mohd. Usman and thereby nephew of defendant no.2. This fact can be made clear through D.N.A. test and its report. Defendant nos. 1 and 2 filed objections against the aforesaid application and alleged that the said application has been moved after closing of evidence when

the file is pending for final arguments. Plaintiff has no legal right to got D.N.A. test of defendant nos. 1 and 2. The responsibility of leading evidence was on the plaintiff. There is no provision for conducting D.N.A. test. The learned trial Court by the impugned order has allowed the aforesaid application of the plaintiff.

4. Learned counsel for the revisionists mainly contended that the learned Court below illegally and in improper manner and without perusing the relevant material on record has allowed the application of the plaintiff and directed the Chief Medical Officer to conduct the D.N.A. test of the revisionist. The learned Court below has exercised the jurisdiction which was not vested in it and has committed manifest error of law. The learned trial Court has not considered the fact that there are other evidence on record on the point and the fact in issue can be decided by other evidence on record. Learned counsel for the revisionists further contended that the impugned order directly affect the privacy of the revisionists causing serious prejudice to them, hence it cannot be sustained. Learned counsel for the revisionists also contended that no one can be compelled to under go D.N.A. test against his will. Learned counsel for the revisionist has placed reliance on **Ashok Kumar Vs. Raj Gupta and others (Civil Appeal No.6153 of 2021** decided on 1st October, 2021).

5. Learned counsel for the opposite party on the other hand contended that the points in issue in the Suit is whether defendant no.2 is the real son of deceased Haneef or not. D.N.A. test may be good piece of evidence determining the aforesaid issue. The plaintiff wants to bring this fact on record to conclusively prove his case and he could not be prevented from adducing a scientific evidence. It is further contended that the learned trial Court has properly exercised its jurisdiction and rightly allowed the application. There is no illegality or impropriety in the impugned order. Learned counsel for the opposite party placed reliance on **Minor Siva Kumar Vs. Chandrasekarn** reported in 2014 **LawSuit (Mad) 2491** and **Dipanwita Roy Vs. Ronobroto Roy** reported in **2014 LawSuit (SC) 851.**

6. From the material on record, it appears plaintiff has filed a suit for declaration that plaintiff and defendant no.2 are the sole legal representatives in possession of the disputed property and defendant no.1 is not the son of Baano wife of Mohd Haneef but son of Mohd. Usman the brother of Baano. So the point in issue in original suit is whether the defendant no.2 is the real son of deceased Mohd. Haneef and his legal representative and has right, title or interest in the disputed property or not. Burden is on the plaintiff to prove his case and in support of his case, he wants to produce one sort of evidence which is scientific in nature. So it will not be proper to debar him from bringing such evidence on record. It is true that a person cannot be compelled to undergo D.N.A. test which can be conducted only on willingness of the concerned person. So it is for the defendants to decide whether they should go for D.N.A. test or not. If they decline to go for the D.N.A. test, Section 114 of the Evidence Act may apply. This has also been observed by the Hon?ble Apex Court in the case of **Dipanwita Roy Vs. Ronobroto Roy reported in 2014 LawSuit (SC) 851** which is cited by learned counsel for the opposite party.

7. In Ashok Kumar Vs. Raj Gupta & Others (Supra) the ruling relied by learned

counsel for the revisionists, the facts are that the burden was on the defendant and the other party moved the application for D.N.A. test and in such a situation Hon?ble the Apex Court in para 16 has observed thus:-

"*16. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendant?s case. In any case, it is the burden on a litigating party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.?*

In this case the burden is on the plaintiff and to discharge it, he wants to adduce one particular evidence which may be relevant so due to above reason the present case is distinguishable.

8. The revisionist/defendant no.2 is claiming legal right in the property of Mohd. Haneef and plaintiff has filed Suit for declaration that he and his mother defendant nos. 1 and 2 are the only legal heirs and owner in possession of property of the deceased Mohd. Haneef. In the facts and circumstances of the present case it will not be just and proper to deny the opportunity to plaintiff to bring the relevant scientific evidence on record. From the aforesaid discussion, it is clear that impugned order is just and proper, there is no illegality or impropriety in the impugned order and the revision lacks merit and liable to be dismissed. However, it is made clear that revisionists has liberty to comply or disregard the impugned order for D.N.A. test, if they don?t comply the order, the allegations may be determined by the concerned Court by drawing presumption of the nature contemplated in Section 114 of the Evidence Act and also the other evidence available on record.

9. With the aforesaid observations, the civil revision is hereby **dismissed.**

(2022)02ILR A69
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2022

BEFORE

THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 351 of 1990

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

Counsel for the Petitioner:
Sri Ajeet Kumar, Sri Rajesh Kumar Mishra (A.C.)

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code,1860 - Sections 376 & 511 - Criminal Procedure Code, 1973 - Section 313 - Offence of Rape - Attempt to commit Rape - Charged – Victims' aged about 9 years brother went to find out her brother who left his house at night - While going to cross road near biscuit factory, accused-appellant met her - He caught hold hand of victim and started taking towards a roadside Mazar, victim (prosecutrix) tried to raise alarm, accused pressed her mouth by his hand and threatened her to kill and untied victim's salwar - He made her to lie on earth and tried to rape her - When victim shouted, informant arrived there with torches and caught accused on spot at 9:00 p.m. - Accused, on being asked, disclosed his name – Conviction – on the basis of sole testimony of the prosecutrix – awarded with sentence – to undergo 4 years of rigorous imprisonment with fine of Rs. 500/- with default stipulation.

Criminal Law - Criminal Procedure Code, 1973 - Section – 374 – validity – effect – statement of the prosecutrix if found to be worthy of credence and reliable – requires no corroboration – plea of the accused that this is a case of consent since there is no any external or eternal injuries found on body of prosecutrix – No such question was asked, even remotely, to prosecutrix in her cross-examination - Therefore, aforesaid submission is to be rejected outright. (Para – 25, 26)

Appeal – dismissed - Conviction – Confirm. (E-11)

List of Cases cited:

1. Ganesan Vs State (2020 Vol. 10 SCC 573)

2. St. of Pun. Vs Gurmit Singh (1996 Vol. 2 SCC 384)

3. St. of Orissa Vs Thakara Besra (2002 Vol. 9 SCC 86)

4. St. of H.P. Vs Rghubir Singh (1993 Vol. 2 SCC 622)

5. Krishna Kumar Malik Vs St. of Hary. (2011 Vol. 7 SCC 130)

6. NCT of Delhi Vs Pankaj Chaudhary (2019 Vol. 11 SCC 575)

7. Sham Sigh Vs St. of Har. (2018 Vol. 18 SCC 34)

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

1. Feeling aggrieved and dissatisfied with the impugned judgement and order dated 13.02.1990 passed by IVth Additional Sessions Judge, Shahjahanpur in Session Trial No.264 of 1989, under Sections 376/511 I.P.C., Police Station Sadar Bazar, District Shahjahanpur by which trial court convicting the accused-appellant for the offence punishable under Section 376/511 I.P.C. and sentencing him to undergo 4 years rigorous imprisonment with fine of Rs. 500/- with default stipulation, accused-appellant has preferred the present appeal.

2. As per prosecution case, on 12.08.1987 in the evening, informant's brother Shahjad left the house and went to visit Lal Imli Chauraha, when he did not get home till late, his younger sister victim aged about 9 years went to find out her brother. While going to cross road near biscuit factory of Atiullah, accused-appellant met her. He caught hold the hand of victim and started taking towards Mazar, victim / prosecutrix tried to raise alarm, accused pressed her mouth by his hand and threatened her to kill. He took her to Mazar and untied the victim's salwar. He made her to lie on the earth and tried to rape her. When victim shouted , Tahir Hussan Khan and Rakesh Singh rushed their with torches and caught the accused on spot at 9:00 p.m. Accused, on being asked, disclosed his name as Mustakeem son of Amir Ali. In the meantime, informant arrived there searching his brother and sister (prosecutrix). Accused-appellant was taken to police station concerned. F.I.R. was got registered on the written tehrir Ex.Ka-1 of informant.

3. Upon the written tehrir, Chick F.I.R. Ex.Ka.-2 was registered bearing Case Crime no. 380 of 1987, under Sections 376/511 I.P.C. by constable muharrir P.W.-4. Entry of case was made in general diary, copy whereof is on record.

4. Investigating Officer, P.W.-5 Balram Singh, undertook the investigation, recorded the statement of victim and other witnesses, visited spot, prepared site plan and after completing entire formalities of investigation submitted charge sheet Ex.Ka.-7 against the accused-appellant

before the Magistrate concerned having competent jurisdiction.

5. Case, being exclusively triable by Court of Sessions, was committed to Session Court which came to be transferred to the concerned Court who framed charges against the accused-appellant to which he pleaded not guilty and claimed to be tried.

6. In order to substantiate its case, prosecution examined as many as five witnesses, out of whom PW-1, P.W. 2 and P.W.-3 are the witnesses of fact and rest are formal witnesses.

7. On closure of prosecution evidence statement of accused-appellant under Section 313 Cr.P.C. was recorded by Court explaining entire evidence and incriminating circumstances against him. Accused denied prosecution story in toto and all formalities of investigation were said to be wrong. He claimed false implication due to earlier rivalry with Tahir (not examined) over the money transaction but he led no evidence in defence.

8. Trial court, on appreciation of entire evidence on record, found the accused-appellant guilty and convicted and sentenced him as stated above.

9. I have heard Sri Rajesh Kumar Mishra, learned Amicus Curiae for the accused-appellant, learned AGA for the State at length and perused the record.

10. Now, I examine the statement of witnesses and other evidence.

11. P.W.-1 Shamshad Husain, who is the informant of the case but not eye witness of the incident. He deposed in his statement that on being told by victim and witnesses, he received information about the incident and he has filed the F.I.R. as per their information. Since, this witness is not eye of the incident, hence close scrutiny of his deposition is not necessary.

12. P.W.-2 victim / prosecutrix, supporting the prosecution case, deposed that she was aged about 9 years at the time of incident. It was 9:00 p.m. Her brother Shahjad after taking food went to visit but he did not come back till late. She went towards town hall to trace him. When she was returning to her home and reached near the shop of Biscuit, accused person caught her hand and took her to Mazar. When she tried to shout, accused-appellant pressed her mouth by his hand and threatened her to beat. He took her near Mazar and untied her Salwar, made her to lie on the earth and threw his underwear and paijama. Accused-appellant tried to rape her. When she shouted, Tahir Hussain Khan and Rakesh Singh arrived there with torches and apprehended the accused-appellant. Her brother Shamshad also arrived there, she narrated entire occurrence to her brother and witnesses. Her brother took the accused-appellant and her to police station along with witnesses. On being asked by witnesses, accused-appellant disclosed his name as Mustakeem. In her cross-examination made from the side of accused-appellant, prosecutrix repeated the incident. She further states that accused caught and dragged her. When she shouted, accused pressed her mouth. While untying her salwar and throwing his underwear and paijama, accused-appellant kept on putting his hand on her mouth. Prosecutrix / witness withstood lengthy cross-examination but nothing could be brought in his statement so as to disbelieve testimonial statement. Learned counsel for

the appellant could not point out any infirmity, so as to blemish her statement.

13. P.W.-3 Rakesh Singh, eye witness, deposed that on the fateful night at about 9:00 p.m., he was standing outside of his house. As he heard the scream of one girl, he and one Tahir Hussain Khan rushed there, Tahir was having torch. He lighted and in the light of torch, they saw that girl was lying on the earth and accused was trying to commit rape her. They apprehended the accused on spot and asked his whereabouts whereupon he disclosed his name as Mustakeem. Both were dressed and taken to Theki. On being questioned, victim told that she was taken by accused pressing her mouth. Thus, witness was lengthy cross-examined by accused side but nothing could be brought on record so as to disbelieve his statement, it appears that witness did not know the accused from before. It has come in the evidence that on being asked accused disclosed his identity as Mustakeem. Since, the accused-appellant was not known with the witnesses, thus it is unlikely that witnesses falsely implicate the accused.

14. P.W-4 and P.W-5 are the formal witnesses. P.W.-4 registered the F.I.R. on the basis of written tehrir Ex.Ka-1 and P.W.-5 is the Investigating Officer, who conducted the investigation finding evidence and filed charge sheet against the accused-appellant.

15. At the outset, it is required to be noted that in the present case, the prosecutrix has fully supported the case of the prosecution. She has been consistent right from the very beginning. Nothing has been specifically pointed out why the sole testimony of the prosecutrix should not be believed. Even after thorough cross-examination, she has stood by what she has stated and has fully supported the case of the prosecution. I see no reason to doubt the credibility and/or trustworthiness of the prosecutrix. The submission on behalf of the accused that no other independent witnesses have been examined and/or supported the case of the prosecution and the conviction on the basis of the sole testimony of the prosecutrix cannot be sustained is concerned, the aforesaid has no substance.

16. In the case of **Ganesan V. State (2020) 10 SCC 573,** Court has observed and held that there can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality. In the aforesaid case, Court had an occasion to consider the series of judgments of this Court on conviction on the sole evidence of the prosecutrix.

17. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness.

18. In State of **Punjab v. Gurmit Singh (State of Punjab v. Gurmit Singh, (1996) 2 SCC 384),** Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of

sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof.

19. In **State of Orissa v. Thakara Besra (State of Orissa v. Thakara Besra, (2002) 9 SCC 86)**, Court held that rape is not mere physical assault, rather it often distracts (sic destroys) the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non- xamination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

20. In **State of H.P. v. Raghubir Singh (State of H.P. v. Raghubir Singh, (1993) 2 SCC 622),** Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in Wahid Khan v. State of M.P. [Wahid Khan v. State of M.P., (2010) 2 SCC 9] placing reliance on an earlier judgment in Rameshwar v. State of Rajasthan [Rameshwar v. State of Rajasthan, AIR 1952 SC 54].

21. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

22. In **Krishan Kumar Malik v. State of Haryana (Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130)**, it is observed and held by Court that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

23. In the case of State **(NCT of Delhi) vs. Pankaj Chaudhary, (2019) 11 SCC 575,** it is observed and held that as a general rule, if credible, conviction of accused can be based on sole testimony, without corroboration. It is further observed and held that sole testimony of prosecutrix should not be doubted by court merely on basis of assumptions and surmises. In paragraph 29, it is observed and held as under:

"29. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu v. State of Maharashtra [Vishnu v. State of Maharashtra, (2006) 1 SCC 283]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without

corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [State of Rajasthan v. N.K. [State of Rajasthan v. N.K., (2000) 5 SCC 30]."

24. In the case of **Sham Singh v. State of Haryana, (2018) 18 SCC 34,** it is observed that testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is further observed that seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

25. Applying the law laid down in the aforesaid decisions to the facts of the case in hand and as observed hereinabove, I see no reason to doubt the credibility and/or trustworthiness of the prosecutrix. She is found to be reliable and trustworthy. Therefore, without any further corroboration, the conviction of the accused relying upon the sole testimony of the prosecutrix can be sustained.

26. Now so far as the submission on behalf of the accused that as there were no external or internal injuries found on the body of the prosecutrix and therefore it may be a case of consent is concerned, the aforesaid has no substance at all. No such question was asked, even remotely, to the prosecutrix in her cross-examination.Therefore, the aforesaid submission is to be rejected outright.

27. After considering the facts and circumstances evidence adduced in trial court, I find that trial court after appreciating the evidence rightly found the accused-appellant guilty. I find no reason to take a different view than that of trial court.

28. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. The conviction and sentence awarded to the accused - appellant herein herein for the offence under Section 376/511 IPC is hereby confirmed.

29. Accused-appellant shall surrender within 15 days before the trial court concerned to serve out the remaining sentence. He shall be entitled to get the benefit Section 428 Cr.P.C.

30. Before parting we provide that Sri Rajesh Kumar Mishra, learned Amicus Curiae for appellant who assisted the Court very diligently, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer posted in the office of Advocate General at Allahabad, to him without any delay and, in any case, within one month from the date of receipt of copy of this judgement.

31. Office is directed to transmit copy of this judgement along with trial court record to the court concerned through District Judge.

(2022)02ILR A75
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2022

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 633 of 2013
Connected with
Criminal Appeal No. 25 of 2013

Pinkoo @ Jitendra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Amit Misra, Sri Bhavya Sahai, Sri Brijesh Sahai, Sri J.S. Audichiya, Sri Pawan Kumar Bhardwaj

Counsel for the Respondent:
A.G.A.,Sri A.K. Umarao, Sri Imran Ullah, Sri Mohammad Khalid, Sri Shishir Prakash, Sri K.K. Upadhyaya

Criminal Law - Indian Penal Code,1860 - Sections 302 r/w 34, 114 - Arms Act, 1959 - Section 25, - Criminal Procedure Code, 1973 - Section 313, 154 & 437 (A), - Indian Evidence Act, 1872 - Sections 3, 8, 27 & 118 - Offence of murder – Delay in FIR – Effect – FIR was scribed by the constable was pre-written and the same was not been explained to the informant – the required general procedure while lodging an FIR has not followed which aspects casts doubt – producing the special report with 14 days delay of lodging FIR before the Magistrate & serious discrepancies creeping in the testimony of the prosecution witnesses proofs that the FIR was suspicious and ante-timed – due to this, the case of prosecution loses its legal significance and renders whole prosecution story is full of doubts.(Para 59, 61, 6, 71, 82)

Criminal Law - Indian Penal Code,1860 - Sections 302 r/w 34, 114 - Arms Act,1959 - Section 25, - Criminal Procedure Code, 1973 - Sections 313, 154 & 437 (A), - Indian Evidence Act, 1872 – Sections 3, 8, 27 & 118 - Offence of Murder – Absence of motive – Effect - Testimony of witnesses is silent about any motive for causing offence – Noting on the record which support or corroborate with the verbal allegation – The testimony of PW1 & PW2 is full of improvement and embellishments – which proofs that the prosecution story have lots of doubts. (Para 43, 55, 56)

Criminal Law - Indian Penal Code,1860 - Sections 302 r/w 34, 114 - Arms Act, 1959 - Section 25, - Criminal Procedure Code, 1973 - Sections 313, 154 & 437 (A), - Indian Evidence Act, 1872 – Sections 3, 8, 27 & 118 - Offence of Murder – Examination of Recovery of Gun, Map of Spot of incident & spot of recovery - Effect – there is no any testimony of witnesses stands to supports the recovery gun (whereas there where allegation that rifle was used in offence) and also there is discrepancy in Map of spot of incident – Inaction on the point in not observing precaution qua the recovery spot map throws lots of doubts on the prosecution story. (Para 70, 71, 72, 73)

Criminal Law - Indian Penal Code,1860 - Sections 302 r/w 34, 114 - Arms Act, 1959 - Section 25, - Criminal Procedure Code, 1973 - Sections 313, 154 & 437 (A), - Indian Evidence Act, 1872 – Sections 3, 8, 27 & 118 - Offence of Murder – charge sheet was filed in case crime no. 25 of Arms Act without awaiting the forensic report – Effect – recovery memo reveals that Gun at the time of kept in seal was in functional condition but the Forensic report shows that it weapon was not in functional condition – Testimony & records shows that defence any how either managed report or weapon was either been changed which casts doubts on the prosecution story. (Para 74, 75, 76)

Criminal Law - Indian Penal Code,1860 - Sections 302 r/w 34, 114 - Arms Act, 1959 - Section 25, - Criminal Procedure Code, 1973 - Sections 313, 154 & 437 (A), - Indian Evidence Act, 1872 – Sections 3, 8, 27 & 118 - Offence of Murder – credibility & reliability of witnesses – Effect - contradiction in

testimony of both Eye-witnesses (PW1 & PW2) shows that both witnesses either did not see the occurrence or came to know about the occurrence and the same has also not corroborated by any independent witness – a cumulative analysis and scrutiny of testimony of Eye witnesses and evidence of formal witnesses along with forensic reports reveals that story of prosecution is full of improvement and embellishments – such innocuous circumstance is self explanatory of real facts and exposes falsity of the prosecution case – as such while following the trite law and settled principle of criminal jurisprudence that '99 guilty persons should escape the clutches of law, than one innocent should be punished' the impugned orders of conviction are not sustainable in the eyes of law. (Para 43, 56, 57, 62, 83, 84)

Criminal appeal is hereby allowed. (E-11)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Brijesh Sahai, learned Senior Counsel assisted by Sri Bhavya Sahai and Sri J.S. Audichya, learned counsel for the appellants, Sri Imran Ullah and Sri K.K. Upadhyay, learned counsel for the informant and learned A.G.A. for the State and perused the material on record.

2. The aforesaid two criminal appeals arise out of judgment and order of conviction dated 18.12.2012 passed by the Additional District and Sessions Judge, Court No.6, Aligarh in Session Trial No. 600 of 2006 (State vs. Pinkoo alias Jitendra and Smt. Ishwari Devi), concerning Case Crime No.04 of 2006, under Sections - 302/34 and 114 I.P.C., Police Station- Gandhi Park, District - Aligarh and connected Session Trial No.601 of 2006 (State vs. Pinkoo alias Jitendra), concerning Case Crime No.10 of 2006, under Section - 25 Arms Act, Police Station - Gandhi Park, District - Aligarh, whereby the aforesaid two appellants have been sentenced to imprisonment for life, under Section - 302 read with Section - 34 I.P.C., coupled with fine against each to the tune of Rs. 20,000/- and in case of default in payment of it, the concerned convict would have to suffer additional rigorous imprisonment for one year. The appellant - Pinkoo alias Jitendra has also been sentenced to three years rigorous imprisonment coupled with fine Rs.5,000/- with default stipulation to suffer additional rigorous imprisonment for four months under Section - 25 Arms Act.

3. The aforesaid sentences awarded against appellant- Pinkoo @ Jitendra have been directed to run concurrently.

4. The factual matrix of the case as reflected from the F.I.R. pertains to fact that the written report was lodged by the informant- Indrabhan Singh Saini, son of Shri Ram Prasad, resident of Mali Ka Nagla (Shyam Bihari), Gandhi Park, Police Station - Gandhi Park, District - Aligarh on 04.01.2006 at 06:15 p.m. at Police Station - Gandhi Park, District - Aligarh against four persons including the present two appellants alleging therein that on 04.01.2006, it was around 05:30 p.m., the younger brother of the informant, Narendra Saini was standing in front of his house, when Pinkoo, Sonu, Monu, sons of Nem Singh arrived on the spot and Pinkoo, with intention to kill, fired on informant's brother with licensed rifle, while Sonu and Monu each gripped one arm of the victim and the mother of the accused- Ishwari Devi-was exhorting her sons for firing. Sonu and Monu were also possessing illicit arms and they shot fire, due to which, the informant out of fear could not save his brother. The written report also includes description that the incident was witnessed by Chandrabhan, son of Ramroop and Vipin Kumar, son of Geetam Singh and

others of the locality. After committing the offence, the assailants being pressurized by the locality secured their escape. The dead body was stated to be lying on the spot, while the informant came to lodge the report.

5. The relevant entry of this written report (Ext. Ka-1) was noted in the concerned Check F.I.R. on 04.01.2006 at 06:15 p.m. at Case Crime No.04 of 2006 at Police Station - Gandhi Park, Aligarh, the same is (Ext. Ka-4) and it was entered by S.I. Naresh Pal (P.W.-3). He also registered case against the present appellant and others named in the F.I.R., vide Rapat No. 39 at 6:15 p.m. on 04.01.2006 at aforesaid police station under Sections - 302, 114/34 I.P.C.

6. The investigation ensued and was entrusted to the investigating officer, Jasvir Singh (P.W.-10), who took note of the contents of the documents, say the F.I.R., recorded statement of Head Moharrir, Naresh Pal (P.W.-3) and proceeded to the spot along with S.I. Arvind Kumar Gautam (P.W.-4) and entrusted him (S.I. Arvind Kumar Gautam) the task of preparing inquest report. Bare perusal of the inquest report and the testimony of S.I. Arvind Kumar Gautam is reflective of fact that the inquest was prepared around 09:00 p.m. after appointing inquest witnesses and it was decided that for ascertaining the real cause of death, let the dead body of the deceased- Narendra Saini be sent for postmortem examination. Consequently relevant papers for the same were prepared. The inquest report is Ext. Ka-6, police form no.13, (challan dead body), photonash, letter to R.I. and letter to C.M.O. etc. are Ext.Ka-7, Ext. Ka-8, Ext. Ka-9 and Ext. Ka-10, respectively. The dead body was sealed on the spot and was entrusted to Constable Pramod Kumar and Rajveer Sharma for sending it to the mortuary.

7. Perusal of the postmortem examination report is indicative of fact that the postmortem examination was conducted in the night intervening 04/05.01.2006 (as per order of District Magistrate, Aligarh and C.M.S., District Hospital), Aligarh, wherein the following ante-mortem injuries were noted upon postmortem examination :-

"Gun shot injury of entry of size 3 c.m. x 3 c.m. x bone deep on the left side present of lower lip, extending from left upper lip to lower part of chin part clotted blood present. Blackening, tattooing, charring present. Underlying bones broken muscle tendon are severely lacerated. One wadding piece and seven pellets were recovered from post pharyngeal wall."

8. Cause of death was stated to be on account of shock and haemorrhage, as a result of ante-mortem injuries. The duration was noted to be 1/3 days. The postmortem examination report is Ext. Ka-11.

9. As the investigation proceeded further, the investigating officer recorded statement of the informant, inspected the spot, prepared site plan of the occurrence (Ext. Ka-21) and prepared memo of simple and blood stained clay (Ext. Ka-3). He prepared memo of recovery of two empty cartridges i.e. 315 bore and 12 bore from the spot, the memo of the same is Ext. Ka-2. He arrested appellant- Ishwari Devi on 06.01.2006. He recorded statement of witnesses Chandrabhan and Vipin Kumar on 08.01.2006.

10. Thereafter, the investigation was handed over to Surendra Pal Singh (P.W.-

7), the S.O. of Police Station - Gandhi Park, Aligarh, with whom he (P.W.-10) formed a team and upon tip off information arrested accused- Pinkoo alias Jitendra on 09.01.2006 at spot Gate No.1 of Mandi Samiti and upon arrest being effectuated, got recovered weapon of assault SBBL gun which the accused allegedly took out from the iron tank (for keeping grain) kept in his house in a room whereupon a case was lodged against accused- Pinkoo alias Jitendra vide Check F.I.R. No. 8/06 at Case Crime No. 10 of 2006, under section - 25 Arms Act, at Police Station - Gandhi Park, Aligarh and entry was made in concerned G.D., whereby a case was registered at Rapat No.58 at 23:45 hours on 09.01.2006. The Check F.I.R. of this case (Crime No.10 of 2006) is Ext. Ka-16, whereas the copy of general diary entry, whereby the case was registered is Ext. Ka-17 and the same has been proved by Constable Bharat Singh (P.W.-8).

11. However, the memo of arrest and recovery was prepared by Jasvir Singh (P.W.-10) on the dictation of S.O. Surendra Pal Singh (P.W.-7), the same is Ext. Ka-15. This witness Surendra Pal Singh (P.W.-7) also recorded statement of various witnesses including that of S.I. Arvind Kumar Gautam, Constable Pramod Kumar and Constable Rajveer Sharma. He prepared spot map of the place of recovery (Ext. Ka-13) and after completing the evidence filed charge sheet (Ext.Ka-12) against the accused-appellant under aforesaid sections of I.P.C. (302/114/34 I.P.C.) at aforesaid case crime number (04 of 2006).

12. However, up to this stage/period, the forensic examination report regarding the SBBL gun and the cartridges had not been obtained. The forensic report dated 12th March, 2007 was subsequently obtained at the instance of the defence, when it moved application before the trial court for calling the forensic report in question, which was signed by the concerned authority of Vidhi Vigyan Prayogshala, Agra on 09.02.2007. The same is marked as Kha-1.

13. The case (Crime No.10 of 2006) pertaining to arms act against accused-appellant- Pinkoo alias Jitendra was investigated by S.I. Vinod Kumar (P.W.-9), who took note of the contents of Check F.I.R. on 10.01.2006, recorded statement of the informant and the witnesses and prepared the site plan (Ext. Ka-18). He also obtained sanction for prosecuting the accused-appellant- Pinkoo alias Jitendra from District Magistrate, Aligarh, the sanction is Ext. Ka-20 and after completing the investigation he filed charge-sheet under Section - 25 Arms Act at Case Crime No.10 of 2006, which charge sheet is Ext. Ka-19.

14. Consequently, the Trial Court heard the accused-appellants and the prosecution on the point of charge and it was prima facie satisfied with the case against the accused-appellants, therefore, framed charges against both the accused-Pinkoo alias Jitendra and Smt. Ishwari Devi under Sections - 302 read with Section - 34 I.P.C. and 114 I.P.C. in Case Crime No.04 of 2006. Accused Pinkoo alias Jitendra was also charged under Section - 25 Arms Act at Case Crime No.10 of 2006. The charges were read over and explained to the accused-appellants, who abjured the charges and opted for trial.

15. In turn, the prosecution produced in all ten witnesses. A brief sketch of the same is as here under :-

16. Indrabhan Saini (P.W.-1) is the informant and eyewitness. Chandrabhan (P.W.-2) is also eyewitness. Naresh Pal is P.W.-3, he has prepared the Check F.I.R. and noted entry in the concerned General Diary of date 04.01.2006 at Police Station - Gandhi Park. S.I. Arvind Kumar Gautam is P.W.-4, who prepared the inquest report. Dr. R.P. Sharma is P.W.-5, who conducted autopsy on the dead body of the deceased Narendra Saini. S.I. Siya Ram Sharma (P.W.-6) has got nothing to do with the case of the present appellants, namely, Pinkoo alias Jitendra and Smt. Ishwari Devi because he arrested another co-accused, Sonu son of Nem Singh, which has got no reference with the merit of the case of the present two appellants, as such need not be looked into in this case. The Inspector Surendra Pal Singh P.W.-7-is the Second Investigating Officer of this case. Constable Bharat Singh is P.W.-8, who prepared the check F.I.R. pertaining to Case Crime No. 10 of 2006, under Section - 25 Arms Act at Police Station - Gandhi Park, District Aligarh and noted entry of its content in the concerned general diary of date on 09.01.2006 and got registered case against accused-Pinkoo alias Jitendra. S.I. Vinod Kumar (P.W.-9) is the Investigating Officer of case pertaining to Case Crime No.10 of 2006, under Section - 25 Arms Act. After completing the investigation, he filed charge-sheet (Ext. Ka-19) against accused-appellant- Pinkoo alias Jitendra. S.I. Jasvir Singh is P.W.-10 who is the first investigating officer pertaining to Case Crime No.04 of 2006.

17. Thereafter, the evidence for the prosecution was closed and statement of both the accused-appellants was recorded under Section - 313 Cr.P.C. Pinkoo alias Jitendra claimed to have been falsely implicated in this case and stated in reply to Question No.17 that his father is employed as constable in the police department at Aligarh. He was working as such at the time of this occurrence. The investigating officer of this case (Jasvir Singh P.W.-10) was also posted at Police Station - Lodha with his father and thereafter he was posted to Police Station - Gandhi Park and he had certain scores to settle with his father, on account of personal as well as departmental grudge, he colluded with the informant and cooked up a false case against him. The accused opted for adducing evidence for his defence.

18. So far as accused- Ishwari Devi is concerned, she refuted charge framed against her and claimed to have been falsely implicated in this case and in her statement in reply to Questionnaire No.17. She adopted statement of Pinkoo alias Jitendra as stated by him in reply to questionnaire no.17 as above. She also wished to adduce her testimony in her defence.

19. The Trial Court after appraisal of facts and circumstances of the case and after evaluating evidence on record and vetting merit of the case, returned finding of conviction and passed sentence against the aforesaid two appellants to imprisonment for life, under Section - 302 read with Section - 34 I.P.C., coupled with fine against each to the tune of Rs. 20,000/- and in case of default in payment of it, the concerned convict was directed to suffer additional rigorous imprisonment for one year. The trial court also sentenced the appellant - Pinkoo alias Jitendra to three years rigorous imprisonment coupled with fine Rs.5,000/- with default stipulation to suffer additional rigorous imprisonment for four months under Section - 25 Arms Act.

20. Consequently, this appeal.

21. It has been vehemently claimed on behalf of the appellants that in fact, no one saw the occurrence. The informant in collusion with the police has concocted and set up a false story in order to falsely implicate the appellants in the commission of the offence in question. The face value of the F.I.R. itself is doubtful and it is suspicious on account of description in it of various aspects of the case, in particular that the informant is acquainted with specific weapons used in the commission of the offence. The written report (Ext. Ka-1), describes, *inter-alia*, that accused-Pinkoo alias Jitendra fired with licensed rifle, whereas two co-accused are stated to have been in possession of illicit countrymade weapon. The F.I.R. is almost cryptic and silent about any motive being assigned to the accused-appellants. When the very import of the F.I.R. is gathered from the above three dimensions, then things appear to have been cleverly articulated, fishy and managed in order to falsely implicate the present accused-appellants in this case.

22. Now, it so happened that in order to give colour to this false case, a false motive was subsequently introduced and it was suggested by the prosecution that the appellant-accused- Pinkoo alias Jitendra was a drunkard, he used to demand money from the persons of the locality, which was opposed by the brother (deceased) of the informant, which factual aspect, the prosecution, if asserted, subsequently was required to strictly prove it and to establish it reasonably and satisfactorily, but that is miserably wanting in this case.

23. Further, we have been persuaded to the ambit that the entire proceeding was initiated after it was decided to falsely implicate the accused-appellants in this blind case. F.I.R. is ante time. There are interpolations and cuttings in the dates on various prosecution papers. Neither the inquest was prepared by the investigating officer himself nor was he present on the spot during course of preparation of inquest but the proceeding was conducted by another police personnel, S.I. Arvind Kumar Gautam (P.W.-4). The memo of recovery (Ext. Ka-2) regarding recovery of two empty cartridges one 315 and the another 12 bore was wrongly prepared and is admitted to the Investigating Officer, Jasvir Singh (P.W.-10).

24. Now, it so happened that the postmortem examination on the dead body of Narendra Saini, aged about 23 years was conducted the very intervening night 04/05.01.2006 at 01:00 a.m., as per the order of District Magistrate, Aligarh and C.M.S., Aligarh as has been endorsed upon the post-mortem examination report by Dr. R.P. Sharma (P.W.-5). No bullet of any sort was ever recovered from the body of the deceased, which may indicate that any rifle was used in the commission of the offence, instead the doctor recovered one wadding piece and seven pellets and this startled both the police and the informant, therefore, description of use of weapon was twisted and the weapon rifle was tried to be obviated by managing the statement of the informant under Section - 161 Cr.P.C. by divulging that the informant per chance described the weapon of assault used by the appellant- Pinkoo alias Jitendra as licensed rifle, whereas, it was 'licensed gun'. This aspect serves as additional link. Now, it so happened that in the night intervening 04/05.01.2006 autopsy was conducted at 01:00 a.m., which revealed use of gun instead of rifle and this being so the matter

was tried to be winced in statement made under Section - 161 Cr.P.C. Further, the F.I.R. is ante timed and it is not believable, as such.

25. No doubt, the F.I.R. is claimed to have been lodged on 04.01.2006 at police station Gandhi Park at 06:15 p.m., but the special report (SR) of the same was sent to the Chief Judicial Magistrate, Aligarh on 18.01.2006 and the entire prosecution story is silent about this considerable delay and there is no whisper as to when the special report was in fact sent to the Magistrate from the police station. Another vital aspect of this case is that the F.I.R. pertains to lodging of a cognizable case but it does not bear signature of the informant on check F.I.R., whereas the informant- Indrabhan Saini (P.W.-1) claims to have appended his signature on the check F.I.R. The aforesaid aspects create a series of discrepancies committed both by the police and the informant, thus the F.I.R. becomes vulnerable and suspicious and is proved to be result of deliberation and collusion with the police. The circumstances so created throw away the very foundation of the case set up by the prosecution. The very statement of the investigating officer in that regard is evasive. Nicety of lodging of F.I.R. and follow up action speaks louder than the reality.

26. Apart from that, it has been claimed that neither Indrabhan Saini (P.W.-1) nor Chandrabhan (P.W.-2), the two witnesses of fact were present on the spot nor have they seen the occurrence. Indrabhan Saini himself admits that he arrived on the spot after the witnesses named in the F.I.R. had arrived on the spot, whereas, his testimony belies his own version when he says that P.W.-2 followed him, when he rushed to the spot. The statement of prosecution witnesses of fact as well as that of the investigating officers are cryptic, contradictory and not inspiring confidence but give way to lot of confusion and irregularities. The place of occurrence has also been substantially changed by the prosecution. Both the witnesses of fact are highly interested witnesses.

27. As per the F.I.R., the incident took place in front of the house of informant, whereas, in the description of the prosecution witnesses, the incident is stated to have taken place at the corner of *'chabutra'* of Devi Ram. The site plan of the place of occurrence has been changed as such. The house of the appellant has not been sketched or marked in the site plan (Ext. Ka-21). Besides, site plan is silent about specific positions of all the accused. The recovery of SBBL gun was planted by the police which is absolutely fake. The recovery memo contains description that SBBL gun when kept under seal was in working condition, whereas, at the time when the SBBL gun was received by the forensic laboratory the alleged gun was found to be not functional. It can be seen with convenience and ease that the houses of a number of persons were located in the neighborhood of the accused- Pinkoo alias Jitendra but not a single witness was obtained or tried to be obtained by the police to give thrust to the point of recovery of the SBBL gun. The entire prosecution testimony lacks corroboration of occurrence by independent source of evidence. Apart from that, learned counsel for the appellants also explained various inconsistencies vis-a-vis facts and circumstances emerging in the case, which they claimed to pose serious question to the entire occurrence. The recovered gun was stated to have not been used in the commission of the crime.

28. The learned counsel for the appellant further proceeded to claim that the trial Judge failed to take stock of the aforesaid factual and legal aspects of this case which were very much apparent to it, but it erroneously recorded conviction against the accused-appellants, which finding of conviction is not based on material on record. The prosecution has failed to prove its case beyond all reasonable doubt. The judgment of conviction is illegal and perverse.

29. Per contra, Mr. Imranullah, learned counsel for the informant, while retorting to the aforesaid argument has claimed that so far as the testimony of both the prosecution witnesses of fact- P.W.1, Indrabhan Saini and P.W.-2, Chandrabhan is concerned - the same is pin pointing, consistent, unflinching and direct on the point of occurrence which gives coherence to the description about the manner and style of the occurrence as it took place on 04.01.2006 at 05:30 p.m. at Nagla Mali. Now, in so far as the point of F.I.R. being ante time as claimed by the defence is concerned, this much can be pointed out that the F.I.R. is prompt one. No time was left for deliberation. Each prosecution paper, in particular the inquest report and the papers prepared on the spot bear case crime number. The F.I.R. was lodged soon after the occurrence at 06:15 p.m. at the police station concerned, which is one kilometer away from the place of occurrence. In so far as point of charge in the use of weapon of assault is concerned, the same was licensed gun, which was inadvertently described as licensed rifle in the F.I.R. and that aspect stood corrected by the informant at the first opportunity, when his statement was recorded in the same night intervening 04/05.01.2006 by the investigating officer and the fact stands substantiated even by the testimony of the investigating officer (P.W.-10) Jasvir Singh.

30. In so far as the story of motive not being described in the F.I.R. is concerned, then it is claimed that F.I.R. is not an encyclopaedia and the motive brought forth subsequently by the informant has sufficient nexus with the crime has been proved satisfactorily. Not only the witnesses of fact (P.W.-1 & P.W.-2) but also the formal witness say - Dr. R.P. Sharma (P.W.-5) have proved the factum of death being caused by ante mortem gun shot injury and death in his opinion might have been caused around 05:30 p.m. Presence of witnesses of fact on the spot is natural and their testimony inspires confidence. The factum of recovery of licensed gun has been proved cogently by the prosecution witness Surendra Pal Singh (P.W.-7) and he has identified it before the trial court.

31. As regards the distortion in functioning of the recovered gun as pointed out by the defence, it is stated by P.W.-7 in the recovery memo that the recovered gun was functioning, however, while the gun was sent for forensic examination, it was found to be non functional on account of mechanical defect in firing pin. That being so, how can the investigating officer/sub inspector be supposed to have skilled knowledge of internal mechanism and its functioning, particularly, in case of the recovered gun. Therefore, only external examination of gun was done at the time of its recovery and whatever was found on the spot of recovery was noted in the recovery memo. Therefore, recovery of gun is satisfactorily proved. Moreover, it has also been proved that 12 bore empty cartridge was found on the spot may have been fired from the recovered gun. That being the case, the prosecution has proved guilt of

the appellant beyond all reasonable doubt. Appellant-Pinkoo alias Jitendra has criminal antecedents and he committed the offence *inter-alia* under Section - 307 I.P.C., while he was on bail during the trial and the learned trial judge has taken note of all the aforesaid aspects and the evidence adduced on record and it passed the just order.

32. Learned A.G.A. has submitted that the eye account testimony inspires confidence and there is no reason to disbelieve the same as that would amount to brushing aside cogent testimony merely on suspicion. It is established law that mistake committed during investigation by the Investigating Officer would not be sufficient justifying to throw away the entire case of the prosecution. Evidence on record profusely indicates involvement of the accused-appellant in the occurrence. The trial court has taken correct view of law and facts and has justifiably recorded conviction against the accused-appellant.

33. In the light of rival submission and the claim raised by both the sides, the following question crops up for our consideration, as to whether the prosecution has been able to prove satisfactorily the charges against the accused-appellants beyond all reasonable doubt ?

34. To began with, a bare perusal of the F.I.R. would be appropriate.

35. We gather from the perusal of the F.I.R. as described in it by the informant-Indrabhan Singh Saini that the incident took place in front of his house on 04.01.2006 at 05:30 p.m. at place Mali Ka Nagla within Police Station - Gandhi Park, District - Aligarh. The younger brother of the informant- Narendra Saini (deceased) was standing in front of his house, when the accused-appellants arrived on the spot and Pinkoo alias Jitendra fired from his licensed gun with intention to kill his brother, while Sonu and Monu each held one arm of the deceased and the mother of the aforesaid accused- Ishwari Devi was exhorting them. The first information report further contains description that Sonu and Monu also fired with their illicit arms, which created panic and due to which, the deceased could not be saved.

36. The written report proceeds on to say that the incident was seen by a number of persons of his locality including Chandrabhan, son of Ramroop and Vipin Kumar, son of Geetam Singh. Pressure of the locality on the spot compelled the accused to secure their escape from the scene. This is the fact position as narrated in the written report (Ext. Ka-1). The written report is stated to have been scribed by one Sardar Mukesh Saini, resident of Mohalla - Gandhi Nagar, Aligarh, who is claimed to have been one among the persons/crowd gathered on the spot after the occurrence. However, the scribe has not been examined by the prosecution. As we proceed further, we gather that this information was given at Police Station - Gandhi Park, where it was taken down in the concerned Check F.I.R. at Case crime No.04 of 2006 on 04.01.2006, under Sections - 302, 114, 34 I.P.C. This Check F.I.R. is Ext. Ka-4.

37. The above being the information regarding the occurrence, certain aspects of the case need be inquired into carefully; firstly the place of occurrence, secondly the use of weapon, thirdly the manner of assault being caused on the deceased and the claim regarding the F.I.R. being ante-

timed and suspicious. Now insofar as testimony in regard to the place of occurrence is concerned, we come across testimony of two witnesses of fact namely P.W.-1 the informant- Indrabhan Singh Saini and P.W.-2 Chandrabhan. Rest of the witnesses of this case are formal witnesses. Testimony of these two witnesses is in line with the description of the occurrence as contained in the first information report with difference that the weapon used by appellant- Pinkoo alias Jitendra for killing the deceased is stated to be licensed gun, whereas, use of rifle has been described in the F.I.R.

38. Explanation has come forth from the testimony of Indrabhan Saini - P.W.1 that the scribe inadvertently wrote in the F.I.R. name of the weapon used as licensed rifle, whereas, it was licensed gun. However, he admits that after the occurrence, he was sure that the weapon used is gun and not rifle, which fact he had told the investigating officer, who recorded his statement as such, under Section - 161 Cr.P.C.

39. At this stage, a suggestion was made to the informant (P.W.1) by the defence that in fact, he was not present on the spot and he did not see the occurrence. The witnesses are highly interested, tutored and their testimony regarding the manner of occurrence is highly improved. The suggestion so put forth by the defence has been denied. However, it has been testified by the informant - P.W.1 that in the very night of the occurrence i.e. 04.01.2006 around 12:00 mid night or at about 12:30 a.m., his statement was recorded. Now, in order to assess properly the veracity and truthfulness of aforesaid specific piece of testimony and the attendant circumstances, we upon perusal of Parcha No.1 (of date 04.01.2006) pertaining to this case come across the fact that the investigation proceeded on after lodging of the F.I.R. and took practical shape after arrival of the police on the spot around 07:15 p.m. - the very same day on 04.01.2006 and the inquest was prepared by S.I. Arvind Kumar Gautam (P.W.-4), for which instructions were given to him by the investigating officer, Jasvir Singh (P.W.10). Inquest was completed by 9:00 p.m. the same night.

40. As per the description contained in the case diary (in Parcha No.1 of date 04.01.2006) regarding night activity, it invariably shows that after doing certain work connected with maintaining the law and order situation in the area where the offence took place, the investigating officer (P.W.-10) tried to apprehend the culprits but could not succeed in apprehending them. Further the Parcha proceeds on to contain description that it being late hours of night, the investigation for the day (04.01.2006) was closed. This Parcha No.1 ends with the noting that rest of the investigation shall be taken, the "next morning" i.e. on 05.01.2006 and Parcha No.2 pertaining to the date 05.01.2006 reflects that the statement of the informant P.W.1, Indrabhan Saini was recorded on that date i.e. 05.01.2006, but not in the midnight or at 12:30 a.m. as stated by PW-1.

41. Apparently, reading of Parcha No.1 (04.01.2006) of the case diary explicitly shows that it is no denying fact that after the inquest was prepared in the night of 04.01.2006 at about 09:00 p.m. the dead body was sent for postmortem examination and no statement was recorded and night activity of the Investigating Officer was confined to apprehending culprits and maintaining the law and order situation and it being late hours of night,

there is no whisper in it (case diary Parcha No.1) that statement of informant was recorded in the night i.e. 04.01.2006 or thereafter upto the next morning after 12:00 midnight up to 06:00-07:00 a.m. in the morning of 05.01.2006. Certainly the next course of investigation was adjourned for 05.01.2006 and Parcha No.2 starts with the statement of the informant (P.W.-1) Thus P.W.-1 Indrabhan Saini is not telling the truth, when he says that his statement was recorded under Section - 161 Cr.P.C. around 12:00 midnight of 04/05.01.2006 - the same night. Obviously, P.W.-1 has tried to fill vital loophole on point of use of weapon and cleverly hid the truth which he first stated in the F.I.R. to be licensed rifle. Therefore, statement of P.W.1 before the trial court that he got his statement recorded under Section - 161 Cr.P.C. at 12:00 midnight (04.01.2006) or 12:30 a.m. (05.01.2006) (in the very night of the occurrence) is found to be highly improved and full of embellishment. This aspect of the case connotes to fact that it was not known up to and till the time of conduction of postmortem examination as to what weapon, in fact, has been used in committing the offence. His testimony in this regard is tutored. We can conveniently observe that the postmortem examination was done the same night of the occurrence (04/05.01.2006) at 01:00 a.m. which proves that one wadding piece along with seven pellets were recovered from the body - thus negating use of any rifle in the commission of the offence.

42. In view of above discussion, it becomes relevant that in case P.W.-1 was present on the spot and saw the occurrence, then the description of occurrence as has been given by P.W.-1 in his statement to the police regarding the manner of occurrence is at great variance to the impact that there is no whisper of fact that he saw two accused each holding one arm of the deceased, while Pinkoo fired on the deceased. But his statement (under Section 161 Cr.P.C.) discloses fact that Pinkoo was chased, surrounded and killed near *'chabutra'* (terrace) of Devi Ram, which place is far away (at a distance of 35-40 steps) from the house of the informant. In the F.I.R. the place, where the incident took place is stated / described to be in front of house of the informant. This aspect of the case throws doubt on the veracity and genuineness of the witness and establishes that he is not believable.

43. The manner of the assault has been contradicted by the defence by putting specific question to both the prosecution witnesses of fact (PW-1 and PW-2) to the ambit that the incident took place in manner that the accused tried to catch/over power the deceased, however he tried to save himself by running away and while he reached to the corner of *'chabutra'* (terrace) of Devi Ram, he was surrounded by the accused and in the meanwhile, accused-appellant- Pinkoo alias Jitendra fired with licensed gun. Both the witnesses have denied any such statement given to the Investigating Officer. This statement of P.W.-1, under Section - 161 Cr.P.C. is in utter contrast to the one recorded by the trial court. Positively the above scrutiny of evidence is fair enough to show that the witness either did not see the occurrence or came to know about the occurrence after it had occurred.

44. The veracity of the testimony of P.W.-1 becomes highly doubtful the moment it is found that he is not telling the truth about the manner of occurrence, for specific reason that he tried to manipulate things existing and articulated by

prevarication to show that prior to the conduction of postmortem examination of the dead body of the decased- Narendra Saini,- his statement had been recorded by the Investigating Officer Jasvir Singh (P.W.10), whereas, Parcha No.1 exposes falsity of the claim that nothing of the sort like recording the statement of the informant took place in the night intervening 04/05.01.2006, whereas, the next course of investigation of the case, which began with the recording of the statement of the informant Indrabhan Saini took shape on 05.01.2006 - either in the morning of 05.01.2006 or afterwards but not prior to that. This being the case and the witness P.W.1 being brother of the deceased is found to be interested witness on this point and he is improving his version in order to show that the use of licensed rifle was, in fact, inadvertently described in the written report (Ext. Ka-1). We may gather that the description of occurrence - in manner and style - given by Chandrabhan PW-2 in the trial court is in utter contrast to the statement given to the Investigating Officer under Section 161 Cr.P.C. This contrast emerges in cross examination in paragraph no.8 of the testimony. More or less PW-2 is toeing same line of of action as PW-1 Indrabhan Saini.

45. The Investigating Officer, Jasvir Singh (P.W.-10) has categorically testified to the ambit that the statement of the informant was recorded on 05.01.2006, which testimony qua noting made in Parcha No.1 of date 04.01.2006 signifies that the statement of the informant was recorded in all eventuality either in the morning of 05.01.2006 or after-wards and it is admitted fact and circumstance of this case that the postmortem examination of the deceased - Narendra Saini was conducted at 01:00 a.m. in the night intervening 04/05.01.2006, which disclosed fact that one wadding and seven pellets were recovered from the body of the deceased and that confirmed, to all intents and purposes, use of gun in the commission of the offence but not the rifle. Thus, the suggestion of the defence that the theory of gun was tried to be inserted in collusion with the investigating officer only after the postmortem examination report (Ext. Ka-11) was available and seen by the investigating officer as that was very much in existence prior to the recording of statement of informant- Indrabhan Saini, carries force. This innocuous circumstance is self explanatory of real facts and exposes falsity of the prosecution case.

46. Vulnerability of the prosecution case is self-exposed when we analyze and come across prevailing circumstance (availability of postmortem report and recording of statement of the informant P.W.-1 on 05.01.2006) that are as explicit as anything and self-explained and leave no room for doubt that the prosecution witnesses - both P.W.1 and P.W.2 are tutored on this (manner of occurrence) point and their testimony on this aspect is fraught with embellishments. It being so, we cautiously scanned the testimony of the other prosecution witnesses, say the formal witnesses as well as the witnesses of fact, whereupon we notice that the place of occurrence as claimed by the prosecution to be in front of the house of the informant at Nagla Mali in District - Aligarh, is not found to be in front of house of the informant, but it is found to be at the corner of *'chabutra'* (terrace) of one Devi Ram of Nagla Mali.

47. As we proceed further and peruse the site-plan (Ext. Ka-21), we do not come across any house of the informant existing

on the spot and it has emerged in the testimony of the prosecution witnesses of fact P.W.1 Indrabhan Saini and P.W.2 Chandrabhan, respectively, that in between the place of incident and the house of the informant, there are located four houses with specific names but the place of occurrence is admittedly the corner of *'chabutra'* (terrace) of Devi Ram, which location (spot) is the meeting point of the main road of Nagla Mali with the street running opposite to the eastern side of *'chabutra'* of Devi Ram, which leads to the house of the informant, which house as per the testimony of P.W.1 and P.W.2 is located at a distance of about 40 steps away in the eastern side from the place of occurrence - (terrace of Devi Ram). Very perusal of the site plan (Ext. Ka-21) reveals that there are located four houses in all. House of Prem Pal Sharma and Devi Ram on the one side of the main road Mali Nagla, whereas, opposite to these houses on the other side of the road, are situated houses of Bhoop Singh and Devi Singh.

48. It is claimed by P.W.1 (Indrabhan Saini) that no one from these houses was present and certain reasons have been attributed for the absence of the inmates of the aforesaid houses. Plea has been taken (by prosecution witnesses of fact) that they were outside/away from home. Bhoop Singh was stated to be working for Dainik Jagran, Prempal was *'lekhpal'* and claim was that Devi Ram resides in village and he makes occasional visit to his house. Though, this witness has tried his best to cleverly save the situation but it stood exposed reason being that it will hardly be expected, moreso in the absence of cogent reason /cause, that not a single person was residing (in the four houses Devi Ram, Prem Pal Sharma, Bhoop Singh and Devi Singh), at that point of time, when the occurrence took place because the testimony of P.W.1 or PW-2 does not show that these houses were locked from outside.

49. Therefore, to claim that in all the above four houses, no one was residing, therefore, no one came to the spot is doubtful testimony and it does not inspire confidence. Assuming it to be that Bhoop Singh was stated to be working for Dainik Jagran and Prempal was *'lekhpal'* and Deviram was stated to be residing in the village and he occasionally visited Mali Nagla, but, the house of Devi Singh, son of Late Pooran Singh - which is located across the Road Mali Nagla opposite to the house of Devi Ram has not been clarified by these witnesses regarding presence or absence of the inmates of this house. In case, any such incident had occurred at that spot (corner of terrace of Devi Ram) at 5:30 p.m. on 04.01.2006 then the presence of any member from the house of Devi Singh, at least, would have been most natural on the spot. But it is woefully wanting. This particular aspect further creates lots of doubt in the ocular testimony of both the witnesses of fact.

50. In this perspective, as we proceed further with the testimonial account of both the witnesses of fact - P.W.1- Indrabhan Saini and P.W.2- Chandrabhan - we notice that as per the description contained in the F.I.R. that under pressure of locality the assailants fled away from the scene, but testimony of both the witnesses of fact say - Indrabhan Saini P.W.-1 and Chandrabhan P.W.-2 - is absolutely silent on this point that because of pressure of locality the assailant fled away from the scene. Conversely, their testimonial account in regard to above aspect goes to claim that after the commission of the offence, the accused threatened them and secured their

escape. What, in fact, was the pressure of locality remains a mystery. May be that a number of person of the locality thronged on the spot at the time of the occurrence but except for two - Chandrabhan and Vipin who are relatives of the deceased, name of no one else has been spelt in the testimony of both the witnesses of fact.

51. Now insofar as the description of the incident being caused by use of licensed rifle appearing in the written report (Ext. Ka-1) is concerned, facts and circumstances reflects that reality has been tried to be shielded by P.W.-1- Indrabhan Saini, while he gave statement under Section - 161 Cr.P.C. that this was due to inadvertence committed by the scribe - Sardar Mukesh Saini -, who instead of writing licensed gun wrote licensed rifle. However, the claim regarding inadvertence of the scribe remains a fact shrouded in intriguing mystery in the absence of non production of the scribe of the report before the trial court. The scribe though interrogated by the investigating officer was a prosecution witness and his name figures at serial no.4 of the charge sheet, but he was not produced before the trial court, his non production *ipso-fcto* raises presumption that had he been produced, his testimony would have been adverse to the prosecution. As a matter of fact, testimony of the scribe in that regard was pivotal and relevant to the claim of inadvertence regarding mention of the use of weapon rifle, but due to inaction by the prosecution that has not been properly explained and particularly for the specific reason that the statement of the informant was in fact recorded (discusssed above) only after the postmortem examination report had been made available to the prosecution, prior to the morning of 05.0.1.2006 and not around mid-night 12:00 or 12:30 a.m. in the night intervening 04/05.01.2006. This particular aspect and relevant fact has not been testified by P.W.-1 in his examination-in-chief that the scribe inadvertently wrote weapon used as rifle in place of 'gun', before the trial court. Had the scribe been produced, then falsity of his (PW-1) statement under Section - 161 Cr.P.C. would have been exposed. Surprisingly, the informant nowhere says in his entire testimony that after the report had been written by the scribe it was either read by him or the scribe read over the contents of the same to him only then he appended his signature on the report. The report was not readover to him by the prosecution even in the trial court. PW-1 Indrabhan Saini merely identified his signature on the report and nothing more. These particular aspects when viewed and analysed in its wholesomeness create impression that the incident was not seen in any manner by the witnesses of fact P.W.-1 and P.W.-2, - Indrabhan Saini and Chandrabhan, respectively. Therefore, their testimony under prevailing facts and circumstances of this case requires independent corroboration. Here, it would not be safe to work on the uncorroborated testimony of both the witnesses of fact.

52. No doubt in criminal jurisprudence, there is no necessity that every piece of testimony should be scrutinized on line that there should be an independent corroboration of it. In normal circumstances criminal jurisprudence discards such approach. However, in cases where the attendant facts and circumstances raise serious doubt in the testimony of prosecution witnesses on point / manner of occurrence and use of weapon in it, then independent corroboration of the same becomes sine qua non. In this case, there is neither independent corroboration to the

version of the manner and style of the occurrence or is reflected from attendant facts and circumstances and it is admitted that both the witnesses are relative of the deceased. P.W.-1 is brother and P.W.2 is son of "tau" (uncle) of deceased. Possibility of their being interested witnesses cannot be ruled out.

53. Now, we proceed on to take note of the very motive for committing the offence. In that context, the appellants' claim that the F.I.R. is silent about any motive, but motive has been assigned subsequently during course of trial before the trial court by PW-1 in his examination-in-chief in paragraph no.5 of his testimony. The reply to it by the prosecution / informant is that an F.I.R. is not encyclopedia of the occurrence and it being a case based upon eye account testimony, the requirement of specific motive for committing the offence has got no relevance in this case. It has been argued vehemently by the defence that no doubt, a case which is based upon eye account testimony, motive need not be mentioned but in those particular cases, where the F.I.R. is silent about any motive but the prosecution introduces any motive subsequently, then the degree of motive and its relevance qua the offence has got to be tested. We sustain this argument by the defence for specific reason that motive was introduced in this case subsequently and it being so, we also find it proper to scrutinize the aspect of motive as set up by the prosecution, subsequently during course of proceeding before the trial court.

54. No doubt, the F.I.R. is silent about any motive for the occurrence, but the testimony of P.W.1 and P.W.2 explicitly puts forth specific motive behind the occurrence alleging that the accused - Pinkoo alias Jitendra was a drunkard and he used to quarrel with the people of the locality and used to demand money from them which was opposed by the deceased Narendra Saini. But that aspect, except for the bald allegation / averment made by the informant (PW-1), this fact remains unfounded from any other testimony or circumstance that in fact, Pinkoo alias Jitendra used to demand money from the people of the locality and the deceased used to object to the same. This piece of testimony as emerging in paragraph no.5 of the testimony of P.W.-1 remains a bald statement not supported on the same line by Chandrabhan PW-2. Nothing concrete emerges on that point in support of claim of the prosecution.

55. We may add here, at the cost of repetition that, regarding motive, we don't come across any corroborative fact, circumstance or testimony, which may connote to the above claim of the prosecution in shape of allegations against accused- Pinkoo alias Jitendra that in fact it was so. Except verbal allegations, there is nothing of the sort on record either in the shape of any complaint or any case being registered against Pinkoo alias Jitendra on that count. Moreso, the prosecution witness of fact (PW-1) has testified to the ambit that no written complaint was ever made to anyone against act of Pinkoo alias Jitendra on that count. Surprisingly, both the witnesses of fact (PW-1 and PW-2) have gone to the extent of stating that the relation between the families of the informant and the accused was cordial and good and the informant never imagined that any such occurrence could have been caused by the accused. That being the position, to claim that the motive behind the occurrence was mooted by the deceased by opposing act of accused- Pinkoo alias

Jitendra, without there being supporting material worth its salt, the point of motive goes into oblivion and cannot be said to be a cause sufficient in itself that almost the entire family of accused - two brothers and the mother (of Pinkoo) apart from Pinkoo were allegedly involved in the commission of the offence and were bitterly inimical to the deceased and they had decided to eliminate the deceased.

56. We also come across Lot of contradictions occurring in between the testimony of the prosecution witnesses of fact P.W.1 and P.W.2 qua their statements recorded under Section - 161 Cr.P.C. are also indicative of fact that their testimony is full of improvement and embellishments and it would be hard for us to place reliance on the same. Further, their testimony is not corroborated from any independent source. The attendant circumstances of this case are so strewn as to require proper explanation of substantive point like use of weapon in the incident and the manner of assault and the contents of written report neither read by him nor readover to the informant prior to his signature on it; and in the absence of any satisfactory explanation, lot of doubts have crept in, in the prosecution story. A person can tell a lie but the circumstances cannot.

57. Now insofar as the other aspects of this case, in particular pertaining to the lodging of the report at Police Station Gandhi Park, District Aligarh, investigation is concerned, we gather that a copy of the Check F.I.R. as per the entry made in the concerned general diary of date 04.01.2006 relating to Case Crime No.04 of 2006 of Police Station - Gandhi Park, Aligarh, it is mentioned that a carbon copy of F.I.R. was given to the informant- Indrabhan Saini. Now, the general procedure that was required to be followed in that regard would be to obtain an endorsement of the informant for the same as a token of receipt in proof of copy being given to the informant. Therefore, an endorsement should normally be obtained either on the Check F.I.R. itself or on carbon copy of the same but there is no endorsement appended either on the Check F.I.R. or on the carbon copy of the Check F.I.R. Though this aspect is trivial but thus sort of omission is sufficient to give rise to some doubt about fact of copy of Check F.I.R. being given to the informant at the time of lodging of the F.I.R.

58. The informant has testified to the ambit that he had appended his signature on the Check F.I.R. No doubt, there is no necessity that after the report regarding any cognizable offence has been lodged, an endorsement should be made on the Check F.I.R. by the informant but the usual practice prevailing at the various police stations of the State of Uttar Pradesh would show that the signature/thumb impression of the informant is usually obtained by the police personnel on the Check F.I.R. or copy thereof and this common practice has fructified into rule. Once the concerned G.D. Entry at Serial No. 39 pertaining to Case Crime No.04 of 2006, indicated that a carbon copy was given to the informant, then an endorsement in token of receipt thereof from the person who received the copy, becomes practical approach to be adopted, but it is not so in this case.

59. Description contained in the F.I.R discloses fact that due to pressure of locality, the assailants secured their escape from the place of occurrence. Now it was incumbent upon the prosecution to have satisfactorily explained away this aspect of "pressure of locality" but nothing of its sort

has been testified or explained by the two witnesses of fact, say P.W.-1 and P.W.-2. Presence of some people might have been created by their arrival on the spot during the incident. However, name of not a single person of the locality has been spelt who saw the occurrence except the two relatives of the informant and the deceased described in the F.I.R. as Chandrabhan and Vipin. Neither in the testimony of the prosecution witnesses of fact nor in their statement recorded under Section - 161 Cr.P.C. name of any person has been opened/specified in support of the prosecution case. Further, it is worth consideration that the two brothers of appellant Pinkoo, each is stated to have held one arm of the deceased and the fire was shot as per testimony of witnesses from a distance of three steps on the deceased with gun (or rifle as described in report exhibit Ka-1) and the shot hit on the mouth, say upper, lower lips and chin of the deceased, then the possibility of pellets hitting the other two co-accused, (two brothers of accused Pinkoo) were imminently there but no injury of any sort, whatsoever, was found on their person, which aspect casts doubt on their presence on the spot besides contradicting statement of Indrabhan Saini PW-1 recorded under Section 161 Cr.P.C. It appears that all the sons of Nem Singh and wife of Nem Singh - Ishwari Devi have been tried to be roped-in for specific reason that has been given when suggestion by the defence that the investigating officer of this case Jasvir Singh (P.W.-10) and the father of accused-Pinkoo alias Jitendra and husband of accused- Ishwari Devi say, Nem Singh (Constable), both were posted at Police Station - Lodha of District - Aligarh prior to this incident and due to official rivalry with Nem Singh, the investigating officer (P.W.-10) falsely got involved the accused-appellants in this case. This suggestion cannot be ignored in view of the serious discrepancies creeping in the testimony of the prosecution witnesses of fact, which do not match with the attendant facts and circumstances of this case. Therefore, reason advanced for false implication gathers force for our approval to it.

60. On Page No.35 of the paper book, it is stated in the testimony of P.W.1, Indrabhan Saini that Chandrabhan is son of his *'tau'* (uncle), whereas Vipin Kuma is his nephew, they are witnesses to the incident and no other person was named as witness in the F.I.R. Surprisingly, it is claimed by P.W.1 that the aforesaid two persons, namely, Chandrabhan and Vipin Kumar had arrived on the spot prior to him and saw the whole occurrence but his testimony on the point contradicts his own version. He testified by stating that as soon as he (P.W.1) rushed to the spot, these two also followed him. This testimony is self contradictory, if Chandrabhan and Vipin Kumar were already present prior to the arrival of informant Indrabhan Saini then how is it possible that the informant, while rushing to the spot was followed by the aforesaid two witnesses. One cannot easily imagine as to how it might have happened in the present case.

61. After prolix discussion of various facts, circumstances of this case and the testimony on record, now it would be appropriate to weigh the claim raised by the appellants regarding fact that the F.I.R. is ante timed. In support of the same, our attention was engaged to Paragraph No.4 of the testimony of P.W.1, Indrabhan Singh Saini, the same is extracted as here under :-

"घटना की रिपोर्ट भीड़ में उपस्थित सरदार मुकेश सैनी से बोलकर लिखवाई फिर

मैंने उस तहरीर पर अपने दस्तखत किये और थाने पर ले जाकर दे दिया । रिपोर्ट देखकर कहा कि यही वह तहरीर है इस पर मेरे हस्ताक्षर है । इस पर एक्जिबिट क-1 डाला गया । रिपोर्ट लिखने के बाद मैंने पढ़ी नहीं थी ।"

English version of the above extract:-

Report of the incident was got scribed by dictating it to one Sardar Mukesh Saini, who was present amongst the crowd, then the report was signed by him and given at the police station. After looking the report, he verified his signature on it. It was marked as Ext. Ka-1. The report was not read by him after it was scribed.

62. This testimony is as explicit as anything and hits to the core that the written report (Ext. Ka-1) was neither read over to the informant nor he himself read it while he gave it at the police station. Meaning thereby, that the informant was unaware of the facts as to what was stated or described in the written report itself. If the written report was not read over and explained to him and he did not read its contents but it was only signed by him, then this aspect in all fairness supplies clue to the magnitude that signature of the informant was obtained on the written report, whereas he did not know the particulars and the contents described in the Written Report (Ext. Ka-1). That way, as it may be, the very foundation of this case i.e., the written report becomes suspicious paper and it looses its legal significance and renders doubtful the whole prosecution story. It shakes the foundation of the prosecution case to the hilt.

63. It is surprising that there is no evidence/testimony of the sort that may reflect on the point that the written report after it was scribed by Sardar Mukesh Saini, was read over and explained to the informant. After the report was written informant- Indrabhan Saini (P.W.-1) appended his signature on it. However, Paragraph No.23 of the cross examination of P.W.1- Indrabhan Saini reveals the truth that after the F.I.R. had been lodged, the report was perused by the informant the very same night (i.e. 04.01.2006). It means the contents of the report at the time of lodging of the F.I.R. were not known to the informant. The entire testimony on this point of the informant is altogether missing. This aspect of the F.I.R. establishes claim of the defence that the F.I.R. is ante timed. Thus, we have ample reason to hold that the F.I.R. is suspicious and ante-timed. Once the first information report becomes doubtful, the entire case falls to the ground.

64. In connection with the aforesaid aspect of F.I.R. being ante timed, argument has also been extended pros and cons, first by the appellant's side that the 'special report' of this case, which was required to be sent forthwith after the lodging of the F.I.R. to the magistrate concerned was not sent promptly but the same was highly belated. In this context, we may observe neither there is any evidence nor is there any record to show as to how and when the special report was sent to the magistrate concerned. The Check F.I.R. bears signature of the chief judicial magistrate, which is dated 18.01.2006. In between the lodging of the F.I.R. on 04.01.2006 and the report being seen by the magistrate on 18.01.2006, there elapsed 14 days. How this long gap occurred is not explained by the prosecution.

65. We upon perusal of record do not come across any testimony or circumstance of this case, which may reflect on the point

as to when the special report was sent to the magistrate and how this long gap occurred. In fact, the constable or the police personnel, who took the special report to the magistrate concerned was required to be produced to explain this particular aspect, but he has not been produced before the trial court, for the reasons best known to the prosecution. Now, the only reality is that the special report was submitted before the magistrate belatedly after 14 days of the lodging of the F.I.R. This inordinate delay in sending the special report to the magistrate is one of the strongest proofs of the F.I.R. being ante timed and it makes serious dent in the prosecution story. In reply to it, claim of the prosecution that this would amount to laches committed during investigation would not minimize its import, as such, unless the delay occasioned is explained satisfactorily by the prosecution.

66. So far as the other important aspect of this case regarding the preparation of the site plan (Ext. Ka-21) is concerned, we come across fact that no particular place has been shown as to from where the accused-appellant- Ishwari Devi extended exhortation. Further, no place has been marked as the place where the other two accused were standing, when each of the two gripped one arm of the deceased.

67. Likewise we do not come across any spot being marked as the spot from where the empty cartridges were recovered. It is obvious from perusal of the memo of empty cartridges stated to have been recovered from the spot was prepared on 05.01.2006, whereas, Arvind Kumar Gautam (P.W.4), who prepared inquest report (Exhibit Ka-6) of the deceased on 04.01.2006 has already stated in so many words that neither any material whatsoever was seen by him lying near the dead body nor any person recovered anything at that point of time from near the body. These aspects are fair enough to castigate authenticity and veracity of the recovery memo pertaining the empty cartridges i.e. Ext. Ka.2, which also bears interpolation and cutting in the date by superimposing 5 over digit 4. It means things have been managed and dates were changed. It is obvious that figure / digit 4 has been made 5 and there are cuttings in all the dates at four places on this exhibit (Ka-2). These cuttings / interpolations are not initialled by anyone.

68. Similar is the position with the memo of simple and blood stained clay (Ext. Ka-3). Here, also there are cuttings in the date at four places but these cuttings have neither been initialled nor properly explained as to under what circumstances, the same was done. This aspect of the case cannot be skipped merely on ground of laches committed during the course of investigation in view of testimony of Arvind Kumar Gautam PW-4 that he saw no material lying near the body at the time of preparation of inquest but all the above aspects taken into consideration by us in its cumulative connotes that things have been tried to be twisted, distorted and manipulated, for the reasons best known to the prosecution.

69. Now, we proceed to take into account the other aspects of this case that pertains to Sessions Trial No.601 of 2006 arising out of Case Crime No. 10 of 2006, under Section - 25 Arms Act, Police Station - Gandhi Park, District - Aligarh, which as per the record is stated to have its origin in the arrest of the accused-Pinkoo alias Jitendra effectuated by the investigating officer Surendra Pal Singh (P.W.7) and

Jasvir Singh (P.W.10) on 09.01.2006 and after his arrest at place Gate No.1 of Mandi, while the accused was coming from Devi Nagla Road around 10:00 p.m. on 09.01.2006, it is stated that he made disclosure regarding the weapon he used in the commission of the offence. Pursuant thereto, one SBBL gun was allegedly recovered from inside his house kept in a room, which he handed over to the police after taking it out from an iron tank. It is stated that a memo of the arrest and recovery was prepared by Jasvir Singh P.W.10 and Surendra Pal Singh P.W.7.

70. However, bare perusal of the spot map regarding recovery of the SBBL gun, indicates that it was prepared on 21.02.2006 by P.W.7- Surendra Pal Singh. It implies and means that the spot map pertaining to the recovery of the gun was not prepared on 09.01.2006 soon after the recovery of SBBL gun was made by the police at 10:20 p.m. (on 09.01.2006). How and under what circumstances, the map pertaining to recovery of the SBBL gun from accused- Pinkoo alias Jitendra was prepared on 21.02.2006 has not been explained by the two witnesses - Surendra Pal Singh P.W.7 and Jasvir Singh P.W.10. However, during course of investigation, the spot map of recovery of SBBL gun from accused-Pinkoo alias Jitendra was prepared on 01.03.2006 by the investigating officer - Vinod Kumar - of the case pertaining to Case Crime No.10 of 2006 under Section - 25 Arms Act, Police Station - Gandhi Park, District - Aligarh and that is Ext. Ka-18 on the record.

71. As we proceed further, we notice that public witnesses were available to the police, as per the testimony of Surendra Pal Singh P.W.7 and Jasvir Singh P.W.10. However, no one was ready to stand witness to the fact of recovery and it is not the case that the house of the accused-Pinkoo alias Jitendra was situated at a lonely and secluded place without any neighborhood. Even the investigating officer of this case S.I. Vinod Kumar (P.W.9) has also not acted cautiously and he has not noted / spelt name of anyone residing in the neighborhood of the house of the accused- Pinkoo alias Jitendra or anyone of the locality concerned - Gate No.1 of Mandi. In the testimony of both the police personnel, Surendra Pal Singh P.W.7 and Jasvir Singh P.W.10, it is reflected that they failed to exercise caution and did not ask name of the person / persons, who refused to stand witness to the fact of recovery of the gun from the house of accused- Pinkoo alias Jitendra. The investigating officer of the case (pertaining to Case Crime No.10 of 2006) and has admitted in cross examination that the special report pertaining to the aforesaid case crime number was seen by the magistrate on 18.01.2006. Thus, inordinate delay in sending the special report to the Magistrate has not been property explained and no evidence tendered in regard thereto besides, no circumstance exists that may allude to any workable inference.

72. In the backdrop of aforesaid fact situation, argument has been extended on behalf of the appellant- Pinkoo alias Jitendra that in fact, nothing has been recovered from his possession and police has planted false recovery of SBBL gun and he was arrested from his house, becomes relevant worth consideration. How and why the police officers involved in the operation for recovery of SBBL Gun refrained from asking names of such persons, who refused to become witness to the fact of recovery is beyond imagination. Inaction on that point in not observing

precaution qua the recovery map dated 21.02.2006 throws lots of doubt on claim of fair recovery.

73. In view of above, the proceeding pertaining to recovery of the SBBL gun stands vitiated as discussed above. One particular aspect of this case (Crime No.10 of 2006) need be addressed at this stage. It is quite surprising that in this case, the SBBL gun allegedly recovered was sent for forensic examination to the Vidhi Vigyan Prayogshala, Agra but this exercise was closed here by the prosecution. In fact, charge sheet was filed in this case (Crime No.10 of 2006, under Section - 25 Arms Act), but no forensic examination report was obtained by the prosecution. The prosecution looked aloof to any forensic report. It is beyond reason to know the cause for avoiding the forensic report.

74. Now, it so happened that after both the cases (Crime No.4 of 2006 and Crime No.10 of 2006) were clubbed together and evidence for the prosecution was concluded, statement of the accused was recorded under Section - 313 Cr.P.C.. No question whatsoever was put to the accused either pertaining to the ballistic report or its outcome. In defense, accused-Pinkoo alias Jitendra opted for adducing testimony, whereupon the defence managed to bring the ballistic report on record, which is available on record as Paper No.113 kha/1 and 113 kha/2 and it is exhibited Kha-1 at the instance of the accused.

75. Learned counsel for the appellant-Pinkoo alias Jitendra has stressed on point that the recovery memo dated 09.01.2006 (Ext. Ka-15) reveals that the gun allegedly recovered and kept under seal was at that very point of time in functional condition, whereas upon receiving the aforesaid SBBL gun, the official of Vidhi Vidyan Prayogshala, Agra found it non functional (condition), which particular aspect goes to imply that after the recovery, the weapon/gun has either been changed or things have been manipulated, for reasons best known to the prosecution.

76. We upon perusal of the forensic report dated 12th March, 2007 come across fact that the SBBL gun that was sent for forensic examination was found non-functional. However, Sri Imranullah, learned counsel for the informant has tried to persuade us to the point that the forensic expert being a skilled person gave his opinion on technical ground, when he found the firing pin small. Learned counsel for the informant added that neither the police officer, who effectuated recovery (Surendra Pal Singh P.W.-7) was a ballistic expert nor did he test functional condition of the recovered SBBL gun.

77. We are not impressed by the argument of learned counsel for the informant for the reason that the recovery memo describes the recovered SBBL gun to be in functional condition, it does not specify about any base on which it was found functional. If it was found functional at the time of recovery, then it means that it was operational. It implies that the SBBL gun was fit for functioning when kept under seal.

78. Thus, we have ample reason to conclude that the factum of recovery of the SBBL gun (on 09.01.2006) allegedly at the instance of accused - Pinkoo alias Jitendra becomes doubtful and non production of the forensic report pertaining to the ballistic report (Ext. Kha-1) by the prosecution carries legal presumption that in case the

prosecution had produced this report it would have been adverse to it. Now, it is admitted fact that defence brought it on record by moving appropriate application before the trial court. Therefore, charge under Section - 25 Arms Act against Pinkoo alias Jitendra cannot be said to have been proved beyond reasonable doubt.

79. Our consideration of the entire record of this case makes it obvious that serious doubt is created in the prosecution story because of the various material abnormalities appearing in the testimony as well as the adverse circumstances working against the prosecution which, in the absence of proper explanation by the prosecution, are sufficient for throwing away its case. The description of the occurrence as given in the F.I.R. does not match with the entirety of this case and inherently contradictory to the statement of Indrabhan Saini PW-1 under Section 161 Cr.P.C. The sequential coherence of occurrence becomes doubtful as one proceeds with the testimony of this case vis-a-vis prevailing circumstances of this case. The weapon used though described in the F.I.R. as rifle was later on changed after the postmortem examination of the body was conducted at 01:00 a.m., the very same night of the occurrence (i.e. 04/05.01.2006), which reveals one wadding piece and seven pellets recovered from the body of the deceased. Thus, negating the possibility of use of rifle in the offence, the statement of both the prosecution witnesses regarding the occurrence are contradicting in material particulars with their version recorded under Section - 161 Cr.P.C. The inadvertence claimed to have been committed by the scribe of the report has not been clarified.

80. Both the witnesses Indrabhan Saini P.W.1 and Chandrabhan P.W.2 are relatives of the deceased, they are found to be interested witnesses not believable and independent corroboration of their testimony is missing altogether and the motive subsequently introduced cannot be said to be of the degree and so serious that the entire family of the accused was stubbornly bent upon killing the deceased-Narendra Saini. The place of occurrence stood changed as per the version contained in the written report. The place of occurrence was stated to be in front of house of the informant, whereas, the site plan indicated the place of occurrence to be the meeting point of the street with the Road *"Mali Nagla"* at the corner of *'chabutra'* (terrace) of Devi Ram. Both the special reports pertaining to Case Crime No.04 of 2006, under Sections - 302/114/34 I.P.C. and report pertaining to Case Crime No.10 of 2006, under Section- 25 Arms Act were seen by the magistrate on 18.01.2006, for which no plausible explanation has come forth and no circumstance exist, that may explain the delay so occasioned in sending the F.I.R. to the magistrate.

81. The version of use of weapons is stated to have occurred on account of mistake committed by the scribe- Sardar Mukesh Saini, who has not been produced before the trial court and the testimony is woefully wanting on the point that after the report (Ext. Ka-1) was written, it was read over and explained to the informant-Indrabhan Saini and he says in his cross examination that he read the contents of the report in the night after lodging of it, whereas, the case was lodged at 06:15 p.m. on 04.01.2006. Not only this, the site plan is also deviating as it does not indicate the material particulars pertaining to the occurrence, about the respective positions of each of the accused who allegedly participated in it.

82. Similarly, testimony of Arvind Kumar Gautam (P.W.4) innocuously points to the fact that no material, whatsoever, was seen by him lying near the dead body and it is stated by the witnesses that two meters away from the dead body, empty cartridges were recovered on 05.01.2006 by the investigating officer, while he visited the spot and prepared the spot map. Arvind Kumar Gautam P.W.4 also testified to the effect that he did not see anyone finding any material from near the dead body. That being so, the consistency and coherence of the normal events become suspicious and no ordinary and prudent man would ever agree with all these abnormalities and aberrations vis-a-vis attendant facts and circumstances of the case, besides the F.I.R. being ante timed, whereas the events of the case must be consistent, clinching and inspiring confidence but it is not so in this case and these aspects of this case have not been appreciated properly by the trial court and the trial court was very much concerned with the face value of the testimony and it did not care to ensure about proper explanation regarding the aforesaid aspects and erroneously recorded finding of conviction, which finding of conviction does not stand the scrutiny of various aspects of this case qua facts and circumstances.

83. Thus, a cumulative analysis and scrutiny of the evidence qua facts and circumstances of this case lead us to conclude that the prosecution has not been able to prove charges under Section - 302/34 and 114 I.P.C. against accused- Pinkoo alias Jitendra and Ishwari Devi and charge under Section - 25 Arms Act against accused- Pinkoo alias Jitendra beyond reasonable doubt and serious question arises on point of their involvement in the commission of the offence.

84. It is trite law and settled principle of criminal jurisprudence that 99 guilty persons should escape the clutches of law, than one innocent should be punished. Therefore, the conviction of both the appellants recorded by the trial court is found to be perverse and illegal and it is not sustainable in the eye of law and the same is liable to be set aside.

85. Consequently, impugned judgment and order of conviction dated dated 18.12.2012 passed by the Additional District and Sessions Judge, Court No.6, Aligarh in Session Trial No. 600 of 2006 (State vs. Pinkoo alias Jitendra and Smt. Ishwari Devi), concerning Case Crime No.04 of 2006, under Sections - 302/34, 114 I.P.C., Police Station- Gandhi Park, District - Aligarh and Session Trial No.601 of 2006 (State vs. Pinkoo alias Jitendra), concerning Case Crime No.10 of 2006, under Section - 25 Arms Act, Police Station - Gandhi Park, District - Aligarh, is hereby set aside. Accused-appellants are acquitted of aforesaid charges, as above.

86. Accordingly, both the above appeals succeed and the same are ***allowed.***

87. In this case, the appellant Pinkoo @ Jitendra is in jail. He shall be released forthwith unless and until he is wanted in connection with any other case, whereas, the appellant Smt. Ishwari Devi is on bail, she need not surrender before the trial court. The appellants shall ensure compliance of Section - 437A Cr.P.C.

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

(2022)02ILR A98
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.03.2021

BEFORE

THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 1611 of 2018

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

Counsel for the Appellant:
Sri Anuj Chaudhary, Sri Akhilesh Kumar Mishra, Sri Chandrajeet, Sri Santosh Kumar Dubey

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code,1860 - Sections 307 r/w 34, 504 - Criminal Procedure Code, 1973 - Section 313 – Indian Evidence Act, 1872 - Section 27 - Offence of attempt to murder – on account of negligence on part of the IOs the prosecution case cannot be discarded if the same is proved from the evidence of the eye witness also corroborated with the medical evidence. (Para 17, 18)

Criminal Law - Indian Penal Code,1860 - Sections 307 r/w 34, 504 - Criminal Procedure Code, 1973 - Section 313 – Indian Evidence Act, 1872 - Section 27 - Offence of attempt to murder – Testimony of related witness - if the presence of relative witness at the place of occurrence is not doubted same cannot be disbelieved on the sole ground of relative – Relationship *per se* does not affect the credibility – The role of appellant accused has been assigned specifically with reliable and cogent ocular evidence which is also corroborated with the medical evidence – as such the impugned judgement of conviction of the appellant does not bear any infirmity and same need no interference. (Para 23, 24)

Criminal appeal is hereby dismissed. (E-11)

List of Cases cited:

1. Vijay Shankar Sinde Vs St. of Mah, (AIR 2008 (SC) 1198)

2. Ashok Kumar Chaudhari Vs St. of Bihar (AIR 2008 SC 2436)

3. C Muniappan & ors. Vs St. of T.N. (2011 Vol. 1 SSC 470 SC)

4. Lakhan Sao Vs St. of Bihar & anr. (2009 Vol. SCC 82)

5. Yogesh Singh Vs Mahabir Singh & ors. (2011 SCC 195)

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

1. The instant Criminal Appeal is against the judgment dated 20.1.2018 of conviction and sentence passed by the court in ST No. 429 of 2015 (State Vs. Kapil and others) arising out of case crime no. 374 of 2014 P.S. Pilkhuva, District Hapur whereby the appellant Kapil was convicted for the offence under section 307/34 of IPC and sentenced with rigorous imprisonment of 7 years and a fine of Rs. 5,000/- and in default of payment of fine additional imprisonment of three months was to be undergone.

2. The brief facts giving rise to this Criminal Appeal are that informant Dharmveer Singh, son of late Bhagirath Singh resident of Mohalla Jatan, Pilkhuva, District Hapur moved written information with the police station concerned with these allegations that on 10.3.2014 at 6.00-O'clock evening he alongwith his son Vikas and the brother-in-law of his son namely Sumit were exchanging talk at the crossing nearby his house. At the same time Kapil, son of Bablu, Gaurav, son of Shailendra,

Bablu son of Sukhpal all resident of Madaia Jatan, Pilkhuva came by Motorcycle of which speed was too fast. The son of the applicant asked them to control the speed and to drive the motorcycle slow just to avoid any mishappening. On this issue all the three accused persons who were armed with weapon hurled abuses to his son and exhorted to his companion to open fire with intend to cause death of his son whereby Vikas opened fire which hit to the stomach of his son Vikas who fell down on the spot due to sustaining injury. The informant made noise whereby the persons of the locality attracted there. All the three accused persons fled away brandishing their country made pistol after having left the Motorcycle at the place of occurrence. He also saw the whole occurrence and recognized the assailants. The condition of his son Vikas was critical. He was rushed to the Saraswati Hospital. After first aid he was referred to Colombia Asia Hospital where he underwent treatment. On this written information Case Crime No. 374 of 2014 was registered against the accused Kapil, Gaurav, Bablu, under section 307 and 504 of IPC and the Investigating Officer after having concluded the investigation filed charge sheet against all the three accused persons on which cognizance was taken by the Magistrate concerned who committed the case for trial to the court of Sessions.

3. The trial court summoned the accused persons and charge was framed against the accused Kapil, Gaurav and Bablu under sections 307/34 and 504 of IPC which were read over and explained to the accused persons. The same was denied by them and demanded for trial.

4. On behalf of prosecution to prove the charge against the accused persons in documentary evidence filed the written information Ext. Ka-1, injury report of Vikas Ext. Ka-2, Charge sheet Ka-3, recovery memo in regard to taking into possession, blood stained cloth of injured Vikas Ext. Ka-4, Site plan of the place of occurrence Ext. Ka-5, recovery memo under section 27 of the Evidence Act Ext. Ka-6, discharge summary and progress report of Colombia Asia Hospital, Ext. Ka-7, Check FIR, Ka-8.

5. On behalf of prosecution in ocular evidence examined PW-1, Dharamveer, PW-2, Vikas, PW-3 Dr. Tejpal Singh, PW-4 SI Roshan Lal, PW-5, SI D.D. Gautam, PW-6, Dr. Sushil Photedar, PW-7 and HCP Mahipal Singh.

6. On behalf of prosecution statement of the accused persons were recorded under section 313 Cr.P.C. All the accused persons denied incriminating circumstances in evidence against them and stated that they have been falsely implicated on account of groupsim of the village and injured was flying kite on the date of occurrence, someone opened fire in air which hit to Vikas consequently he sustained injuries.

7. On behalf of accused persons no defence evidence was adduced.

8. Trial court after hearing learned counsel for the rival parties passed the impugned judgment of conviction and sentenced to the appellant as stated above.

9. Aggrieved from the impugned judgment of conviction and sentence, this criminal appeal has been preferred on behalf of the appellant Kapil on the ground that the impugned judgment is based on perverse and illegal finding and the trial court has not appreciated the evidence in proper perspective. There is no explanation

of delay in lodging the FIR and the weapon used in commission of crime was not recovered and there is no independent witness of the occurrence. There is also discrepancies in the statement of prosecution witness in regard to the place of occurrence. The trial court has not considered the pleas raised on behalf of the appellant and convicted the appellant on the wrong appreciation of the evidence. Accordingly, prayed to allow this criminal appeal and to set aside the impugned judgment of conviction.

10. Learned counsel for the appellant has submitted that the conviction of the appellant is based on the evidence of interested and related witnesses. No independent witness has been examined and on this ground contended to discard the prosecution case.

11. On behalf of prosecution the place of occurrence is the crossing nearby house of informant Dharmveer Singh. On the date of occurrence on 10.3.2014 at 6:00-0' clock of evening informant Dharamveer Singh along with his son Vikas and the brother-in-law of his son namely Sumit were standing and exchanging talk. At the same time the accused Kapil, Gaurav and Bablu came by the Motorcycle which was driven at a very high speed. The son of informant asked the accused persons to drive the Motorcycle slowly so as to avoid any accident. On this, all the accused persons hurling abuses and on the exhortation of Bablu all the accused persons opened fire. One bullet hit the stomach of Vikas. He was immediately rushed by **PW-1 Dharamveer** to Sarswati Hospital from where after first aid he was referred to Colombia Asia Hospital, Meerut. This prosecution case has been proved by the statement of PW-1 Dharamveer, informant who had lodged the FIR and the written information of the same Ext. Ka-1 was proved by him.

12. PW-2 Vikas is the victim and and impugned witness of the occurrence. This witness has stated that on the date, time and place of occurrence he along with his father and brother-in-law Sumit were talking at the crossing. The accused persons came by Motorcycle which was driven with high speed on being opposed by him accused persons hurled abuses and opened fire on the exhortation of Bablu and the bullet which was fired by Kapil hit to his stomach.

13. Therefore, from the statement of both these witnesses whose presence is not doubted at the place of occurrence, it is proved that the firearm opened by Kapil which hit to the stomach of Vikas.

14. The Investigating Officer in the list of witnesses have not interrogated any independent witness of the occurrence and only three witnesses of the fact were shown in the list of the charge sheet i.e. informant Dharamveer, injured Vikas and Sumit.

15. Admittedly, Sumit was not examined by the prosecution during trial. So far as the evidenciary value of PW-1 Dharmveer, PW-2 Vikas are concerned, although both the witnesses are related being father and son respectively yet their presence at the place of occurrence is not shaked in cross examination by the defence counsel.

16. It is settled law that the testimony of injured holds more value as a injured will never conceal the real culprit. So far as the testimony of a related witness is concerned, if the presence of relative witness at the place of occurrence is not

doubted, same can not be disbelieved on the sole ground being relative.

Hon'ble Apex Court held in ***Vijay Shankar Sinde Vs. State of Maharastra AIR 2008 SC 1198*** the testimony of a injured witness holds more credence. Normally, he would not shield the real culprit.

Hon'ble Apex Court held in ***Ashok Kumar Chaudhari Vs. State of Bihar AIR 2008 SC 2436*** the relationship per se does not affect the credibility. Non examination of public witness by itself does not give rise to adverse inference against the prosecution when the evidence of injured witness is reliable.

17. The injury report of injured Vikas Ext. Ka-2 has been proved by **PW-3 Dr. Tejpal Singh** in which the gun shot entry wound and exit wound is mentioned on the lower chest of injured Vikas. PW-3 Dr. Tejpal Singh also kept this injuries under observation and advised X-Ray and USG of whole of the abdomen.

PW-6 Dr. Sushil Photedar of Colombia Asia Hospital proves the discharge summary report of patient Vikas Ext. Ka-6 and papers related to the same Ext. Ka-7. This witness also says that he operated the injured Vikas. There were two gun shot wounds in his stomach; entry wound and exit wound; blackening and tattooing around entry wound was in size .5 cm x.5 cm; while exit would was 1 cm x 1 cm.

Therefore, the ocular evidence adduced on behalf of prosecution in regard to firearm injury in the stomach of injured Vikas is also corroborated with the medical evidence adduced on behalf of prosecution.

18. Learned counsel for the appellant contended that the Investigation Officer did not recover the weapon used in commission of crime. No live or empty cartridge were recovered from the place of occurrence. As per prosecution case firearms were opened by all the accused persons. Moreover, the blood stained cloths of the injured which were taken in custody by the Investigating Officer, same were not sent for examination to FSL and this lacunae in investigation is fatal to the accused appellant.

19. Admittedly, no weapon was recovered during investigation despite taking the police custody remand of accused Kapil on his confessional statement as same could not be recovered from the place where it was concealed by the accused. It is also admitted that the blood stained cloth; the recovery memo of the same have been proved by PW-5 Sub-Inspector D.D. Gautam as ext. Ka-6; but the same were not sent to FSL for examination. This fact is admitted to PW-5, Sub-Inspector D.D. Gautam. Admittedly, no empty or live cartridges were recovered by the Investigating Officer from the place of occurrence even blood stained clay and plain clay was not taken by the Investigating Officer in custody**. On account of negligence on part of the Investigating Officer, the prosecution case can not be discarded, if the same is proved from the evidence of the eye-witness also corroborated with the medical evidence.**

20. The Hon'ble Apex Court held in ***C Muniappan and others Vs. State of Tamil Nadu (2011) 1 SSC 470 SC*** the defect in investigation by itself is not a ground of acquittal. It is obligatory upon the Court to examine the prosecution witness and to see

whether lacunae in investigation is affecting the object of finding truth.

21. The Hon'ble Apex Court held in ***Lakhan Sao Vs. State of Bihar and another (2009) 9 SCC 82*** para 18 appreciation of the evidence in criminal trial-non recovery of the pistol or spent cartridges does not detract from the case of prosecution where the direct evidence is acceptable.

22. The Hon'ble Apex Court held in ***Yogesh Singh Vs. Mahabir Singh and others (2011) SCC 195 in para 47,*** mere non recovery of weapon does not falsify the case of prosecution where there is ample unimpeachable evidence.

23. In the present case the prosecution has been successful in proving its case with reliable and cogent ocular evidence which is corroborated with the medical evidence. The role of the appellant Kapil has been assigned specific who opened fire and the bullet hit the stomach of injured Vikas. As such, the impugned judgment of conviction of the appellant Kapil for the offence under section 307 IPC does not bear any infirmity and same needs no interference.

24. Therefore, in view of re-appreciation of the evidence on record this criminal appeal is hereby dismissed and the impugned judgment of conviction and sentnece passed in ST No. 429 of 2015 (State Vs. Kapil and others) arising out of case crime no. 374 of 2014 P.S. Pilkhuva, District Hapur is affirmed. The appellant has to serve out the sentence as awarded by the court below.

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

(2022)02ILR A102
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 2410 of 1985

Gulab & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Veeresh Mishra, Sri S.R. Yadav, Sri C.M. Yadav, Sri K.K. Tripathi, Sri Rajiv Sharma, Sri Rakesh Prasad, Sri Brijesh Yadav

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code,1860 - Sections 302 r/w 34, Code of Criminal Procedure, 1973 - Sections 161 ,313 & 437(a), Indian Evidence Act, 1872 - Sections 134 & 45 - offence of Murder - Testimony of solitary eye-witness (PW2) – FIR lodged against the appellants with allegation that they having enmity with deceased forcibly lifted him in the field of Jwar crop and murdered him - Entire prosecution story rests heavily on testimony of sole eye-witness PW2- on seeing accused persons with arms, having bodily lifted the deceased into the field PW-2 escaped from the place of incident due to fear - He reached to home after 2 hours whereas an elderly persons could cover double the distance, in 20 to 25 minutes – this throws serious doubt whether PW2 was with the deceased or loitering somewhere else - Another aspect noteworthy is whether incident occurred between 6 - 6.30 pm sole witness deposed that accused had 'Gandasa', 'Axe' and 'spear' in their hands - In case of indiscriminate assault ordinarily, injuries should be found All over body and not only on the face especially when one of accused claimed to have pinned down deceased – Size, nature &

numbers of injuries mentioned in post mortem report not relatable either to spear or Gandasa or Axe - Eye witness is permissible provided his evidence is free of any blemished or suspicion and impresses the court as wholly truthful, reliable and natural Testimony - thus appears to be doubtful and not worthy. (Para 30, 31, 32, 34, 39, 41, 42, 44, 45)

Criminal Law - Criminal Procedure Code, 1973 – Section 154 - Offence of murder - Delay in lodging FIR - casts a doubt on the prosecution case - Informant received information about incident from PW 2 (eye-witness) but the FIR was lodged with delay of five hours – which creates doubt - Eye witness who saw the incident neither lodged FIR nor promptly returned home to informed his father about incident - From the testimony of Inquiry officers and other witnesses of fact a strong possibility arises that the FIR was ante-timed.(Para 49, 52, 53)

Criminal Law - Indian Penal Code, 1860 – Section 302 - Indian Evidence Act, 1872 - Section 45 — offence of murder – scrutiny of medical evidence – Effect of inconsistency founds between the inquest report and the post mortem report in respect of nature, manner and number of Injuries of deceased which gives feeling to the court that prosecution has not come out with clean hands and the case has been built on strong suspicion than evidence – as such benefits of doubts goes in favour of Accused appellants. (Para 54, 55)

Criminal Law - Indian Penal Code, 1860 – Section 302 - Indian Evidence Act, 1872 - Section 118 - offence of murder – Testimony of Chance witness (PW3) - Reliability - Chance witness had seen accused persons coming out from Jawar field having weapons in their hands but he did not see the eye-witness at that time - Although he tried to explain his presence on the spot with explanation that he was going to see his niece who was ill – but the prosecution failed to corroborate his testimony with any other witnesses – PW 3 (Chance witness) failed to inspire the confidence of Court and as such his testimony not found worthy - Accused appellants entitled to acquittal.(Para 56, 58)

Criminal Law - Indian Penal Code, 1860 – Section 302, Indian Evidence Act, 1872 - Section - 8: offence of murder – effect of false implication on the ground of enmity - there was grave enmity between deceased and co-accused – it is settled law that merely on the ground of enmity, testimony of an eye witness cannot be discarded, if there is a ring of truth about it – but, here entire prosecution case rested only on the testimony of sole eye-witness who was not found wholly reliable - Prosecution failed to prove its case against the surviving appellant beyond reasonable doubt consequently appeal is allowed. (Para – 59, 60**)**

Appeal allowed, appellant is entitled for acquittal from all the charges. (E-11)

List of Cases cited:

1. Bhimapa Chandapa Hosamani & ors. Vs St. of Karn. (2006 Vol. 11 SCC 323)

2. Parvat Singh & ors. Vs St. of M.P. (2020 Vol. 4 SCC 33)

3. Amar Singh Vs St. (NCT of Delhi) (AIR 2020 SC 4894)

4. Solanki Chimanbhai Ukabhai Vs St. of Gujrat (AIR 1983 SC 484)

5. Mukesh & anr. Vs St. (NCT of Delhi) (2017 Vol. 6 SCC)

6. Mukesh Tiwari Vs St. of UP (2021 Vol. 3 ADJ 446 DB)

7. Jarnail Singh Vs St. of Punj. (2009 Vol. 9 SCC 719)

(Delivered by Hon'ble Sameer Jain, J.)

1. The present appeal has been filed by two appellants, namely, Gulab(appellant No. 1) and Nanku @ Nanhu (appellant No. 2). The appeal of Nanku @ Nanhu (appellant No. 2) has been abated, on account of his death, vide order dated 8.12.2021. Therefore, by way of present

order, we will decide the appeal filed by Gulab (appellant No. 1).

2. Appellant- Gulab and three others were convicted by the trial court under Section 302 IPC read with section 34 IPC and awarded life imprisonment vide order dated 10.9.1985. The other convicted accused-Ram Awadh and Ram Kripal filed a separate appeal i.e. Criminal Appeal No. 2408 of 1985, has already been abated on account of their death, vide order dated 10.9.2018.

Introductory facts

3. Prosecution case was instituted on a First Information Report (FIR) which was lodged on 4.9.1980, at about 11:15 pm by Nabi Baksh (PW-1) against the appellant-Gulab (surviving appellant) and three others, under Section 302 IPC, at P.S. Handia, District Allahabad as case crime No. 300 of 1980.

4. As per FIR, Nabi Baksh (PW-1) was the Munshi of Shekh Mohammad Naqi (deceased) who was Ex-landlord (Zamindar) having agricultural holdings at Birapur. In respect of illegal occupation of his holdings by Mangal Yadav and his pattidars (associates) Shekh Mohammad Naqi (deceased) had filed a civil suit. Deceased had won a case up to the stage of High Court but another case was pending. As a result, Mangal Yadav and his collaterals used to threaten him. It is alleged that a day before the incident, when the informant (PW-1) had gone to Allahabad in 'pairvi' of a case, Mangal Yadav told PW-1 that it be conveyed to the deceased that he (deceased) will have to face consequences for cases filed against him. It is alleged that on 04.09.1980 due to some household work, informant (PW-1) could not go to Birapur, therefore, he sent his son Nurul Islam (PW-2) to Birapur with the deceased who used to go to Birapur on a daily basis. It is alleged that while the deceased was returning back with PW-2, near village Derha, around sunset, PW-2 stopped for urination whereas Mohd. Naqi (deceased) moved ahead; soon thereafter, PW-2 heard shrieks and saw that accused Ram Awadh, Gulab (surviving appellant), Kripal and Nanhu, who were having enmity with Mohammad Naqi (deceased), forcibly lifted the deceased and took him to the field where there was standing Jwar crop. Due to fear, PW-2 ran away and, at about 8 pm, he gave information to the informant about the incident, and when the informant (PW-1) and others arrived at the spot, they found Shekh Mohammad Naqi lying dead.

5. After lodging the First Information report (Ext. Ka 5), investigation started and police arrived at the spot. Investigating Officer lifted blood stained and plain soil from the spot and prepared recovery memo (Ext. Ka 10) and also recovered one spectacle, an umbrella and a stick (belonging to the deceased) from near the spot and prepared seizure memo (Ext. Ka 14). Thereafter, inquest report (Ext. Ka-4) was prepared and the body was sent for post mortem. On 5.9.1980, at about 3 pm, post mortem was conducted of which post-mortem report (Ex. Ka-16) was prepared and, after investigation, charge sheet was submitted against appellant- Gulab (surviving appellant) and other accused persons under Section 302 IPC. After taking cognizance on the charge-sheet, the case was committed to the court of session and, on 16.7.1981, charges were framed against the appellant no.1 (Gulab) and other accused persons under Section 302 IPC read with Section 34 IPC. The accused including Gulab (surviving appellant) denied the charge and claimed trial.

6. Prosecution during trial examined 13 witnesses, out of them Nabi Baksh (PW-1)-the informant; Nurul Islam (PW-2)-the eye witness; Abdul Wahid (PW-3); and Jadunath (PW-4) are witnesses of fact whereas rest are formal witnesses.

7. After recording the evidence of prosecution witnesses trial court examined appellant- Gulab (surviving appellant) under Section 313 Cr.P.C. and thereafter, Umakant (DW-1) was examined as defence witness. The trial court thereafter, on the basis of the evidence available on record, convicted the surviving appellant- Gulab under Section 302/34 IPC along with other co-accused persons.

8. We have heard Sri Veeresh Mishra, learned Senior Counsel assisted by Sri Brijesh Yadav for surviving appellant Gulab (appellant no.1); and Sri Amit Sinha, learned AGA for the State- respondents.

Submissions on behalf of the appellant

9. Learned counsel for the appellant (Gulab) submitted that prosecution failed to prove its case beyond reasonable doubt and on the basis of sole eye witness testimony, conviction of the appellant (Gulab) is not justified. He submitted that FIR of the present case was lodged at about 11:15 pm i.e. after more than 5 hours and prosecution failed to explain the delay in lodging the first information report. He further contended that the FIR was lodged by Nabi Baksh (PW-1), who is not an eye witness, whereas, his son Nurul Islam (PW-2) who is stated to be an eye witness did not lodge the report, despite opportunity, this itself creates doubt as to whether PW-2 was an eye witness. Sri Veeresh Mishra further submitted that there are material omissions and contradictions between the version of the FIR and in the statement of prosecution witnesses. He contended that medical evidence also does not support the ocular evidence and from the perusal of the entire evidence on record, it appears, the alleged eye witness Nurul Islam (PW-2) did not witness the incident and that, after due deliberations, the accused including the surviving appellant- Gulab were implicated due to previous enmity with Shekh Mohammad Naqi (deceased). Sri Mishra submitted that the trial court failed to properly appreciate the evidence on record and has wrongly convicted the appellant, therefore, the order of conviction is liable to be set aside.

Submission on behalf of the State.

10. Per contra, learned AGA contended that from the testimony of Nurul Islam (PW-2), it is proved that the appellant- Gulab along with other accused persons committed the murder of Shekh Mohammad Naqi. He submitted that there is no material contradiction between the FIR and the statement of prosecution witnesses. From the statement of (PW-2) Nurul Islam it is clear that he witnessed the incident and saw the appellant- Gulab having a 'Gandasa' in his hand. He also submitted that there is no conflict between the medical evidence and the ocular evidence and the testimony of Nurul Islam (PW-2) stands corroborated by the testimony of Abdul Wahid (PW-3) who saw the surviving appellant No. 1 (Gulab) at the time of incident with other accused persons when they, with their respective weapons, were coming out from the Millet (Jwar) field. Thus, the conviction of the appellant- Gulab in the present case is justified and the appeal is liable to be dismissed.

11. Having noticed the rival contentions and having perused the record of the case, before analyzing the prosecution evidence, it is necessary to briefly discuss the prosecution evidence adduced during trial.

Prosecution witnesses

12. Prosecution examined Nabi Baksh as PW-1. This witness is the informant of the case who lodged the first information report and is the father of alleged eye witness Nurul Islam (PW-2). This witness repeated the version of the FIR and stated that Shekh Mohammad Naqi (deceased) was Honorary Magistrate and Ex-Zamindar. He was having agricultural land in village-Birapur. PW-1 was a servant of Shekh Mohammad Naqi (deceased) for last 40 years. This witness stated that accused-Ram Awadh and Ram Kripal are real brothers and sons of Mangal Yadav while Gulab (surviving appellant) and accused Nanhu are neighbors of accused Ram Awadh and there is long standing enmity between Shekh Mohammad Naqi (deceased) and Mangal Yadav (father of accused Ram Awadh and Ram Kripal). He stated that a day before the incident, when PW-1 was in civil court in connection with case against Mangal Yadav, father of co-accused Ram Awadh and Ram Kripal, threats were extended. This witness stated that on the date of incident i.e. on 04.09.1980, he could not go to Birapur as he had house repair work to do; therefore, he sent his son Nurul Islam (PW-2) with Shekh Mohammad Naqi (deceased). As per this witness, Shekh Mohammad Naqi (deceased) used to visit Birapur at about 3:00 pm, post noon. On the date of incident, after the 'maghrib prayer', when PW-1 inquired about Shekh Mohammad Naqi (deceased) and Nurul Islam (PW-2) he came to know that they have not returned as yet. As a result, he went on foot to Birapur. When PW-1 arrived at Birapur, Devi (not examined) and Jadunath (PW-4) informed him that Shekh Mohammad Naqi (deceased) and his son Nurul Islam (PW-2) had departed even before sunset. After receiving this information, PW-1 returned to his house; there, after some time, his son Nurul Islam (PW-2) arrived and informed PW-1 that when he and Shekh Mohammad Naqi (deceased) were returning from Birapur and were between village-Derha and Kazipur, PW-2 sat to uninate. In the meantime, appellant- Gulab (surviving appellant) and other accused Nanhu, Ram Awadh and Ram Kripal forcibly lifted Shekh Mohammad Naqi (deceased) and took him into the Millet field. According to PW-1, his son Nurul Islam (PW-2) had informed him that accused Ram Awadh was having an axe therefore, he got scared and ran away. PW-1 stated that after receiving information from his son Nurul Islam (PW-2), he, along with others, visited the spot and found body of Shekh Mohammad Naqi lying in the Jwar field. PW-1 stated that he got the report scribed by Anu, which was lodged by him. PW-1 proved the written report as Ex. Ka-1.

13. During cross examination, PW-1 stated that he told the scribe of the FIR, namely, Anu (not examined), that before arrival of Nurul Islam (PW-2), he went to search for Shekh Mohammad Naqi (deceased) but, if this fact was not written by Anu, he can not provide an answer. PW-1 further stated that when he first went to search for the deceased, it was dark and the sun had already set. PW-1 also stated that between 6:45 and 7:00 PM he went in search of the deceased and in 20-25 minutes had arrived at Birapur and after 15 minutes, he departed from Birapur. PW-1

stated that during this search he did not meet anybody on the way. According to this witness, Village Derha is adjacent to the place of incident. In respect of weapons assigned to the respective accused, he stated that in the FIR, he mentioned that co-accused Ram Awadh had an axe but if it is not written, he cannot give reason. PW-1 in his cross examination also stated that he did not notice the dead body of Shekh Mohammad Naqi (deceased) lying in the field while he was going towards Birapur in search of him. He admitted that if one stood on that chak road, the dead body would have been visible. PW-1 stated that the face of deceased was flattened because of the injuries. PW-1 denied the suggestion that he got to know about the death of Shekh Mohammad Naqi (deceased) next morning. In respect of pending litigation, PW-1 stated that he is not aware whether there is any case pending between surviving appellant- Gulab and Shekh Mohammad Naqi (deceased). In respect of presence/non presence of blood on the spot, PW-1 stated that due to rain, blood was washed out. He later clarified that it started to rain when he returned from the police station. He also denied the suggestion that his son did not inform him about the murder of Shekh Mohammad Naqi (deceased). He admitted that he had send his son (PW-2) with Shekh Mohammad Naqi (deceased) to ensure safety of Shekh Mohammad Naqi (deceased) as the deceased never used to go alone. PW-1 (Nabi Baksh) in his cross-examination also stated that 'Maghrib' prayer (Namaz) is read after sunset.

14. From above, it is clear that Nabi Baksh (PW-1), the informant, is not an eye witness of the incident.

15. Prosecution next examined Nurul Islam as PW-2. He is the sole eye witness of the incident. According to him, he, on the date of incident, had gone with Shekh Mohammad Naqi (deceased) to Birapur because his father Nabi Baksh (PW-1) was busy in repair work. He and Shekh Mohammad Naqi (deceased) went to Birapur around 3:00 to 3:15 PM and they departed from Birapur before sunset as Shekh Mohammad Naqi (deceased) used to offer 'maghrib prayer' (namaz) at home. According to PW-2 between 6 and 6:30 PM, on way back, he stopped to urinate whereas Shekh Mohammad Naqi (deceased) moved ahead. Soon thereafter, he heard cries of Shekh Mohammad Naqi (deceased); he saw the surviving appellant No. 1-Gulab and other accused persons, namely, Nanhu, Ram Kripal and Ram Awadh, forcibly taking away, Shekh Mohammad Naqi (deceased) into the Millet (jwar) field. There, he saw the surviving appellant- Gulab assaulting the deceased and co-accused Nanhu holding his leg. As per PW-2, appellant- Gulab had 'gandasa' in his hand whereas co-accused Ram Awadh and Ram Kripal had axe and spear, respectively. According to PW-2, accused persons threatened him and due to fear, he ran away via Katehra road to come to his house. He stated that due to the fear of the accused persons he did not take the usual 'pagdandi' route to home. According to this witness, he arrived at his house by about 8:00 to 8:15 PM and narrated the entire incident to his father PW-1 (Nabi Baksh); thereafter, they arrived at the spot with others and saw the dead body of Shekh Mohammad Naqi (deceased) lying in Millet (jawar) field. Thereafter, his father Nabi Baksh (PW-1) went to the police station to lodge the first information report. PW-2 further stated that Abdul Wahid (PW-3) and Abdul Moin (not examined) also arrived at the place of incident and informed that they also witnessed the accused persons running

away from the spot after committing the murder of Shekh Mohammad Naqi (deceased). As per this witness, surviving appellant No. 1-Gulab and Nanhu had no enmity with the deceased. PW-2 identified articles of the deceased, namely, umbrella, one pair of spectacles and other belongings of deceased, recovered from the spot as material Exhibit Nos. 1 to 6.

16. In his cross-examination, PW-2 stated that his house is about 1-1.5 miles away from the place of incident and Birapur is about 1-1.25 miles away from the village-Kajipur whereas, Birapur is about 2 to 2.5 miles away from his home. According to PW-2, from Village Derha his house is about 1 to 1.5 miles away. As per this witness, from the place of incident, village Birapur is about 1 to 1.25 miles. As per this witness, though he heard shrieks of Shekh Mohammad Naqi (deceased) but he did not witness the accused assaulting the deceased. According to PW-2, he did not notice any other person near the place of incident. PW-2 in his cross-examination further stated that he went straight to his home via Katehra and did not stop in between. In respect of the height of the Millet crop, he stated that at the time of incident, height of the Millet (jwar) crop was around 5 to 6 feet. According to this witness, from the 'pagdandi' (narrow foot-path) dead body lying in the field was noticeable. In his cross-examination, PW-2 denied the suggestion that he did not witness the incident and was not present at the place of incident. He added that from the place of incident he arrived at his house in 1.5 to 2 hours. PW-2 admitted that one side of the face of the deceased was flattened as if it was compressed by a heavy item. PW-2 however denied the suggestion that Shekh Mohammad Naqi (deceased) was having several enemies and, therefore, somebody killed him and he did not witness the incident.

17. Abdul Wahid was examined as PW-3. According to this witness, on 4.9.1980 at about sunset, he was going to Birapur alongwith his friend Abdul Moin (not examined) to visit his niece and when they crossed village-Derha, he witnessed that surviving appellant No. 1-Gulab and other accused persons were coming out from Millet (jwar) field; at that time Gulab had 'gandasa' in his hand and co-accused Ram Awadh and Ram Kripal had axe and spear, respectively, in their hands. This witness also states that when he asked them as to what happened, they went away without saying anything. PW-3 further stated that in between 9 and 9:30 pm, when he was sitting in his relative's house, he came to know that Shekh Mohammad Naqi (deceased) was murdered on his way back home; he arrived at the spot and saw the body of Shekh Mohammad Naqi (deceased) lying in the field. There, Nurul Islam (PW-2) was present who informed him about the incident. PW-3 also stated that he informed Nurul Islam (PW-2) that he also witnessed the accused persons running away from the spot. PW-3 being one of the inquest witnesses proved the inquest report (Ext. Ka-4). In his cross examination, PW-3 stated that he did not see Nurul Islam (PW-2) at the spot nor he heard his shrieks. PW-3 further admitted that he did not witness commission of the crime; he only saw the accused persons including appellant-Gulab running away from the place of incident.

18. Jadunath was examined as PW-4. He was servant of Shekh Mohammad Naqi (deceased). According to him, on the day of his murder Shekh Mohammad Naqi (deceased) arrived at Birapur with Nurul

Islam (PW-2) and about an hour before sunset, Shekh Mohammad Naqi (deceased) and Nurul Islam (PW-2) left Birapur. As per PW-4, Shekh Mohammad Naqi (deceased) visited Birapur daily. PW-4 denied the suggestion that being servant of the deceased, he lodged a false report against the accused Ram Awadh 3-4 days before. In his cross-examination, PW-4 stated that he came to know about death of Sheikh Mohd. Naqi (the deceased) between 10 and 11 PM though he does not remember as to who informed him. He, however, visited the spot next day morning.

19. Ramji Mishra, Head Constable was examined as PW-5. He prepared the chik report after receiving the written report (Ext. ka 1). He proved the chik report as Ext. Ka 5. He also proved the G.D. Entry of 'kayami mukadma' as Ext. Ka 6. PW-5 also proved sealed item which was kept in malkhana as Ext. Ka 7-8.

20. Constable Duryodhan Singh (PW-6) gave his statement through an affidavit. According to this witness in the night of 4/5.9.1980, S.I. Ameer Ali handed over the dead body of Shekh Mohammad Naqi (deceased) to him and constable Salik Ram Chaubey (not examined) for post mortem along with other documents. According to this witness, on 5.9.1980, he kept the body in the mortuary and identified it at the time of autopsy.

21. Nanhu Singh, Assistant Clerk (Malkhana, Sadar, Allahabad) gave his statement through an affidavit as PW-7. According to this witness, on 11.2.1981 the sealed blood stained and plain soil was kept in the malkhana and on 25.3.1981, the above bundle, in a sealed condition, was sent to Agra for analysis.

22. Ameer Ali was examined as PW-8. He is the first investigating officer. According to this witness, on 4/5.09.1980, at about 1.00 AM, in the night he prepared the inquest report (Ex. Ka-4); he made recovery of blood and blood-stained as well as plain soil from the spot. PW-8 stated in his examination-in-chief that in column Nos. 2 and 3 of 'chalan lash' due to mistake the date was mentioned as 5.9.1980 in place of 4.9.1980. In his cross-examination, this witness has stated that by the time he received the documents of the present case, he was not aware as to who was the scribe of the FIR. According to this witness, in the FIR, it was not mentioned as to what weapon was used by which accused. PW-8 stated that he recorded the statement of Nabi Baksh- informant (PW-1) under Section 161 of Cr.P.C. PW-8 also stated that during investigation, he did not come to know whether there was an eye witness of the incident. He added that till the time he was investigating the matter, he did not come to know as to who committed the murder. PW-8 in his cross-examination admitted that police dog squad was called. PW-8 further added that the head of deceased appeared pasted to the earth as if it was compressed by some heavy item.

23. PW-9, Ram Tripathi gave his statement on an affidavit and the defence did not cross examine him. This witness stated that on 11.2.1981 two sealed boxes of blood stained and plain soil were kept in the malkhana on 25.3.1981. These items in sealed condition were sent for Forensic Analysis to Agra.

24. Dr. S.T. Imam, Physician at District Hospital, Gorakhpur, was examined as PW-10. This witness conducted the post mortem of the body of the deceased-Shekh Mohammad Naqi on

5.9.19980 at about 3:00 pm. According to this witness, deceased died a day before and rigor mortis was present on both the extremities. PW-10 noticed following injuries on the body of the deceased:-

1. Incised wound 2" X ½" X Complete cut of Mandible on the chin.

2. Incised wound right side temporal region 3" above the right ear with fracture of temporal bone.

3. Incised wound on the right side of the forehead just above the right eye-brow 2 and 1/2" X 1" with complete out of the frontal bone.

4. Incised wound 1/2" X 1/4" on the forehead just above the root of the nose.

5. Incised wound 1/2" X 1/4" on the right side neck.

25. In internal examination of the body, Doctor-(PW-10) found scalp and brain lacerated. According to this witness deceased could have died at about 6:00 pm in the evening and the injuries found could have been caused by axe, farsa and spear. This witness proved post mortem report as Ext. Ka-15. In his cross-examination Dr. Imam stated that deceased sustained only incised wounds and there was no punctured wound. PW-10 denied the suggestion that under the pressure of Collector and S.S.P. concerned, he prepared a wrong post mortem report. PW-10 also stated that the right eye of deceased was not compressed; if any such injury existed, it would have been noticed by him.

26. Ram Ratan Ram PW-11 was the third Investigating Officer. According to this witness, on the order of Circle officer, he started investigation of the case on 6.9.1980. He recorded the statement of Nurul Islam (PW-2); inspected the spot and prepared the site plan (Ext. Ka 16). On 7.9.1980, he recorded the statements of Abdul Wahid (PW-3) and other witnesses and on 3.10.1980, he submitted charge sheet (Ext. Ka 17). In his cross-examination, this witness stated that Amir Ali, S.I. (PW-8) started investigation of the case on 4.9.1980, at about 11.15 PM, after the FIR. He stated that Nurul Islam (PW-2) was an eye witness of the incident. According to PW-11, on 5.9.1980 investigation of the case was handed over to Shankar Sharan Upadhaya (PW-13). PW-11 stated that till 6th September, it was not mentioned in the case diary that Nurul Islam (PW-2) was an eye witness. PW-11 stated that Nurul Islam (PW-2) had told him that he witnessed the accused persons running away after committing the murder of Shekh Mohammad Naqi (deceased). PW-11 denied the suggestion that the investigation of the case was handed over to him only to generate an eye witness account by manipulating the investigation. Upon further suggestion, PW-11 stated that he is not aware whether the Collector was annoyed as there was no eye witness in the FIR.

27. A.S.I., Subedar Yadav as PW-12 filed an affidavit. Defence did not cross examine him. This witness proved that S.I. Amir Ali (PW-8) handed over to him sealed bundle of blood stained and plain soil which was entered by him in the malkhana in a sealed condition.

28. Shankar Saran Upadhyay, S.I. (PW-13) is the second Investigating Officer of the case. He stated that on 4.9.1980 while he was posted as S.O. at P.S.-Handia he could not investigate, as he was ill. He, however, recorded the statements of accused Kripal, Gulab (surviving appellant) and Nanhu after their arrest. According to this witness, S.I. Amir Ali (PW-8) arrested

the accused persons and Amir Ali started the investigation of the case and, thereafter, Ram Ratan Ram (PW-11) investigated the matter. Ameer Ali (PW-8) investigated the matter on 4.9.1980 only and Ram Ratan Ram started investigation on 6.9.1980. According to this witness, as per Report No. 90 dated 05.09.1980, at 6.40 hours, written by Ramji Mishra, Constable, there was a report in respect of dog squad and Report No. 19, at 13:10 hours, indicates arrival of dog squad, this report too, is written by Head Constable Ramji Mishra. PW-13 submitted and proved these reports as Ext. Kha 1, Kha 2 and Kha 3.

Analysis:-

29. Having noticed the prosecution evidence, it is clear that there are four witnesses of fact, namely, Nabi Baksh (PW-1)-the informant, Nurul Islam (PW-2), Abdul Wahid (PW-3) and Jadunath (PW-4).

30. Nabi Baksh PW-1 is the informant of the case. He lodged the FIR to the effect that on 04.09.1980 at about 8.00 PM his son Nurul Islam (PW-2) informed him that when he (Nurul Islam) was returning back along with Sheikh Mohd. Naqi (deceased) from Birapur and arrived near village Derha, the accused persons including the surviving appellant no. 1 (Gulab) committed the murder of Sheikh Mohd. Naqi. PW-1 stated that he used to accompany the deceased to Birapur on a daily basis but, on the date of incident, he could not go as he had some house repair work, therefore, he sent his son Nurul Islam (PW-2) along with the deceased. PW-1 proved the enmity between co-accused Ram Awadh and Ram Kripal with the deceased Sheikh Mohd. Naqi but, stated specifically that the surviving appellant no. 1(Gulab) had no direct enmity with the deceased.

31. Thus, PW-1, the informant, Nabi Baksh, is not an eye witness. He only proved the motive for the crime and that Nurul Islam (PW-2) went along with the deceased to Birapur on 04.09.1980 i.e. the date of the incident.

32. Abdul Wahid (PW-3) is also not an eye witnesses of the murder but is a witness of circumstance. Abdul Wahid (PW-3) stated that on or about the time of the incident he witnessed the accused persons coming out from the Millet (Jwar) field having weapons in their hands. This witness is a chance witness.

33. Jadunath (PW-4) is also not eye witness of murder but is a witness who proves that on the date of the incident, Nural Islam (PW-2) and Sheikh Mohd. Naqi (deceased) came to Birapur and they returned back an hour before sunset. This witness thus proves that Nurul Islam (PW-2) accompanied Sheikh Mohd. Naqi on way back from Birapur.

34. Consequently, Nurul Islam (PW-2) is the only eye witness of the incident and entire prosecution story rests heavily on his testimony. Before we examine the worth of the testimony of PW-2, it would be useful to notice the law as to when conviction can be based on the testimony of a solitary eye witness.

35. The Apex Court in case of **Bhimapa Chandapa Hosamani and others Vs. State of Karnataka (2006) 11 SCC 323** observed as follows:-

"This Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also cautioned that while doing so the Court must be satisfied

that the testimony of the solitary eye witness is of such sterling quality that the Court finds it safe to base a conviction solely on the testimony of that witness. In doing so the Court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the Court as wholly truthful, must appear to be natural and so convincing that the Court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness."

36. Again, the Apex Court in case of **Parvat Singh and others Vs. State of Madhya Pradesh (2020) 4 SCC 33** observed as follows:-

"However, at the same time, the evidence/deposition of the sole witness can be relied upon, provided it is found to be trustworthy and reliable and there are no material contradictions and/or omissions and/or improvements in the case of the prosecution."

37. Recently, the Apex Court in case of **Amar Singh Vs. State (NCT of Delhi) AIR 2020 SC 4894** observed in paragraph 16 as follows:-

"Thus the finding of guilt of the two accused appellants recorded by the two Courts below is based on sole testimony of eye witness PW-1. 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 Government of NCT of Delhi)"

38. Thus, the law as it stands is that conviction on the basis of testimony of sole eye witness is permissible provided his evidence is free of any blemish or suspicion and impresses the Court as wholly truthful, reliable and natural.

39. From a perusal of the evidence of Nurul Islam (PW-2) and other witnesses, it is proved that he accompanied Sheikh Mohd. Naqi (deceased) to Birapur on 04.09.1980 and was with the deceased at Birapur at or about 3.00-3.15 PM. The testimonies of Nurul Islam (PW-2) and Jadunath (PW-4) also proves that the deceased and Nurul Islam (PW-2) departed from Birapur before sunset. The question that arises for our consideration is whether at the time of the incident, say at about 6-6.30 PM, Nurul Islam (PW-2) was present at the spot with Sheikh Mohd. Naqi (deceased) or not; and whether his testimony is wholly reliable and truthful.

40. Having gone through the entire evidence of the witnesses of fact what transpires is that PW-2, according to his own stand, as soon as he saw the accused persons with arms, having bodily lifted the deceased into the Millet field and assaulting him, he effected his escape from the spot and ran for his life. According to PW-2, he did not take the usual Pagdandi, but the road to reach home. The distance between Birapur and Handia (home of the deceased) has come on record to be

between 2 and 2 and ½ mile whereas the distance between the place of incident and PW-2's house is about a mile and a half. PW-2 states that he reached home at about 8.00-8.15 PM. Importantly, the deceased used to offer Magreeb Prayer (Namaz) on a daily basis. This is at sunset. The sunrise and sunset chart of 04.09.1980 for Allahabad would indicate that the sunset on 04.09.1980 was at 6.18 PM. Meaning thereby that the deceased had a target to reach before 6.00 PM or about. As per PW-4, he left Birapur for home an hour before sunset. According to PW-1, when the deceased did not arrive home for Magreeb prayer, he went to Birapur from that Pagdandi adjoining which, in a field the deceased was lying dead. According to PW-1, he left at about 6.45-7.00 PM to Birapur in search of the deceased and reached Birapur in about 25 minutes and after staying there for 15 minutes came back. All of this suggest that the place of occurrence was not that far from the residence of the deceased as to take PW-2 two hours to reach home, whatever the route he might take. This throws serious doubt whether he was with the deceased or loitering some where else. Another aspect noteworthy is whether the incident occurred between 6-6.30 PM, as stated by PW-2 or earlier. Ordinarily, if a devout muslim is used to offer Magreeb Prayer, which is at sunset, he would not like to miss it. Sunset as per the chart was at 6.18 PM on 04.09.1980, hence, the probability is high that the incident may have occurred before 6.00 PM. Be that as it may, what is important is that if PW-2 ran away from the spot to the safety of his home why he took about 2 hours to reach, when even elderly persons could cover double the distance, that is between Birapur and the home of the deceased in 20 to 25 minutes. Thus, there arises a serious doubt as to whether PW-2 was with the deceased at the time of the incident.

41. As per PW-2, Nurul Islam, surviving appellant no.1 Gulab was having 'Gandasa' in his hand while accused Ram Awadh and Ram Kripal were having axe and spear respectively and they all assaulted Sheikh Mohd. Naqi (deceased) whereas co-accused Nanhoo Singh caught hold his legs.

42. According to Dr. S.T. Imam (PW-10), who conducted post mortem, Sheikh Mohd. Naqi (deceased) sustained as many as five incised wounds. Injury no.1 was on his mandible on the chin, injury no.2 was on the temporal region, injury no.3 and 4 were on the forehead and injury no.5 was on the neck. Thus, all the five injuries sustained by Sheikh Mohd. Naqi (deceased) were on his face and head. It is hard to believe that if three persons having deadly weapons assault a person then all the injuries sustained by him would be on the face and head and not elsewhere, particularly, when the victim is pinned down and whole of his body is available to inflict wounds. In case of indiscriminate assault by weapons like Gandasa, axe and spear, ordinarily, injuries would be found all over the body and not only on face and head more so, when one of the accused persons had pinned down the deceased. Further, there is no punctured wound relateable to a spear, which, as per Nurul Islam (PW-2), was used by co-accused Ram Awadh while assaulting Sheikh Mohd. Naqi (deceased). Further, the maximum size of injuries (incised in nature) mentioned in the post mortem report is 2 and ½ x 1 (i.e. injury no.3), which is not relatable to a Gandasa, which, if used, would leave a big cut wound.

43. Although, the medical evidence is only an opinion, but if it is in apparent conflict with the ocular account as to the weapons used, and the manner of assault, it casts a doubt on the reliability of the ocular account. The Apex Court in case of **Solanki Chimanbhai Ukabhai Vs. State of Gujarat AIR 1983 SC 484** in paragraph no. 12 observed as follows:-

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries: taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

44. In the light of the aforesaid legal position, on this ground also, testimony of Nurul Islam (PW-2) appears to be doubtful to us and not worthy enough as to form the sole basis of conviction.

45. For all the reasons recorded above, in our considered view, the testimony of Nurul Islam (PW-2) is not trustworthy and does not inspire our confidence as to form the sole basis of conviction.

46. Another important feature that we notice is that PW-8 Ameer Ali i.e. the first Investigating Officer of the case, stated that while he was investigating neither an eye witness came forward nor he could get an eye witness of the incident. This witness also stated that Dog Squad came after the incident. PW-8 Ameer Ali added by saying that he did not make an arrest as he was unaware as to who committed the murder. Statement of Ameer Ali (PW-8), the first Investigating Officer, surprises us because if the FIR had been lodged on 04.09.1980, at about 11.15 PM, as alleged by the prosecution, and the accused persons were named in the FIR including surviving appellant no.1 Gulab, where was the occasion for this witness to make such statement before the trial court. PW-11 Ram Ratan Ram was also one of the Investigating Officers of the case, he also stated in his cross-examination that in the case diary till 06.09.1980 it was not mentioned that Nurul Islam (PW-2) was an eye witness of the incident. PW-13 Shankar Sharan Upadhya was also one of the Investigating Officers of the case, he proved that a Dog Squad was called. All of this would suggest that either there was no eye witness or clue about the accused or the police never believed in the witness.

47. Further, according to the inquest report of deceased Sheikh Mohd. Naqi, inquest started on 05.09.1980 at about 1.00 AM and was completed by about 2.00 AM, but the inquest report does not bear crime number and other essential details of the case, had it been registered, as is the prosecution case.

48. Interestingly, Jadunath (PW-4) in his cross examination stated that after receiving the information of death of Sheikh Mohd. Naqi he, next morning i.e. on 05.09.1980, after sunrise, arrived at Police Station Handia and there the body of Sheikh Mohd. Naqi was lying but nobody was present. Whereas, the testimony of

PW-8 Ameer Ali indicates that the body of Sheikh Mohd. Naqi was sent for post mortem in the night of 4/5.09.1980 immediately after the inquest report. Thus, there is material contradiction in the version of Jadunath (PW-4) and Ameer Ali (PW-8).

49. Admittedly, informant PW-1 (Nabi Baksh) had received information about the incident on 04.09.1980 at about 8.00 PM from Nurul Islam (PW-2) but, in spite of that, FIR was lodged at about 11.15 PM i.e. after more than three hours by tendering explanation that on receipt of information, he went to the spot to check. This throws a doubt as to whether the information received from PW-2 was convincing. It also creates a possibility that PW-2 left the deceased and when he could not find the deceased, PW-1 and PW-2 went in search of the deceased. Importantly, Nurul Islam (PW-2), who saw the incident at 6 to 6.30 PM, neither lodged the FIR nor promptly returned home to inform his father about the incident. Rather, he informed his father Nabi Baksh (PW-1) at about 8.00 PM i.e. after about two hours.

50. In **Mukesh and another Vs. State (NCT of Delhi) (2017) 6 SCC,** a three judges Bench of the Supreme Court, in para 50 of its judgment, observed as:-

"50. Delay in setting the law into motion by lodging of complaint in court or FIR at police station is normally viewed by courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors. Even a long delay can be condoned if the informant has no motive for implicating the accused."

51. Recently, a Division Bench of this Court in **Mukesh Tiwari Vs. State of U.P. 2021 (3) ADJ 446 (DB)** (in which one of us Manoj Misra, J. was a member), after noticing several judgments of Supreme Court, observed, in para 39 of its judgment, as follows:-

"39. It is well-settled position of law that delay in lodging the FIR does not make prosecution case improbable when such delay is properly explained, but a deliberate delay in lodging the FIR may prove fatal. In cases where there is a delay in lodging the FIR, the court has to look for a plausible explanation for such delay."

52. In the present case, PW-1 Nabi Baksh is the informant of the case, whereas, Nurul Islam (PW-2) is the eye witness. The eye witness, who witnessed the incident at about 6:00 pm did not lodge the report, and PW-1, who was informed about the incident at about 8:00 pm did not lodge the FIR till 11:15 pm when the distance between the place of occurrence and the police station is just 2 miles. This delay of about five hours in lodging the FIR from the time of the incident, casts a doubt on the prosecution case, especially when police station was hardly two miles from the place of incident.

53. Further, from the testimony of Investigating Officers and Jadunath (PW-4) and the omission of case details in the inquest report a strong possibility arises that the FIR of the present case was not lodged on 04.09.1980 at 11.15 PM, as alleged by the prosecution, but later and, therefore, could be ante-timed.

54. Further, there appears inconsistency between the Inquest Report and the post mortem report in respect of the injuries noticed on the body of the deceased. In the inquest report (Ex.Ka-4), dated 05.09.1980, the deceased had sustained as many as 15 injuries and that the head of the deceased was compressed. This condition of the body, as noticed in inquest report, finds support in the testimony of Nabi Baksh (PW-1), Nurul Islam (PW-2) and (PW-8) Ameer Ali, but this fact is denied by the doctor (PW-10), who conducted the post mortem, by stating in his cross examination that if such injuries existed, he would have noticed the same.

55. Although, ordinarily, where there is inconsistency in respect of the injuries mentioned in the inquest report with those in the post mortem report then the opinion of the doctor would prevail. But, in the present case, the number of injuries mentioned in inquest report are 15 in number while in post mortem report only five injuries were noted by the doctor. There is a huge difference in the number of injuries mentioned in the inquest report and post mortem report. Importantly, the ocular evidence also shows that the head of deceased was flattened i.e. compressed, which is totally denied by doctor Imam (PW-10), who conducted the post mortem. When we notice this inconsistency as also that details of case were not mentioned in the inquest report, while keeping in mind the statement of police witnesses that initially they had no clue that there existed a witness and that a dog squad was called for, it gives us a feeling that the prosecution has not come out with clean hands and that the case has been built on strong suspicion than evidence.

56. Now, we come to the testimony of Abdul Wahid (PW-3). Although, he is not an eye witness but he stated that he witnessed the accused persons including the surviving appellant no.1 (Gulab) near the spot when they were coming out from the Millet field (Jwar) on 04.09.1980 at or about the time of sunset while PW-3 was going towards Birapur with his friend Adbul Moin (not examined) to visit his niece, who was sick. This witness stated that he did not see Nurul Islam (PW-2) at that time. Nurul Islam (PW-2) also stated that he did not see Abdul Wahid (PW-3) and Abdul Moin (not examined) at the time of incident near the place of incident. As this witness is a chance witness, his testimony would have to be scrutinized carefully before acceptance.

57. The Apex Court in case of **Jarnail Singh Vs State of Punjab (2009) 9 SCC 719** observed that the evidence of a chance witness requires a very cautious and close scrutiny and the chance witness must explain his presence at the place of occurrence.

58. When we analyse the testimony of Abdul Wahid (PW-3), who is a chance witness, we find that his testimony does not inspire confidence. Although he tried to explain his presence at the spot with the explanation that he was going to Birapur to see his niece, namely, Bibbi, who was ill, but prosecution failed to produce Bibbi or any other witness in this regard, who could corroborate whether Abdul Wahid (PW-3) visited Birapur on 04.09.1980 at or about 6 to 6.30 PM. Even Abdul Moin, who accompanied Abdul Wahid (PW-3) to Birapur has not been examined by the prosecution. Otherwise also, the testimony of PW-3 does not inspire confidence because in ordinary course if he would notice men with arms emerging from a field, after they had left, the natural

reaction would be to check the spot from where they had emerged. Admittedly, according to the prosecution evidence, the body was not dragged deep into the standing crop and would have been visible from the Pagdandi. Hence, PW-3 could have easily spotted the body if he had been curious as would be the natural reaction under the circumstances. Thus, in our view, Abdul Wahid (PW-3) fails to inspire our confidence and his testimony is not worthy enough to lend credence to the eye witness account rendered by PW-2.

59. The upshot of the discussion made above, it appears to us that there was grave enmity between Sheikh Mohd. Naqi (deceased) and co-accused Ram Awadh and Ram Kripal, therefore, accused including the surviving appellant no.1 (Gulab) were implicated. Though, we are conscious of the law that merely on ground of enmity, the testimony of an eye witness cannot be discarded, if there is a ring of truth about it, but, in the present case, the entire prosecution case rests solely on the testimony of Nurul Islam (PW-2) who we find not wholly reliable. Therefore, in our considered view, the prosecution has failed to prove its case against the surviving appellant (Gulab) beyond reasonable doubt.

60. Consequently, the appeal is **allowed**. The judgment and order of conviction as well as sentence recorded by the trial court vide order dated 10.09.1985 passed by Special Judge/Additional Sessions Judge, Allahabad in Sessions Trial No. 43 of 1981, under Sections 302/34 IPC as against the surviving appellant (Gulab) is set aside. The appellant (Gulab) is acquitted of all the charges for which he has been tried. The appellant no.1 (Gulab) is reported to be on bail. He need not surrender, subject to compliance of provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court concerned at the earliest.

61. Let a copy of this order/judgment and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2022)02ILR A117
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 6167 of 2010

Mohd. Afzal @ Guddu & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.M.G. Asghar, Sri C.P. Mishra, Sri D.K. Mishra, Sri M.S. Akhtar, Sri Mewa Lal Shukla, Sri Mohd. Israr, Sri O.P. Mishra, Sri Prahlad Kumar Khare, Sri V.M. Zaidi

Counsel for the Respondent:
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Criminal Law - Indian Penal Code,1860 - Sections 302 r/w 34 - Arms Act, 1959 - Sections 25 & 27, - Code of Criminal Procedure, 1973 - Sections 161 & 313 - UP Gangsters and Anti Social Activities (Prevention) Act, 1986 - Sections – 2 & 3 - Indian Evidence Act, 1872 - Section 33 - Offence of Murder – Circumstantial Evidence - Examination of witnesses –incident took place in the intervening night about 03:00 AM when deceased was sleeping baithak – accused

person not named in the FIR but name of appellants came in the light through evidence of chance witnesses - no any direct evidence or eye witnesses regarding involvement of the accused appellants - chain of circumstantial evidence not completed and are not fully reliable on aforesaid reasons so as to believe that appellants could be only perpetrators of crime thus prosecution has failed to prove motive beyond all reasonable doubts – Accused appellants are entitled to be benefit of doubt. (Para – 25, 30, 32, 38, 39)

Appeal allowed, impugned judgment & order of Session Trial court is set aside. (E-11)

List of Cases cited:

1. Surinder Kumar Vs St. of Har. (2011 Vol. 10 SCC 173)

2. St. of H.P. Vs Gian Chand (2001 Vol. 6 SCC 7)

3. Anjan Kumar Sharma Vs St. of Assam (2017 vol. 14 SCC 359)

4. Sharad Birdhi Chand Sarda Vs St. of Mah. (1984 Vol. 4 SCC 116)

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard Sri Mewa Lal Shukla, learned counsel for the appellants, Sri A.N. Mulla, Additional Government Advocate on behalf of the State and perused the material on record.

2. The appellants have preferred the present criminal appeal aggrieved by the judgment and order dated 04.09.2010 passed by the learned Special Judge (Gangster Act)/ Additional Sessions Judge, Court No.5, Bulandshahr in Special Trial No. 683/2007, under Section 302/34 IPC, State vs. Mohd. Afzal @ Guddu and others, Police Station Gulawadi, District Bulandshahr, convicting and sentencing the appellants to undergo life imprisonment under Section 302/34 of IPC with a fine of Rs.10,000/- each, in default thereof, to undergo three months additional rigorous imprisonment.

3. The prosecution case is as follows:

4. The deceased Shafaqat Ali was sleeping in his baithak situated in the Village Chandpur, P.S. Gulawadi, District Bulandshahr in the intervening night of 31-1/1-2-2007. At about 3:00 am, on the basis of hearing the gun shot fire and hue and cry the neighbours reached on the spot and found that the father of the first informant Shafaqat Ali received a gun shot injury, complainant immediately rushed to him and proceeded to the District Hospital for treatment along with his brother Hasmat and his uncle Shahid and Rahat but he has succumbed to death in the way.

5. On the basis of the written report, the police registered a case as Crime No.30/2007, under Section 302 IPC and entry about registration of the case was made in the General Diary on 01.02.2007. Investigation of the case was taken over by the Sub-Inspector Samay Singh. He rushed to the spot and recorded the statement of the complainant Mukeet Ali and prepared the site plan.

6. During investigation, the Investigating Officer recorded the statements of the witnesses. After completing all formalities of investigation, he submitted the charge sheet (Exhibit Ka-16) against the appellants in the Court of Special Judge (Gangster Act), Bulandshahr, under Section 302 IPC and cognizance of offence was taken by the Court concerned.

7. Charge under Section 302/34 IPC and section 2/3 of Uttar Pradesh Gangsters

and Anti Social Activities (Prevention) Act, 1986 was framed by the Special Judge on 01.07.2008.

8. Charge sheet against Mohd. Afzal under Section 25/27 of Arms Act has been submitted before Chief Judicial Magistrate, Bulandshahr, cognizance taken by the Magistrate concerned, committed to the Court of Sessions Judge and thereafter transferred to the Court of Special Judge, (Gangster Act).

9. Charge under Section 25/27 of Arms Act has been framed against the accused Mohd. Afzal on 01.07.2008 by Special Judge, (Gangster Act), Bulandshahr. The accused-appellants pleaded not guilty and claimed to be tried. Special Trial No.639/2007 was consolidated and tried together with leading file Special Case No.683 of 2007.

10. In order to prove the charges framed against the appellants, the prosecution has examined the complainant Mukeet Ali, son of the deceased (P.W.-1), Wahid Ali, the brother of the deceased (P.W.-2), Dr. B.P.S. Kalyani (P.W.-3), Munfat Ali (P.W.-4), Shyam Singh, Sub Inspector Reader (P.W.-5), Dariyab Singh (P.W.-6), Harish Chand Josi (P.W.-7), Sub Inspector Samay Singh (P.W.-8), Sub Inspector Ashok Kumar (P.W.-9) and Sub Inspector Kunwar Singh (P.W.-10).

11. In documentary evidence, the prosecution has proved written report (Exhibit Ka-1), chik FIR (Exhibit Ka-2), gang chart (Exhibit Ka-9), spot map (Exhibit Ka-4), recovery memo (Exhibits Ka-5 and Ka-6), post mortem (Exhibit Ka-3), panchayatnama (Exhibit Ka-15), photo naash (Exhibit Ka-19), letter of R.I. (Exhibit Ka-15), letter of CMO (Exhibit Ka-17) sample seal (Exhibit Ka-18), charge sheet under section 302 IPC (Exhibits Ka-13 and Ka-14), recovery memo under Section 25 of Arms Act (Exhibit ka-7), chik FIR under Section 25 of Arms Act (Exhibit Ka-8), spot map under Section 25 of Arms Act (Exhibit Ka-2) general diary (Exhibit Ka-14), prosecution sanction (Exhibit Ka-22), charge sheet under section 25 of Arms Act (Exhibit Ka-21).

12. In the statement recorded under Section 313 Cr.P.C., the accused appellants have stated that they have been falsely implicated in the present case due to enmity of Pradhani and recovery was false and in defence no evidence has been adduced by the accused.

13. Eye witness P.W.-1, the complainant Mukeet Ali, son of the deceased, who is an Advocate has stated in his examination-in-chief that in the intervening night of 31.01./01.02 of 2007, I was sleeping at my home and my father Safaqat Ali was sleeping alone in his baithak. At about 3:00 am, sound of fire arm was heard. On this, neighbourers and I alongwith others reached the baithak and saw that there was a big wound on the head of my father and blood was oozing out. I alongwith my brother Hasmat, uncle Shahid, Rahat took out father to the District Hospital for treatment but near Village Jainpur, my father died. We returned to our home with the dead body of my father and saw that near the cot of my father, there was a piece of paper, in which something was written regarding murder of my father with intent to misguide us. This piece of paper is proved as material Exhibit-1. I have handed over this piece of paper to the Investigating Officer. I wrote a report myself. After panchayatnama and post mortem, the police handed over the dead

body of my father to me for cremation. In the meantime, Parvez, Wahid and my brother Hasmat told me that Mohd. Afzaal, who is a jhola chaap doctor, used to practice near my baithak. Wife of Rahat Ali was ill and Afzal used to visit the house of my uncle for treatment. Afzal used to tease Sultana, the daughter of Rahat Ali. My father opposed this. Accused Iqbal, brother of Afzal is a criminal and both threatened my father prior to the incident and also threatened to kill him. We have not taken this threatening seriously. Pravez also told me that on 31.01/01.02 of 2007, in the intervening night, he was going to the house of Master Niaz Mohd. He saw that Afzal and Iqbal were coming from my baithak, Afzal had taken a country made pistol in his hand and both were full of fear. He asked them to stop but they had not given any reply. Munfat Ali also told me that in the night, he had gone for urinal, then he saw Iqbal and Afzal going towards the baithak of informant. Afzal took out country made pistol and both murdered Parvez. He had seen them at the place of occurrence in committing the murder of my father. Parvez has given statement before the police but Parvez was murdered on 06.02.2007.

14. P.W.-2 Wahid Ali, brother of the deceased had deposed on oath that his brother Safakat Ali was sleeping in his baithak. In front of his baithak, Afzal used to practice in his clinic. Rahat Ali is my younger brother and wife of Rahat Ali was ill and for treatment of wife of Rahat Ali, Afzal used to visit at his residence. Rahat Ali has a daughter, aged about 22 years. Afzal used to tease her. Shafaqat intervened in this matter. About 3 to 4 days prior to the incident, Shafaqat Ali threatened Afzal and there were hot talk between them. Afzal and his brother Iqbal threatened to kill Shafaqat Ali but we have not taken this threatening seriously and for this reason, accused committed the murder of my brother Shafaqat Ali.

15. P.W.-3 Doctor V.P.S. Kalyani had conduced the post mortem of the deceased Shafaqat Ali on 01.02.2007 at 3:10 pm. As per the opinion of the Doctor, the possibility of death of the deceased was about half of a day prior to the date of postmortem. The deceased was of normal stature and his eyes and mouth was closed. After death of the deceased, stiffness was present on the body of the deceased. On internal examination of the deceased, the doctor opined that the deceased died due to shock and haemorrhage due to ante mortem injuries.

16. Following ante-mortem injuries were found on the body of the deceased:

"1. Fire arm wound of entry 10 cm x 4 cm, brain cavity deep on right head 5 cm above from right ear. B/T not present margin inverted bones under found badly fractured.

2. Contused swelling 3 cm x 1.5 cm on right eye.

3. Multiple fire arm wounds in an area 8 cm x 4 cm on back of inner aspect of right fire arm middle part margins of all wounds are inverted.

Blackening and tattooing present in an area 10 cm x 5 cm around the wounds on exploration. 8 small pellets recovered from wounds. Sizes of wounds vary from 05 cm x 3 cm to 03 cm x 02 cm."

17. P.W.-4 Munfat Ali had deposed on oath that I know accused Afzal and Iqbal. Afzal had relation with the daughter of Rahat Ali. Shafaqat Ali was elder brother of Rahat Ali. There was hot talk prior to four

days from the date of incident among Afzal, Shafaqat Ali and Iqbal Ali. Both threatened to Safaqat Ali to kill. On 31.01/01.02 of 2007 at about 12:00 pm, I was doing urinal out of my house, I saw in the light of torch and bulb that Afzal and Iqbal were coming towards baithak of Safaqat Ali. I identified them. Afzal had taken a country made pistol in his hand. Thereafter I slept. In the morning it came to my notice that Safaqat Ali was murdered. I have full confidence that Afzal and Iqbal had committed the murder of Safaqat Ali.

18. P.W.-5 S.I. Shyam, a formal witness, has proved chik FIR (Exhibit Ka-2), he was the Investigating Officer of the case. He had prepared spot map and proved it as Exhibit Ka-4. He had also proved recovery memo of blood stained and simple earth as Exhibits Ka-5 and Ka-6. He had also proved the statement of Pravez as Exhibit Ka-6. This witness also proved recovery memo of ala-katal country made pistol, cartridges and recovery memo as Exhibit Ka-6.

19. P.W.-6, Constable Dariyab Singh had proved chik FIR as Exhibit Ka-2 and General Diary as Exhibit Ka-10 and on the basis of gang chart section 2/3 of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 has been added in the general diary, which is proved as Exhibit Ka-11.

20. P.W.-7 Harish Chandra Joshi, Investigating Officer of the case had filed the charge sheet, which is proved as Exhibit Ka-12.

21. P.W.-8 S.I. Samay Singh was also part of the investigation of the case and he had also filed charge sheet against Iqbal and proved it as Exhibit Ka-14.

22. P.W.-9 S.I. Ashok Kumar had prepared panchayatnama and proved it as Exhibit Ka-15. He also prepared recovery memo of spot stained and simple earth and proved them as Exhibits Ka-5 and Ka-6. This witness also proved letter of R.I. and letter of C.M.O., sample seal, challan laash and photo naash as Exhibit Ka-6. He also proved bundle (pulinda) as material Exhibit Ka-1, country made pistol as material Exhibit Ka-2, cartridges as material Exhibit Ka-3, empty cartridges as material Exhibit Ka-4 and polythin as material Exhibit Ka-5 and report of the FSL as material Exhibit Ka-6.

23. P.W.-10 S.I. Kunwar Singh, the Investigating Officer of the case filed charge sheet under Section 25/27 of Arms Act. He prepared spot map of the recovery and proved it as Exhibit Ka-20 and proved the charge sheet as Exhibit Ka-21. He has also proved prosecution sanction as Exhibit Ka-22.

24. So far as the FIR is concerned, as per the prosecution case, the incident took place in the intervening night of 31.1/01.02 of 2007. FIR was lodged on 01.02.2007 at 10:00 am. Police Station is about 10 km far from the place of the occurrence. Complainant is an Advocate, he tried his best for the treatment of his father but on the way, he died. He alongwith other returned back to the home and FIR was lodged after seven hours from the time of the incident against unknown accused. It means that at the time of lodging of the FIR, entire facts were not in the knowledge of the complainant. The complainant has no suspicion against the accused at the time of lodging of the FIR. Thus from the facts and circumstances, it is clear that FIR has been lodged promptly without consultation and the complainant had full opportunity to

name the accused at the time of the lodging of the FIR but has not done so, which shows his bona fide.

25. There is no direct ocular evidence regarding the involvement of the accused appellants in the crime. The case of the prosecution is on the basis of circumstantial evidence. Factors has to be taken into account in adjudication of cases on circumstantial evidence as laid down by the Apex Court in **Anjan Kumar Sharma vs. State of Assam (2017 14 SCC 359) and in Sharad Birdhi Chand Sarda vs. State of Maharashtra, 1984 (4) SCC 116.**

26. Five golden principles as laid down in the case of **Sharad Birdhi Chand Sarda (Supra)**, are as follows:

"(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 and another vs. State of Maharashtra 1973 2 SCC 793 where the observations were made :

(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) 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."

27. The first circumstance relied by the trial Court is that accused Afzal is a jhola chaap doctor. His shop is in front of baithak of Shafaqat Ali. Rahat Ali is the brother of the deceased. His wife was ill and accused Afzal used to tease Sultana, daughter of Rahat Ali. Shafaqat Ali opposed this. There was altercation between Afzal and deceased Shafaqat Ali, prior four days of the incident. Afzal threatened Shafaqat Ali to kill him. It relates to motive.

28. It is a case of a circumstantial evidence. There is no eye witness of the alleged incident. Later on, prosecution had developed a motive for the incident that Afzal was a jhola chhap doctor and was treating the wife of Rahat Ali. Rahat Ali has a daughter, named Sultana aged about 22 years old and with her he developed a relationship or he began to tease Sultana as stated by P.W.-2 and P.W.-4 but no report regarding teasing Sultana has been filed by her father, Rahat Ali, his wife and his daughter against the appellant accused Afzal. Rahat Ali, his wife and his daughter Sultana are the best witnesses for proving the motive but the prosecution had not examined any of them to prove the motive. Thus, in the absence of best witnesses, it will be deemed that prosecution had failed to prove the motive of the incident. It is also alleged that there was hot talk between Safaqat Ali and Afzal prior to 4 days from the incident in which Afzal Ali had threatened Safaqat Ali to kill but no FIR has been lodged on this aspect and even this fact has not come in the knowledge of the complainant at the time of the lodging of the FIR. Although, he was advocate. It is

very common that in the night when Advocate was present in the home, such sort of threatening incident, would normally be communicated to him but the threatening by the accused to father of the complainant is not in the knowledge of the complainant, which also shows that there was no threatening and no teasing by the accused appellants. In case of circumstantial evidence, the motive plays a very important role.

29. It is also pertinent to mention here that in the statement recorded under Section 161 Cr.P.C., the complainant had also not given such statement that accused Afzal has an illicit relationship with Sultana and also not stated that Munfat Ali and Parvez had told about this. This fact has not been told by him that accused has given threatening to kill Safaqat Ali prior four days from the date of incident. This fact was stated in the statement of Investigating Officer P.W.-5 at page-8 in his cross-examination. The factum of the motive has not been stated in the written report.

30. It is also stated that the complainant generally lives in the city and occasionally lives in the village so he was not aware of the motive. This submission is not tenable because the appellant Afzal is an Advocate and he is much aware about his family and village. Thus, the evidence on the point of motive by P.W.-1 is an improvement on the basis of evidence of P.W.-2 and P.W.-4, whereas the best witness of motive has not been produced. Although, they were present and also closely related to the complainant. This fact will be against the prosecution. Thus, the prosecution has failed to prove motive beyond all reasonable doubt against the accused appellants. Thus, the first circumstance relied upon by the trial Court is not proved.

31. The second circumstance is that Mohd. Pravez at about 3:00 to 4:00 am in the night was going at the house of Master Niaz and he saw that Afzal and his brother Iqbal was coming with fast paces with fear in mind. Afzal was carrying a country made pistol in his hand. It is submitted that statement of Pravez has been recorded by the Investigating Officer on 03.02.2007. Thereafter the accused persons killed Parvez. Parvez also told the complainant about this fact that he saw accused persons going in fast paces after the incident and Afzal was carrying a country made pistol in his hand. The Investigating Officer also proved the statement of Parvez recorded under section 161 Cr.P.C. as Exhibit Ka-6 but Parvez has not told this fact to the complainant before lodging of the FIR. The name of Parvez has not been shown as a witness in the FIR. The trial Court had relied on the statement of Parvez, which is in Exhibit Ka-06 with the help of Section 33 of Indian Evidence Act.

32. Section 33 of Indian Evidence Act, reads as under:

"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it,is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which is states, when the witness is dead of cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his present cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided *- that the proceeding was between the same parties or their representatives in interest;*

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation *- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."*

33. It is crystal clear in the catena of judgement that statement of the witness recorded under Section 161 Cr.P.C. does not fall within the ambit of evidence. Such evidence is only for confrontation in cross-examination. The statement of witness recorded under Section 161 Cr.P.C., being wholly, inadmissible in evidence, cannot be taken into consideration. An investigation is not a judicial proceeding. Opportunity to cross-examine the chance witness Parvez has not been given to the accused. There are not two proceedings between same the parties in this case and no question that issues were substantially the same in the first as in the second proceeding. Witness Parvez is not an injured persons or a complainant, so his statement has no relevance in the present facts and circumstances of the case. The incident took place in the season of winter at about 3:00 to 4:00 am and for what purpose, chance witness Parvez was going at the house of Master Niaz Mohd, is not disclosed by this witness in the statement recorded under Section 161 Cr.P.C.. To prove this fact, Master Niaz Mohd. should have been examined but he has not been examined. Thus, the statement of Parvez recorded under Section 161 Cr.P.C. is not relevant or admissible under Section 33 of Indian Evidence Act. Thus, the second circumstance relied by prosecution, is also not proved.

34. The third circumstance is that P.W.-4 Munfat Ali, awoke for urinal and went out of his house at about 12:00 to 1:00 pm and saw that Afzal and Iqbal were going towards baithak of Safaqat Ali. Afzal was carrying a country made pistol in his hand. He saw them in the light of torch and bulb. But in the cross-examination, this witness has stated that I had not told about bulb light to the Investigating Officer and also not produced the torch to the Investigating Officer and also told that my house is 100 meters far from the baithak of Safaqat Ali. House of Abrar Khan and Abid Khan is between my house and baithak of Safaqat Ali. This witness has deposed that there was a country made pistol in the hand of Afzal. This statement is not reliable because generally while committing the crime, the accused does not show the incriminating weapons to persons 100 meters away from the place of offence. He will naturally hide the weapon in his clothes. It is also not probable that after committing the crime, the accused left the place of occurrence at 3:00 am, brandishing country made pistol in his hands, as stated by Parvez. Thus, the statement of this witness has no relevance who is simply a chance witness. Thus, the third circumstance is not also tenable.

35. The last circumstance is that incriminating weapon country made pistol 12 bore, empty cartridges and one live cartridge have been recovered on the pointing out of the accused Afzal. The trial Court has not relied on this point and disbelieved the recovery from the accused Afzal under Section 27 of the Indian Evidence Act.

36. In cross-examination, the complainant P.W.-1 has stated that Parvez and Munfat Ali told everything in the evening of the date of the incident. What Munfat and Pravez told me, I narrated all the facts to the Investigating Officer but if all the facts has not been mentioned in my statement, I could not tell the reason.

37. Contrary to this, P.W.-4 Munfat Ali had deposed in his cross-examination that I told about the incident to Mukeet Ali after third day of the incident, after azal-mazal (a muslim ritual). He had not shown the torch to the Investigating Officer. There was no report with regard to the hot talk between Shafaqat Ali and accused. Thus, there is contradictions in the evidence of above two witnesses. Evidence of P.W.-1 is not corroborated by the evidence of P.W.-4. A parcha has also been annexed with the FIR in which it has been stated that "Shafaqat Ali used to complain about me with my uncle at his baithak, so I planned the murder by giving Rs. 2 lakhs to the out sider criminals. Wakeel and Niaz Mohd. would be murdered by out sider criminals for which, I shall pay Rs. 4 lakhs but the date of death is not soon. I have relation with criminals who belongs to Lucknow." This piece of paper was found under the quilt of deceased. For this piece of paper, P.W.-1 has stated that this paper has been given with intent to misguide the investigation. This paper is proved by P.W.-1 but it has no relevance with the present murder. P.W.-1 has not shown the names of Babbar, Anwar, Abid and Liyaqat in the FIR, who reached on the spot.

38. The accused had stated in their statements recorded under section 313 Cr.P.C. that they have been falsely implicated in the present case due to election of Pradhani. Shanawaz won the election. Hasmat, complainant had threatened for dire consequence. Due to that enmity, accused has been falsely roped. No witness has been examined to prove the said defence of the accused.

39. No doubt the death of the deceased Shafaqat Ali took place in a most unfortunate manner by fire arm head injury, but that itself is not sufficient. The prosecution has to establish beyond reasonable doubt person being prosecuted is guilty of the crime. From the evidence on record, it is apparent that appellants are not named in the FIR but the name of the appellants came in light through the evidence of chance witnesses. The evidence of P.W.-1, P.W.-2 and P.W.-4 is not fully reliable on the aforesaid reasons. Their evidence would not lead us to believe that appellants could be only perpetrators of crime. The chain of circumstantial evidence is not complete and do not lead to the conclusion that in all human probability, the murder must have been committed by the appellants only. Thus, prosecution has failed to prove its case beyond all reasonable doubts that accused Afzal @ Guddu and Iqbal had committed the murder of Shafaqat Ali at the time, place and in the manner as alleged by the prosecution. It would indeed be unsafe to convict the appellants based on the testimony of circumstantial evidence. They would certainly be entitled to be benefit of doubt which is created by the very circumstances which we have referred.

40. Appellants Afzal @ Guddu and Iqbal are acquitted by the trial Court for the charge under Section 3 (1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention), Act. Accused Afzal @ Guddu is also acquitted under Section 25/27 of Arms Act by the trial Court.

41. For the aforementioned reasons, the appeal is **allowed** and the judgment and order dated 04.09.2010 passed by the learned Special Judge (Gangster Act)/ Additional Sessions Judge, Court No.5, Bulandshahr in Special Trial No. 683/2007, under Section 302/34 IPC, State vs. Mohd. Afzal @ Guddu and others, Police Station Gulawadi, District Bulandshahr for convicting and sentencing the appellants to undergo life imprisonment under Section 302/34 of IPC, is hereby set-aside.

42. The appellants Afzal @ Guddu and Iqbal are acquitted for the charges under Section 302/34 IPC. They shall be set at liberty forthwith, if not required in any other case.

43. Office is directed to send copy of this judgment alongwith original record to the Court concerned for necessary action and compliance in accordance with law.

(2022)02ILR A126
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.11.2021

BEFORE

THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 7220 of 2019

Ajay Singh Chauhan ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ram Vishal Mishra, Sri Bala Nath Mishra, Sri Sanjay Kumar Singh

Counsel for the Respondent:
A.G.A., Sri Purushottam Mani Tripathi

Criminal Law - Indian Penal Code,1860 - Sections 498-A & 304-B – Dowry Prohibition Act, 1961 – Sections – 2, 3 & 4, Criminal Procedure Code, 1973 - Section 313 – Indian Evidence Act, 1872 - Section – 113 B - Appeal against conviction - Examination of accused - Demand of dowry - Daughter of informant was married to accused-appellant - After marriage accused-appellant and his other family members started harassing victim in demand of dowry – inability of paying dowry - She was continuously harassed and humiliated - Victim used to inform the entire story to her parents on telephone - It was also informed by her that accused-appellant and his family members took out ornaments from her almirah.

Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 304-B – Dowry Prohibition Act, 1961 – Sections 2, 3 & 4 - Criminal Procedure Code, 1973 - Section 313 – Indian Evidence Act, 1872 - Section – 113 B - Appeal against conviction - Examination of accused - Demand of dowry – witnesses withstood lengthy cross-examination but noting adverse could be recorded - so as to disbelieve their testimonial statements.

Criminal Law - Indian Penal Code,1860 - Sections 498-A & 304-B – Dowry Prohibition Act, 1961 – Sections –2, 3 & 4, Criminal Procedure Code, 1973 - Section 313 – Indian Evidence Act, 1872 - Section – 113 B - Appeal against conviction - Examination of accused - Demand of dowry – proper appreciation of evidence - once all the essential ingredients are established by the prosecution – presumption under section 313-B of Evidence Act, mandatorily operates against the accused.

Criminal Law - Indian Penal Code,1860 - Sections 498-A, 304-B – Dowry Prohibition Act, 1961 – Sections 2, 3 & 4, Criminal Procedure Code, 1973 - Section 313 – Indian Evidence Act, 1872 - Section – 113 B - Appeal against conviction – question of appropriate sentence is depends upon the facts and circumstances of each case, nature of offence and manner – punishment should be proportionate to gravity of offence – Trail court

awarded punishment fit and proper.(Para – 12, 13, 21, 22, 24, 25, 26, 28, 29)

Appeal Dismissed. (E-11)

List of Cases cited:

1. Satbir Singh & anr. Vs St. of Har. (Criminal Appeal No. 1735-1736/2010, decided on 28.05.2021)

2. Jatinder Kumar Vs St. of Har. (Criminal Appeal No. 1850/ 2020, decided on 17.12.2019)

3. Sampath Kumar Vs Inspector of Police, Krishnagiri (2012 vol. 4 SCC page 124)

4. Smt. Shamim Vs State of (NCT of Delhi) (Criminal Appeal No. 56 of 2018, decided on 19.09.2018)

5. Rajinder Singh Vs St.of Punj. (2015 vol. 6 SCC page 477)

6. Sumer Singh Vs Surajbhan Singh & ors. (2014 vol. 7 SCC page 323)

7. Sham Sunder Vs Puran (1990 Vol. 4 SCC 731)

8. MP Vs Saleem (2005 Vol. 5 SCC page 554)

9. Rajiv Vs State of Raj., (1996 vol. 2 SCC page 175)

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

1. By this criminal appeal, accused-appellant Ajay Singh Chauhan has challenged the judgement and order dated 09.10.2019 passed by Additional Session Judge / Special Judge (Anti Corruption) Court No. 4, Varanasi in Session Trial No.319 of 2015 (State of U.P. vs. Ajay Singh Chauhan), arising out of Case Crime No.174 of 2015, under Sections 498-A, 304-B I.P.C. and Section 4 Dowry Prohibition Act, Police Station Rohaniya, District Varanasi by which accused-appellant has been convicted and sentenced 10 years rigorous imprisonment under Section 304-B I.P.C., 2 years rigorous imprisonment under Section 498-A I.P.C. with fine of Rs. 2,000/- and 2 years rigorous imprisonment with fine of Rs. 2,000/- under Section 4 Dowry Prohibition Act with default clause.

2. According to prosecution case, Smt. Chanchal Singh daughter of informant was married to accused-appellant Ajay Singh Chauhan on 06.12.2013. After the marriage everything was OK for six months but later on, accused-appellant and his other family members started harassing victim in demand of dowry. She was asked to take Rs.2,00,000/- from her father to which she expressed her inability to bring money in dowry on the ground that her younger sister is to be married. She was continuously subjected to cruelty. Victim used to inform the entire story to her parents on telephone. It was also informed by her that accused-appellant and his family members took out the ornaments from her almirah. On 19.04.2015 at about 4:00 P.M., informant came to know that her daughter committed suicide. When he reached the house of accused-appellant, he saw that his daughter died. There was no rope in the room.

3. P.W.-1, Vijay Singh Chauhan informant, presented a written tehrir Ex.Ka-2 before the police station concerned whereupon Chick F.I.R. Ex.Ka-10 was drawn by constable Shri Prakash Singh and entry of case was made in general diary, copy whereof is Ex.Ka.11.

4. Inquest was done over the dead body of Smt. Chanchal Singh. Inquest report Ex.Ka.-2 was drawn by Officer concerned P.W.-4 Anand Kumar Kannajiya, Nayab Tehsildar and dead body was sent to mortuary for post-mortem along with relevant papers thereto.

5. Post-mortem was done by P.W.-3 Dr. Satya Prakash over the dead body of Smt. Chanchal Singh. Doctor prepared post mortem report Ex.Ka.-3, noting ante-mortem injuries found on the person of victim. According to doctor death of victim was found due to asphyxia as a result of ante-mortem hanging.

6. P.W.-5 Mukesh Chandra Uttam, Investigating Officer under took the investigation, visited the spot, prepared site plan, recorded the statements of witnesses and P.W.-6 Ram Sewak, after completing entire formalities of investigation, submitted charge-sheet, Ex.Ka-9 against the accused-appellant before the competent court.

7. Case, being exclusively triable by Court of Sessions, was committed to Session Court which came to be transferred to the Court of Additional Sessions Judge, Court no. 14, Varanasi who framed charges against the accused-appellant under Sections 498-A, 304-B I.P.C. and Section 3/4 Dowry Prohibition Act to which the accused denied and claimed to be tried.

8. In order to substantiate its case, prosecution examined as many as seven witnesses, out of whom PW-1 and P.W. 2 are the witnesses of fact and rest are formal witnesses.

9. On closure of prosecution evidence statement of accused-appellant under Section 313 Cr.P.C. was recorded by Court explaining all incriminating circumstances and other evidence. Accused denied prosecution story in toto and all formalities of investigation were said to be wrong. He claimed false implication. Suicidal death was claimed.

10. Trial court on appreciation of evidence adduced before it, found the accused-appellant guilty and convicted and sentenced the accused-appellant as stated above.

11. I have heard Sri Sanjay Kumar Singh, learned counsel for the appellant, Sri Purushottam Mani Tripathi, learned counsel for the informant and learned AGA for the State at length and perused the record.

12. Learned counsel for the appellant submits that admittedly, Smt. Chanchal Singh died within seven years of her marriage under the abnormal circumstances. She committed suicide but appellant is not responsible for her suicide. There is no motive to accused-appellant to commit the crime with the deceased. He further submitted that entire witnesses adduced by prosecution are not the eye witness. There is no evidence that she has been subjected to cruelty in demand of dowry, hence no presumption under Section 113-B of Indian Evidence Act or Section 304-B I.P.C. is made out against the accused-appellant. He further argued that it has come in evidence that before her death, victim went to her parental house where she was humiliated by her brother and sister-in-law (Bhabhi), due to which she got frustrated and on returning to her matrimonial house, she decided her life to end and committed suicide. He further submitted that when appellant entered in her room, he saw her dead body hanging and lowered it. She was taken to hospital and he informed her father. If he had committed any crime, he would not have informed the informant. There is material contradiction in the statement of witnesses so as to disbelieve the prosecution story. As per statement of informant, money is said to have been demanded for business

purpose which does not come under the purview of Dowry Prohibition Act. Unless money is demanded in the shape of dowry. No presumption under Section 304-B I.P.C. is made out. He further argued that if criminal appeal fails on merit, he should be dealt with sympathetically and his sentence deserves to be reduced to the extent of period already served by him in jail. The accused-appellant is in jail for more than six years. Learned counsel for the accused-appellant placed reliance upon the judgement of Hon'ble Supreme Court in the case of **Satbir Singh and another vs. State of Haryana** in Criminal Appeal No. 1735--1736 of 2010 decided on 28.05.2021.

13. On the other hand, learned AGA as well as learned counsel for the informant opposed the appeal and submitted that Smt. Chanchal Singh was married to accused-appellant in the year, 2013. After her marriage, she was harassed and subjected to cruelty in demand of dowry soon before her death. She committed suicide by hanging herself and died within 7 years of her marriage. Accused-appellant deserves no sympathy. Death of victim, under the abnormal circumstances within 7 years of her marriage, is an admitted fact. Learned AGA as well as counsel for the informant relied upon the judgement of Hon'ble Supreme Court in the case of **Jatinder Kumar vs. State of Haryana** in Criminal Appeal No. 1850 of 2020 decided on 17.12.2019.

14. At the outset, it is pertinent to analyze the law on dowry death.

Section 304-B IPC, which defines, and provides the punishment for dowry demand, reads as under:

"304-B. Dowry death. --(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death', and such husband or relative shall be deemed to have caused her death.

Explanation. --For the purpose of this sub-section, "dowry' shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life." Section 304-B (1) defines "dowry death' of a woman. It provides that "dowry death' is where death of a woman is caused by burning or bodily injuries or occurs otherwise than under normal circumstances, within seven years of marriage, and it is shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband, in connection with demand for dowry. Sub-clause (2) provides for punishment for those who cause dowry death. Accordingly, in Major Singh v. State of Punjab, (2015) 5 SCC 201, a three Judge Bench of Apex Court held as follows:

"10. To sustain the conviction under Section 304-B IPC, the following essential ingredients are to be established:

(i) the death of a woman should be caused by burns or bodily injury or otherwise than under a "normal circumstance';

(ii) such a death should have occurred within seven years of her marriage;

(iii) she must have been subjected to cruelty or harassment by her husband or any relative of her husband;

(iv) such cruelty or harassment should be for or in connection with demand of dowry; and

(v) such cruelty or harassment is shown to have been meted out to the woman soon before her death."

15. Now, considering the entire evidence, prosecution witnesses and other evidence, admittedly, it transpires that deceased was married to accused-appellant in the year, 2013. She died in the year, 2015 i.e. within 7 years of her marriage under the abnormal circumstances. She committed suicide by hanging herself in her matrimonial house and accused-appellant is her husband.

16. Only question remains for consideration in the present appeal is, "whether Smt. Chanchal Singh was harassed after her marriage and she was subjected to cruelty in demand of dowry soon before her death or not".

17. P.W.-1 Vijay Singh Chauhan, who happens to be the father of deceased deposed in his examination-in-chief before the trial court that his daughter Smt. Chanchal Singh was married to accused-appellant Ajah Singh Chauhan in the year, 2013. After her marriage, she was demanded dowry to the tune of Rs.2,00,000/- by her husband and her in-laws. When she showed her inability of paying dowry, she was harassed and humiliated. She was not provided food and accused-appellant harassed her. Entire story of harassment was narrated by her whenever she came to her parental house. She was continuously harassed and given threat that if she does not meet the demand, she would not survive. On the fateful day i.e. 19.04.2015, accused-appellant Ajay Singh Chauhan made a call on his mobile and informed that Smt. Chanchal committed suicide. He reached there along with other family members and saw that his daughter Smt. Chanchal Singh was lying dead and there was no rope. When he inquired regarding the incident, found no response. Thereafter, he went to police station concerned and got F.I.R. registered.

18. P.W.-2 Jai Prakash Singh, brother of deceased deposed that his younger sister Smt. Chanchal Singh was married to accused-appellant Ajay Singh Chauhan in the year, 2013 according to Hindu rites. In her marriage sufficient dowry was given but her husband and her in-laws were not satisfied with the dowry given in the marriage. Everything was OK for six months after her marriage but later on they started demand of dowry to the tune of Rs.2,00,000/- on the pretext that service of her husband in Dehradoon was over. He has to deal with business. When her sister Smt. Chanchal Singh came to her parental house on the occasion of Bhaiduj, she told that her husband and other members of in-laws were demanding the dowry to a tune of Rs.2,00,000/- and if it is not given, they will not leave her alive. Accused-appellant started beating and harassing her. Ornaments of victim was also taken from her. Due to harassment given by accused-appellant, she committed suicide by hanging herself in her in-laws house.

19. P.W.-3, Dr. Satya Prakash conducting post-mortem over the dead body of Smt. Chanchal Singh, deposed that he was posted as Medical Officer in Pt. Deen Dayal Upadhyay, Sadar Hospital, Varanasi and conducted the post-mortem of Smt. Chanchal Singh. He prepared the post-mortem report Ex. Ka-3 and found ante-mortem ligature mark measuring 32 cm. X 1.5 cm around the neck and two

contusions on her body. He noted the injuries in post-mortem report. According to doctor, death of victim was possible one day before from post-mortem. The injury no. 1 found on the person of deceased was responsible for causing her death.

20. The witnesses withstood lengthy cross-examination by defence but nothing adverse could be brought on record so as to disbelieve their testimonial statements. Certainly, there are minor contradictions in the evidence of witnesses but they are not of such nature which could blemish the truthfulness of their statements.

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

22. We should not lest forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision of Apex Court (3 Judges) in Criminal Appeal No. 56 of 2018, ***Smt. Shamim v. State of (NCT of Delhi), decided on 19.09.2018.***

23. In the case of **Rajinder Singh vs. State of Punjab (2015) 6 SCC 477,** it was held that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise.

24. When the prosecution shows 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', a presumption of causation arises against the accused under Section 113-B of the Evidence Act. Thereafter, the accused has to rebut this statutory presumption. Section 113-B, Evidence Act reads as under:

"113B. Presumption as to dowry death--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation. - For the purpose of this section, "dowry death" shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 1860)"

25. Therefore, once all the essential ingredients are established by the prosecution, the presumption under Section 113-B, Evidence Act mandatorily operates against the accused. This presumption of causality that arises can be rebutted by the accused.

26. In the present appeal deposition of prosecution witnesses about torture and demand for dowry made by appellant have been believed by the Trial Court. Both P.W.-1 and P.W.-2 have narrated the facts which would constitute demand of dowry as also inflicting cruelty and torture upon

the deceased victim. Such consistent stand of these two witnesses cannot be said to have been overshadowed. It is a finding on fact upon proper appreciation of evidence. I do not find any major contradiction in the statements made by P.W.1 and P.W.2 on demand of dowry subjecting the deceased to cruelty. They stuck by their statements in cross-examination. From their depositions, a link can be established between such acts of the appellant and death of the deceased victim. Once these factors are proved, presumption rests on the accused under Section 113-B of the Indian Evidence Act, 1872. The appellant attributed suicide of the victim due to depression on account of her neglection in parental house within a short spell of time. Though the factum of depression has been tried to be established from the side of appellant, there is no corroboration of such a depressive state of mind of the deceased. Trial Court rejected his defence. P.W.-1 father of the deceased, and also P.W.2 brother of deceased have proved the demand for dowry. This version has run consistently from the statement forming the basis of F.I.R. to deposition stage and I do not think the Trial Court had come to such conclusion in a perverse manner.

27. So far as sentence of accused-appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

28. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: ***Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].***

29. Hence, applying the principles laid down in the aforesaid judgment and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which offence was executed or committed, I find that punishment imposed upon accused-appellant-Ajay Singh Chauhan by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no question arises to interfere in the

matter on the point of punishment imposed upon him.

30. In view of above discussion, the appeal lacks merit and is accordingly **dismissed.**

31. Certify the judgement along with the lower court record to the court concerned for compliance.

(2022)02ILR A133
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Misc. Writ Petition No. 6403 of 2021

Anil Kumar Rathore ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vivek Prakash Mishra, Meenakshi Sharma, Sri Anoop Trivedi

Counsel for the Respondents:
A.G.A, Ms. Priyanka Midha, Sri Ram M. Kaushik, Sri Dileep Kumar

A. Indian Penal Code,1860 - Sections 193,194 & 195 .- **Quashing of F.I.R.** – The 'judicial proceeding' within the meaning of Cr.P.C. does not include the proceeding of investigation before a Police Officer as the evidence before a Police Officer is not taken on oath.

B. Only the material that has come before the court during enquiry or trial which is required to be proved according to law of evidence can be said to be evidence within the meaning of Section 195 I.P.C.

C. Neither the St.ment recorded by Police Officer u/S 161 nor the police diary prepared u/S 172 Cr.P.C. of Chapter XII can be read in evidence before a court of law. Even a St.ment u/S 164 Cr.P.C. cannot be read as substantive evidence and has only corroborative value.

D. An investigation preparatory to a trial by a Magistrate would be a stage of a judicial enquiry in view of Illustration 2 Explanation 2 to section 193 I.P.C., while a police investigation preparatory to a Magistrial enquiry for commitment would not.

E. The St.ments recorded at the stage of police investigation are not permitted to be treated as evidence at the trial under Cr.P.C. and Indian Evidence Act and thus such St.ments cannot be made basis to frame charge for offences u/Ss 193, 194,195 I.P.C. Similarly any electronic or documentary evidence produced before a Police Officer alleged to contain a false St.ment, false entry cannot be made basis for conviction for an offence u/S 193, 194,195 I.P.C. unless and until such evidence is produced before a court of law during the course of enquiry or trial and is proved or exhibited as a documentary evidence.

Writ Petition dismissed. (E-12)

List of Cases cited:

1. Hardeep Singh Vs St. of Pun. & ors. AIR 2014 SC 1400

2. Ashok Pratap Rai Vs St. of U.P. & ors. Criminal Misc. Writ Petition No. 2500/2016

3. Shamsul Qamar Vs St.of U.P. (1995)4 SCC 430

4. Haji Mohd. & anr. Vs St. Rep. by the Inspector of Police, Koradacheri Police Station, Tiruvarur District 2019(1) MLJ(Criminal) 464

5. Maharashtra St. Electricity Distribution Company Ltd. & anr. Vs Datar Switgear Ltd. & ors. (2010)10 SCC 479

6. Perumal Vs Janki (2014)5 SCC 377

7. Pandurang Chandrakant Matre Vs St. of Mah. (2009)10 SCC 773

8. M/s Niharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. AIR 2021 SC 1918

9. R.P. Kapur Vs St. of Punj. AIR 1960 SC 866

10. St. of Har. Vs Bhajan Lal 1992(Supp)1 SCC 335

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Anoop Trivedi learned Senior Advocate assisted by Sri Vivek Prakash Mishra learned counsel for the petitioner, Sri Dileep Kumar learned Senior Advocate assisted by Ms. Priyanka Midha learned counsel for the respondent no. 4/complainant and Ms. Meena learned A.G.A. for the State.

2. The petitioner herein is seeking for quashing of the first information report dated 25.6.2021 registered as Case Crime No. 466 of 2021, under Sections 147, 148, 419, 195, 452, 323, 504, 506, 427 and 120-B I.P.C., Police Station Anoop Shahar, District Bulandshahar on two grounds:

(i) Firstly that the allegations in the first information report do not constitute commission of any offence within the jurisdiction of the Police Station Anoop Shahar, District Bulandshahar. It is contended that as per the assertions in the first information report, an incident dated 15.6.2021 had occurred at about 5:30 PM inside the residence of the complainant located in New Delhi, addressed at Farm No. 2, Silver Oaklane, Satbari, New Delhi. Both the complainant and the accused persons in the said complaint reside in Delhi. The concerned Officer of the Police Station Anoop Shahar, District Bulandshahar had, thus, illegally registered the FIR, the incident being beyond the area of his territorial jurisdiction.

(ii) Secondly, there is no allegation against the petitioner of his involvement in the incident allegedly occurred on 15.6.2021. No offence at all is made out against the petitioner herein. As regards the allegations of conspiracy to lodge the false criminal case namely Case Crime No. 450 of 2021 at the Police Station Anoop Shahar, District Bulandshahar under Sections 307, 323, 504 and 506 I.P.C., i.e. in reporting the incident dated 10.6.2021, it is contended that the offence as alleged under Section 195 IPC cannot be made out from any of the averments in the FIR. The contention is that the material collected by the Investigating Officer during the course of the investigation of the said criminal case (report) cannot constitute "evidence" within the meaning of Section 3 of the Indian Evidence Act, 1872. The "evidence" as defined under Section 3 of the Evidence Act is the oral and documentary evidences filed before the Court upon which the Court has to form its opinion during the course of the trial.

3. The contention is that the statement of the witnesses recorded under Section 161 Cr.P.C. by the Investigating Officer cannot be used for any purpose at any inquiry or trial in respect of any offence. The only exception is that if the witness is called for the prosecution in such inquiry or trial, his said statement or any part of it, if reduced in writing, may be used by the prosecution to contradict the said witness, in such manner as provided under Section 145 of the Indian Evidence Act. To constitute an offence under Section 195 IPC, "the intention to procure conviction" by giving or fabricating false evidence, thereby to cause, or knowing it to be likely, that it will cause any person to be convicted

of an offence punishable with imprisonment for life or imprisonment for a term of seven years or upwards, is necessary. The contention is that the production of false evidence before a Court of law intending thereby to cause the accused to be convicted of the aforesaid offence would amount to commission of offence under Section 195 IPC. The crucial condition to constitute offence under Section 195 IPC, according to the petitioner, is whether on the alleged fabricated material, the possibility of conviction was there or not.

It is contended that neither the first information report nor the Case diary maintained under Section 172 Cr.P.C., or the charge sheet/report prepared under Section 173(2) Cr.P.C. constitute evidence within the meaning of Chapter XI of the Indian Penal Code. The statement inserted whether in the police diary or the material otherwise collected by the police officer cannot be used or mean as evidence under the Indian Evidence Act for appreciation during the course of trial. Section 172(2) Cr.P.C. clearly provides that the police diaries of the case sent to the Criminal Court cannot be used as evidence in any enquriy or trial by the Court.

It is, thus, vehemently argued that the element of "intention to procure conviction" on false or fabricated evidence is completely missing in the instant case. The contention, thus, is that the "evidence" as occurring in Section 195 IPC is the evidence led in a Court of law in a judicial proceeding and not otherwise.

4. Reliance is placed on the decision of the Apex Court in **Hardeep Singh vs. State of Punjab and others1** to substantiate the above assertions.

It is argued that the specific questions framed by the Apex Court to discern the meaning of the word "evidence" answered therein would come to the rescue of the petitioner herein, inasmuch as, considering the meaning of the word "evidence" under Section 3 of the Evidence Act, it was held therein that the "evidence" whether oral or documentary, means only such evidence as is made before the Court in relation to statement, and as produced before the Court in relation to documents, and not the material collected during investigation as the inquiry by the Court is neither attributable to the investigation nor the prosecution but by the Court itself to find out the truth of the allegations in the FIR. It is contended that the material collected during the investigation before the trial actually constitutes a part of the process of the inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held. The same definition cannot be extended for any material collected during the inquiry/investigation either by the Investigating Officer, the Magistrate or the Court before commencement of the trial. Apart from the evidence recorded during trial, any material that has been collected even by the Court after cognizance is taken and before the trial commences cannot be utilized as evidence recorded during trial. The word "evidence" as defined under Section 3 of the Evidence Act is, thus, the statement of the witnesses that is recorded during trial and the documentary evidence led in accordance with the Evidence Act. Only such evidence and the material on the basis whereof the Court can form an opinion as to the complicity of the accused or some other person who may be connected with the offence, can be said to be evidence, to cause or likely to cause conviction of such person(s) to be convicted of the offence mentioned in Section 195 IPC. The pre-requisite for

constituting an offence under Section 195 is that there must exist allegation of giving or fabricating false evidence in the criminal trial, i.e. before a Court of law or else the "intention to procure conviction of offence" on false/fabricated evidence cannot be found or will be lacking completely.

It is urged that as there is no question of recording satisfaction by the Court on the material/evidence (whether oral or documentary) collected by the Investigating Officer, which cannot be read or admitted as evidence in the trial, no offence is made out against the petitioner from the reading of the FIR itself.

Much emphasis has been laid to the discussion to the meaning of word "evidence" under Section 3 of the Indian Evidence Act in paragraphs "56' to "68' of the said report **(Hardeep Singh1**].

5. The Division Bench judgment of this Court in **Ashok Pratap Rai vs. State Of U.P. and 3 Others2** has been relied to assert that in the similar facts and circumstances, as in the present case, relying upon the decision in **Hardeep Singh1**, it was held by this Court that only the material that has come before the Court during inquiry or the trial, which is required to be proved according to the law of evidence can be said to be evidence within the meaning of Section 195 IPC.

It was held therein that the statement of the petitioner therein during a television show to the T.V. correspondent containing references/allegations of commission of offence against the complainant, do not constitute evidence within the meaning of Section 3 of the Evidence Act and hence the allegations in the FIR do not disclose the ingredients of the offence under Section 195 IPC and was liable to be quashed.

Further reliance has been placed on the decision of the Apex Court in **Shamshul Kanwar vs. State of U.P.3** to assert that the police diary referred to in Section 172, which the Court may call for, can be used to the limited extent by the Court as well as by the accused as contained in Section 172(3) Cr.P.C., not as evidence in the case, but to aid the Court in such inquiry or trial.

Reliance is placed on the decision of the Madras High Court in **Haji Mohammed and others vs. State Rep. By the Inspector of Police, Koradacheri Police Station, Tiruvarur District4** to assert that the entries in the Case diary are not the evidence, nor can they be used by the Court unless the case comes under Section 172(3) of the Code.

Placing the decision of the Apex Court in **Maharashtra State Electricity Distribution Company Limited and another vs. Datar Switchgear Limited and others5**, it is argued that for constituting an offence under Section 192 IPC in absence of any specific averment demonstrating the role of the accused in the commission of the offence, the alleged fabrication of false evidence or adducing the same in evidence, the ingredients of the offence under Section 192 IPC cannot be said to exist. The allegations in the first information report or the complaint in such case, taken at its face value and even assuming to be correct in its entirety, do not constitute the offence alleged.

The decision of the Apex Court in **Perumal vs. Janaki6** has been placed before us to submit that the question before the Apex Court was as to whether a police officer filing a charge sheet can be said to have made any statement on oath or is bound by any express provision of law to state the truth so as to try him for offence under Section 193 of the IPC. The Apex

Court therein was dealing with the complaint under Section 190 of the Cr.P.C. filed before the Judicial Magistrate praying for trial of the police officer for an offence under Section 193 of the IPC. The Judicial Magistrate had rejected the complaint as not maintainable in view of Sections 195 and 340 Cr.P.C. The revision filed against the said order was also dismissed by the High Court.

6. We may note at this juncture that while dealing with the same, the Apex Court had observed the question that whether the statement made by the police officer in a charge sheet amounts to a declaration upon any subject within the meaning of the clause "being bound by law to make a declaration upon any subject" occurring under Section 191 IPC required further examination. Further a police officer filing a charge sheet does not make any statement on oath nor is bound by any express provision of law to state the truth though being a public servant he is obliged to act in good faith. Considering the provisions of Section 211 of the IPC as also the language of Section 195 Cr.P.C., it was held that the conclusion drawn by the learned Magistrate in dismissing the complaint was justified for the complaint had not been filed by the person contemplated under Section 195 Cr.P.C. However, it was observed that the High Court being Constitutional Court has been invested with the powers of superintendence over all Courts within its territorial limits. It can certainly exercise jurisdiction under Section 195(1) Cr.P.C. As the allegations of the appellant was that he had been prosecuted on the basis of palpably false statements and further that the respondent (police officer) did so for extraneous consideration, it was opined that it was an appropriate case where the High Court ought to have exercised the jurisdiction under Section 195 Cr.P.C. The appeal was, thus, allowed. The matter was remitted back to the High Court for further appropriate course of action to initiate proceedings against the respondent/police officer on the basis of the complaint of the appellant therein, in accordance with law.

The decision of the Apex Court in **Pandurang Chandrakant Mhatre & Others vs. State of Maharashtra7** has been placed before us to contend that the legal position that the first information report is not a substantive piece of evidence and that it can be used with regard to testimony of the witnesses who depose in respect of the incident, is fairly well settled.

7. Placing the above decisions, it is vehemently argued by the learned Senior Counsel for the petitioner that only an act of giving false evidence or fabricating false evidence in a judicial proceeding, with the intention to procure conviction for offence, as per the language employed in Section 195, may lead to conviction for the offence under the said section. The investigation which is preliminary proceedings before the matter is brought in a Court of law, cannot be brought within the meaning of the judicial proceeding and the 'evidence' led before the Investigating Officer would not fall with the meaning of "evidence" under Section 195 IPC. The allegations in the first information report taken at its face value and even if accepted in their entirety do not constitute the offence as alleged under Section 195 IPC and as such the impugned FIR is liable to be quashed.

8. Having heard learned counsels for the parties and perused the record, it may be noted that the first information report lodged on 25.6.2021 contains assertions

that in relation to a criminal case namely Case Crime No. 450 of 2021 registered under Sections 307, 323, 504 and 506 IPC at Police Station Anoop Shahar, District Bulandshahar on 10.6.2021, some unknown persons had entered in the house of the complainant on 15.6.2021 at about 5:30 PM, impersonating them as the police officers for making investigation in the said criminal case. Out of those, one named accused Satendra Kumar Bhati was impersonating himself as Deputy Superintendent of Police (D.S.P.). Those persons had misbehaved and assaulted the family members of the complainant and also destroyed their household goods which has caused loss of more than two lacs.

There are six named accused in the FIR which has been lodged against some unknown persons as well.

Another part of the allegation in the first information report is that six named accused in the first information report had conspired to lodge a first information report namely Case No. 450 of 2021 at Police Station Anoop Shahar, District Bulandshahar on false evidence with the intention to cause conviction of the complainant for life imprisonment. The said first information report was lodged as Case Crime No. 466 of 2021 on 25.6.2021, under Sections 147, 148, 419, 195, 452, 323, 504, 506, 427 and 120-B I.P.C., Police Station Anoop Shahar, District Bulandshahar.

The petitioner before us is one of the named accused, Anil Kumar Rathore.

9. From the careful reading of the FIR, it is evident that the allegations against the petitioner herein is of committing an offence of criminal conspiracy with the other accused to lodge a false report so as to cause the conviction of the complainant for an offence punishable with imprisonment for life. The first information report in question, therefore, cannot be said to be only the information of the incident occurred on 15.6.2021. With regard to the petitioner herein, the allegations of commission of offence under Section 195 readwith Section 120-B of the IPC are clear and categorical therein.

As the Case Crime No. 450 of 2021 was registered in the Police Station Anoop Shahar, District Bulandshahar and the allegations in the first information report are of offence of criminal conspiracy committed by the petitioner, a named accused in lodging the said report, the contention of the learned Senior Counsel for the petitioner with respect to lack of territorial jurisdiction of the police station concerned, is found misplaced. Even otherwise, the first information report of an offence committed cannot be quashed on the ground of lack of jurisdiction of the police station concerned. It must be left to the wisdom of the police officer to decide as to whether he has jurisdiction to proceed with the investigation or not. The question as to whether the offence alleged has been committed within the area of his territorial jurisdiction can very well be looked into by the Investigating Officer.

10. The first limb of argument of the learned Senior Counsel for the petitioner that the first information report was only an information with regard to the incident occurred on 15.6.2021 at the residence of the complainant in New Delhi and the police officer at Police Station Anoop Shahar, District Bulandshahar lacked jurisdiction to lodge the said report, therefore, is turned down.

11. As regards the second argument pertaining to the quashing of the first information report on the plea that it does not disclose commission of the offence under Section 195 IPC, we would deliberate the matter as under.

12. To deal with the submission of the learned Senior Counsel for the petitioner that even if the allegations in the first information report are taken at its face value and accepted in their entirety, do not constitute the offence as alleged under Section 195 IPC for the reason that any statement or documentary material collected/produced during the course of investigation before a police officer would not constitute "evidence" within the meaning of the Indian Evidence Act and Section 195 IPC, it would be apposite to first go through the relevant provisions as contained in Chapter XI of the Indian Penal Code.

For ready reference, Sections 191, 192, 193 and 195 relevant for our purposes are reproduced as under:-

"191. Giving false evidence:- *Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.*

Explanation 1- *A statement is within the meaning of this section, whether it is made verbally or otherwise.*

Explanation 2- *A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.*

192. Fabricating false evidence:- *Whoever causes any circumstance to exist or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence.*

193. Punishment for false evidence:- *Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine,*

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1- *A trial before a Court-martial; 101[***] is a judicial proceeding.*

Explanation 2- *An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.*

Illustration

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a

judicial proceeding, A has given false evidence.

Explanation 3- *An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a state of a judicial proceeding, though that investigation may not take place before a Court of Justice.*

Illustration

A, in any enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding. A has given false evidence.

195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment:- *Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which [by the law for the time being in force in [India]] is not capital, but punishable with [imprisonment for life], or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished."*

Chapter XI of the Indian Penal Code constitutes offences pertaining to false evidence and offences against public justice. Section 191 IPC defines as to what would constitute "giving false evidence" in a case. Section 192 provides as to what would constitute "fabricating false evidence". Section 192 provides that whoever causes any circumstance to exist or makes any document (or electronic record) or makes any false entry in any book or record (or electronic record) containing a false statement, intending that such circumstance, false statement or false entry may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, and that such circumstance, false statement or false entry, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said to fabricate false evidence.

The reading of Section 192 IPC makes it clear that any document containing a false statement appearing in evidence lead by any person, in a proceeding taken by law before a public servant, which may cause any person in such proceeding who is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such a proceeding, is said to fabricate false evidence.

The phrase "in a proceeding taken by law before a public servant as such" has been placed before us by the learned Senior Advocate for the respondent to contend that any false evidence led before the Investigating Officer in a criminal case would fall within the meaning of fabricating false evidence under Section 192 IPC.

13. To appreciate the said argument, we have to look further into provisions of Sections 193 and 195 (relevant for the purpose of this case).

Section 193 provides punishment for giving false evidence or fabricating false evidence. It provides punishment of two descriptions for such an evidence being used; (i) in any stage of the judicial proceeding, which is imprisonment for a term extending to seven years with fine, (ii) in any other case, punishment with imprisonment for a term upto three years

with fine. Thus, the gravity of offence of fabricating false evidence and giving false evidence depends on the nature of the proceeding in which it has been used or recorded.

Explanations (1) to (3) further explains the words "judicial proceeding". The phrase "an investigation directed by law preliminary to a proceeding before a Court of Justice" in Explanation (2) to Section 193 IPC has been placed before us by Sri Dileep Kumar learned Senior Advocate for the respondent to assert that an investigation made by the police officer under Section 156 Cr.P.C. after lodging of the first information report under Section 154, is an investigation directed by law and being preliminary to a proceeding before a Court of law, it is one of the stages of a judicial proceeding. The words "though that investigation may not take place before a Court of Justice" further clarifies that the investigation made by a police officer is included as a stage of a judicial proceeding as per Explanation (2) to Section 193 IPC.

14. The contention, thus, is that any false or fabricated evidence placed before a police officer during the course of investigation would make the person leading such evidence guilty of offence under Section 193, (first part) of punishment. It is contended that Sections 191, 192 and 193 prescribe as to what constitute offence of giving false evidence or fabricating false evidence in a judicial or any other proceeding and punishment for the said offence with varying gravity. Section 195 IPC is only an aggravated form of the offence under Section 193. Section 195 is, thus, similar to Section 193 except the gravity of the offence in respect of which fabrication/purgery is committed.

It is contended that if a complainant has lead false evidence before a police officer during the course of investigation with the intention to procure the conviction of a person for an offence which is punishable with imprisonment for life or imprisonment for a term of seven years or upwards, he shall be liable to be punished for the same offence and investigation for commission of such an offence is to be processed when alleged.

15. To deal with the said submissions, having noted the language employed in Sections 191, 192, 193 and 195 IPC, the question for consideration before us is whether any evidence led by the complainant or any other person before the police officer during the course of investigation can be said to be an evidence led in a stage of a judicial proceeding within the meaning of Section 193 Explanation (2) IPC. In other words, whether the documents furnished before a police officer in the police investigation alleged to be fabricated false evidence can be made basis to frame charge under Section 193 IPC or 194 and 195 IPC depending upon the nature of the proceeding and gravity of the offence in which such an evidence is lead.

Under the Code (Indian Penal Code), the words "judicial proceeding" has not been defined, however, the words "Judge", "Court of Justice", "Public servant" have been defined in Sections 19, 20 and 21 of the Indian Penal Code; respectively. The words "judicial proceeding" has been defined in Section 2(i) Cr.P.C. as including any judicial proceeding in the course of which evidence is or may be legally taken on oath. The 'judicial proceeding' within the meaning of Cr.P.C., thus, does not include a proceeding of investigation before a police officer as the evidence before a police officer is not taken on oath.

The illustration to Explanation (2) of Section 193 explains further that any inquiry before a Magistrate preparatory to commitment for trial is a stage of a judicial proceeding and if someone makes a statement on oath which he knows to be false, he can be punished for giving false evidence under Section 193.

16. In Cr.P.C., the power and procedure of police investigation and magisterial inquiry are provided in different Chapters. The police investigation starts with lodging of the first information report of a cognizable offence whereupon a police officer is under duty to investigate. There is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities in a matter. Where first information report is lodged, magisterial inquiry would commence upon submission of the police report of commission of offence.

Chapter XIV in Cr.P.C. deals with the magisterial inquiry wherein a Magistrate is empowered to take cognizance of any offence with or without a police report, i.e. suo motu or on receipt of information or complaint of facts which constitute such offence.

During the course of police investigation under Chapter XII, the police officer may record statements of witnesses and collect such material in order to find out the truth of the allegations or commission of offence. The case Diary under Section 172 Cr.P.C. is to be maintained in the said process. On completion of the investigation, the police officer is obliged to submit a report containing all necessary documents in accordance with Section 173 Cr.P.C.

17. It may be noteworthy that neither the statement recorded by the police officer under Section 161 nor the police Diary prepared under Section 172 of Chapter XII can be read in evidence before a Court of law. Even a statement under Section 164 Cr.P.C. cannot be read as a substantive evidence and has only corroborative value. The statement under Section 161 Cr.P.C. can only be used during the course of the examination of the witnesses to contradict them. The case Diary under Section 172 Cr.P.C. can be called by the Court only to refresh the memory of the police officer who have maintained it or for the purpose of contradicting such police officer.

18. Under the Indian Penal Code (IPC), a "judicial proceeding" be considered to be a proceeding before a 'Judge' as defined in Section 19 which excludes a Magistrate holding an inquiry preparatory to commitment for trial to another Court, in respect of a charge on which he has power only to commit. The words "Court of Justice" denote a "Judge" as defined under Section 19 and include a body of Judge which is empowered by law to act judicially as a body. The phrase in Explanation (2) to Section 193 "An investigation directed by law preliminary to a proceeding before a Court of Justice", however, include a magisterial inquiry preparatory to commitment as an inquiry directed by law preparatory to the trial in view of the 'illustration' attached to it. The effect of the 'illustration' is to make a magisterial inquiry preparatory to commitment, a stage of a judicial proceeding.

To hold that a police investigation is a stage of a judicial proceeding would lead to anomaly for the reason that a Magistrate trying a warrant case is a 'Court

of Justice' within the meaning of Section 20 IPC whereas a Magistrate holding an inquiry preparatory to commitment is not even a 'Judge' in view of Section 19, illustration (d). An investigation preparatory to a trial, by a Magistrate, would be a stage of a judicial inquiry in view of illustration to Explanation (2) to Section 193 IPC, while a police investigation preparatory to a magisterial inquiry for commitment would not.

19. Another reason to say so is that there is no direction of law that the police investigation should precede a trial. When a Magistrate takes cognizance on a complaint or suo motu proceeds to make an inquiry to take cognizance of an offence reported/coming to his knowledge, often there is no police investigation. Section 193, thus, requires something more. It is not enough that the police investigation does as a matter of fact precede a trial. There must be an express direction by law, just as under Explanation (3) there must be an express direction by a Court of Justice, to make the investigation within the meaning of Explanation (2). A statement made to a police officer under Section 161 of the Code or 161 Cr.P.C. or a statement made before a Magistrate under Section 164 of the Code cannot form the basis of framing a charge, much less of conviction under Section 193 IPC, though the person making the statements is under an obligation to state the truth on both the occasions.

20. The scheme of the Code of Criminal Procedure makes a clear distinction between the stage of police investigation and that of judicial proceedings by way of inquiry or trial. There is a clear distinction between two classes of statements also. This difference is because of the circumstances and surroundings under which the two sets of statements are recorded before the Police Officer and the Magistrate. This may be taken to be recognition by the Legislature of the harsh realities of the situation, that the statements recorded at the stage of police investigation are not permitted to be treated as evidence at the trial under the Code of Criminal Procedure and the Indian Evidence Act.

In a case where police report of commission of offence is lodged under Section 154 Cr.P.C., the Court's function begins when a report is submitted before it under Section 173(2) Cr.P.C. and not until then. On a fair interpretation of the Section 193 IPC, to hold that a statement, which is not 'evidence' in a judicial proceeding, can be made basis to frame a charge for offence under the said Section, would result in travesty of justice.

21. Similarly any documentary or electronic evidence produced before a police officer alleged to contain a false statement, false entry cannot be made basis for conviction for an offence under Section 193 IPC, unless and until such an evidence is produced before a Court of law during the course of inquiry or trial and is proved or exhibited as a documentary evidence.

The reason being that the police report is only a fact finding report and even the Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit by exercising his power under Section 190(1)(b) Cr.P.C. It is open to the Magistrate to act under Section 200 or 2002 also for taking cognizance of a case.

[Reference **Minu Kumari and another vs. State of Bihar and others8]**

We may further note that in **Hardeep Singh1**, the question for consideration before the Apex Court was of interpretation of word "evidence" used in Section 319(1) Cr.P.C.:- whether the word "evidence" used in the said section includes the evidence collected during investigation or is limited to the evidence recorded during trial". While answering the said question, the meaning of "evidence" under Section 3 of the Indian Evidence Act and the scope of power of the Code under Section 319 Cr.P.C. has been considered to hold that the word "evidence" as used in Section 319 Cr.P.C. has to be understood in its wider sense to include evidence both at the stage of trial and even at the stage of inquiry. It was, however, held that the inquiry would be the inquiry conducted by the Court before commencement of trial. It was held that any material that has been received by the Court after cognizance is taken and before trial commences apart from the evidence recorded during trial, can be utilized to invoke the powers under Section 319 of the Cr.P.C. It was, thus, held that the evidence within the meaning of Section 319 Cr.P.C. has to be broadly understood and not literally, i.e. as evidence brought during a trial. Section 319(1) Cr.P.C. empowers the courts to proceed against other persons who appears to be guilty of offence though not an accused before the Court. Section 319 Cr.P.C. uses both terms, "inquiry" and "trial". It was observed that trial is distinct from an inquiry and must necessarily succeed it. The inquiry must be a forerunner to the trial. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge sheet for the purpose of trying the accused.

The Apex Court has noted the observations in **Raghubans Dubey vs. State of Bihar9** that once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence, it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by Magistrate taking cognizance of an offence. It is, this inquiry which has been defined as "inquiry" under Section 2(g) of the Code of Criminal Procedure. The purpose of the trial, however, is to fasten the responsibility upon a person on the basis of facts presented and evidence led in this behalf.

The Apex Court further held that the 'inquiry' within the meaning of Section 2(g) Cr.P.C. clearly envisage 'inquiry before the actual commencement of the trial', and is an act conducted under Cr.P.C. by the Magistrate or the Court. The word "inquiry" is not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the Court on filing of the charge sheet. The Court can, thereafter, proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial wherein the Court proceeding commences on cognizance being taken with the determination of issues adjudging the guilt or innocence of the person.

The view taken by us to interpret the words "an investigation directed by law preliminary to a proceeding before a Court

of Justice" occurring in Explanation (2) to Section 193 IPC, thus, is getting support from the above observations in **Hardeep Singh1**.

22. In the instant case, the question whether the documents furnished before a police officer in the police investigation alleged to be fabricated false evidence can be made basis to frame charge under Section 193 IPC or 194 or 195 IPC posed by us, therefore, is to be answered in 'Negative'.

23. The issue, however, left is as to whether the first information report, in the instant case, can be quashed on the ground that no offence under Section 195 IPC as alleged therein is made out as in the Case Crime No. 450 of 2021 the allegations that fabricated false evidence had been lead was neither in the inquiry by the Magistrate nor trial by the Court, i.e. not in any stage of the judicial proceeding.

24. To answer this, we may note that the first information report contains information of commission of offence other than Section 195 IPC which are Cognizable in nature, which has been lodged against six named accused and some unknown persons as well. The allegations are of the incident occurred prior to 15.6.2021 and on the said date. Without letting the investigation to proceed, it cannot be said that no other offence can be said to have been made out against the petitioner, i.e. other than Section 195 IPC readwith Section 120B. It would not be possible for the Court to split the first information report where named and unnamed accused have also been implicated for offences other than Section 195 IPC, to state that no other offence is made out against the petitioner herein.

25. As regards issue pertaining to the jurisdiction of the police station concerned to investigate the incident occurred on 15.6.2021, the first information report cannot be quashed on this ground. It is well settled that a first information report is only an initiation to move the machinery to investigate into allegation of commission of a cognizable offence. It is well within the jurisdiction of the police officer concerned to make an enquiry and to transfer the investigation to the appropriate police station of competent jurisdiction.

26. At this stage, it is not possible for the court to sift the materials or to weigh the materials and then come to the conclusion one way or the other. It has been held by the Apex Court in **M/s Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and others10** that there is a well defined and well demarcated function in the field of investigation and its subsequent adjudication. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. Even if the information does not give full details regarding the above noted matters, the Investigating Officer is not absolved of his duty to investigate the

case and discover the true facts, if he can. The Court would not interfere with the investigation or during the course of investigation which would mean from the time of lodging of the first information report till the submission of the report by the officer in charge of the police station in Court under Section 173(2) Cr.P.C., this field being exclusively reserved for the investigating agency. The principles of law in the matter of scope of interference by the Court in the police investigation as laid down in **M/s Neeharika Infrastructure Pvt. Ltd.10** are:-

"10. From the aforesaid decisions of this Court, right from the decision of the Privy Council in the case of King Emperor vs. Khawaja Nazir Ahmad (AIR 1945 PC 18), the following principles of law emerge:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into cognizable offences;

ii) ***Courts would not thwart any investigation into the cognizable offences;***

iii) However, in cases where no cognizable offence or offence of any kind is disclosed in the first information report the Court will not permit an investigation to go on;

iv) ***The power of quashing should be exercised sparingly with circumspection, in the ''rarest of rare cases'. (The rarest of rare cases standard in its application for quashing under Section 482 Cr.P.C. is not to be confused with the norm which has been formulated in the context of the death penalty, as explained previously by this Court);***

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) ***Criminal proceedings ought not to be scuttled at the initial stage;***

vii) ***Quashing of a complaint/FIR should be an exception and a rarity than an ordinary rule;***

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities. The inherent power of the court is, however, recognised to secure the ends of justice or prevent the above of the process by Section 482 Cr.P.C.

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. During or after investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the

learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint; and

xv) When a prayer for quashing the FIR is made by the alleged accused, the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether or not the allegations in the FIR disclose the commission of a cognizable offence and is not required to consider on merits whether the allegations make out a cognizable offence or not and the court has to permit the investigating agency/police to investigate the allegations in the FIR".

27. The only exceptions are where no cognizable offence or offence of any kind is disclosed in the first information report the Court will not permit an investigation to go 'on', or where non-interference would result in miscarriage of justice the Court may interfere at the stage of investigation of offence. Regard being had to the parameters of quashing the first information report laid down by the Apex Court in **M/s Neeharika Infrastructure Pvt. Ltd.10**, noticing its previous judgments in **R.P. Kapur vs. State of Punjab11** and **State of Haryana vs. Bhajanlal12,** we find that no case is made out for quashing of the present FIR as it cannot be said that the FIR does not disclose commission of any cognizable offence or offence of any kind.

The relief of quashing of the first information report, therefore, deserves to be refused.

The writ petition is, accordingly, **dismissed.**

No order as to costs.

(2022)02ILR A147

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 28.01.2021

BEFORE

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

THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Misc. Writ Petition No. 17732 of 2020

Vimal Kumar & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Ajay Vikram Yadav

Counsel for the Respondents:
A.G.A.

A. Code of Criminal Procedure, 1973 – Section 167 - Judicial custody remand of an accused involved in offences punishable upto 7 years imprisonment may be granted by the Magistrate after he satisfied himself that the application for remand moved by the Police Officer has been made in a *bonafide* manner and the reasons for seeking remand mentioned in the case diary are in accordance with the requirements of Section 41(1)(b) and 41-A of Cr.P.C. and there is a concrete material in existence to substantiate the grounds for seeking remand.

B. Bail applications to be considered expeditiously- Where the accused himself surrenders or where investigation has been

completed and the Magistrate needs to take the accused to judicial custody as provided u/S 170(1) and Section 41(1)(b)(ii)(e) Cr.P.C., the Magistrates and Sessions Court to consider the bails expeditiously and not to mechanically refuse the same, especially in short sentence cases punishable upto 7 years imprisonment unless the allegations are grave and there is any legal impediment in allowing the bail. Lal Kamlendra Pratap Singh v St.of U.P. (2009)4 SCC 437 and Sheoraj Singh@Chuttan v St.of U.P. & ors. 2009(65) ACC 781 followed.

C. Interim Bail.- The facility of releasing the accused on interim bail pending consideration of regular bail may also be accorded by the Magistrate and Sessions Judges in appropriate cases.

D. Arrest of the accused: Arrest of the accused in a mechanical or *malafide* manner in contravention of Section 41(1)(b) and 41-A Cr.P.C.---Where the Magistrate is satisfied that a particular police officer has been persistently arresting the accused in cases punishable upto 7 years term in a mechanical or *malafide* and dishonest manner in contravention of requirements of Section 41(1)(b) and 41-A of Cr.P.C. he may furnish information to Registrar of the High Court through District Judge so that appropriate directions may be issued to the D.G.P. to take action against such errant police officers.

E. Registrar General of the High Court directed to issue a Circular with directions to the Sessions Court and the Magistrates to monitor and oversee the applications for remand sought by the arresting Police Officer.

F. Issue of compliance with Section 41(1)(b) and 41-A Cr.P.C. and the directions of this court in this regard may also be discussed in the monthly meetings of District Judges with the administration and superior police officer.

G. Arrest for offence u/S 498-A I.P.C.- The St.Government to instruct it's Police Officers not to automatically arrest a person when a case u/S 498-A I.P.C. is registered but to satisfy themselves about the necessity for arrest.

H. Section 41-A Cr.P.C.—Notice of appearance in terms of Section 41-A of Cr.P.C. be served on the accused within 2 weeks from the date of institution of the case which may be extended by the S.P. of the District for reasons to be recorded in writing.

I. Balancing individual liberty and social order.---In Writ Petition(Civil) No. 73 of 2015, Social Action Forum for Manav Adhikar & anr.r v UOI, Ministry of Law and Justice and in the matter of Anand Tiwari v St.of U.P. & ors., Criminal Misc. Writ Petition No. 17641 of 2020 and Arnesh Kumar v St.of Bihar (2014)8 SCC 273 the Police authorities have been directed to strike the balance between individual liberty and social order.

Petition allowed. (E-12)

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

1. Heard learned counsel for the petitioners and learned A.G.A. for the State.

2. This writ petition has been filed by the petitioners with the following prayers:

(I) issue a writ order or direction in the nature of certiorari quashing the impugned First Information Report dated 28.11.2020 lodged by respondent No. 4 in case crime No. 824 of 2020, under sections 498-A IPC and section ¾ Dowry Prohibition Act, Police Station Kotwali Nagar, District Etah.

(II) issue a writ order or direction in the nature of mandamus commanding the respondents not to arrest the petitioners in case crime No. 824 of 2020, under sections 498-A IPC and section ¾ Dowry Prohibition Act, Police Station Kotwali Nagar, District Etah.

(III) issue any other writ order or direction In the like nature which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(IV) award the costs of the writ petition to the petitioners.

3. The brief facts of this case are that the marriage of daughter of respondent no. 4 namely Priyanka was fixed with the petitioner No. 1 by which on 7.6.2020 the Ring ceremony was held and during this period about 6.5 lacs rupees was given by the respondent no. 4 to the petitioners. It is further alleged that on 25.11.2020 all the petitioners demanded a Creta Car and stated if said demand could not be fulfilled then they would not solemnize the marriage.

4. It is submitted by learned counsel for the petitioners that the marriage of daughter of respondent no. 4 was fixed with the petitioner no. 1 and after Ring ceremony respondent no. 4 with the ulterior motive, demanded money from the petitioners for solemnizing the marriage with her daughter with petitioner no. 1 and stated that if the same was not fulfilled then petitioners would be falsely dragged in a criminal case, present malicious prosecution has been launched by the respondent no. 4.

5. It is next submitted by learned counsel for the petitioner that all the offences are punishable with incarceration below 7 years but the police of concerned police station is regularly visiting the house of petitioners under the influence of respondents No. 4. It is further submitted that under the provisions of Sections 204, S41(1)(b), S.41(1)(b)(ii)(e), S.41(a) of the Cr.P.C. police cannot arrest the petitioners without giving notice and without and without collecting any credible evidence against the petitioners the police can not arrest the accused.

6. Learned counsel for the petitioners has invited our attention to the provisions embodied in sections 204, S41(1)(b), S.41(1)(b)(ii)(e), S.41(a) of the Cr.P.C. the judgment of this Court **in 2011 0 Supreme (All) 2785** (Shaukin Vs. State Of U.P. and Others) has been relied and has placed reliance on **Social Action Forum for Manav Adhikar and another Vs. Union of India, Ministry of law and Justice and others passed in Writ Petition (Civil) No. 73 of 2015.**

7. We proceed to explain the import and meaning of the amended provisions 41(I)(b) and 41 A Cr.P.C., and to give some illustrations where accused could be arrested straightaway on the lodging of the FIR, and other illustrations where immediate arrests may not be needed, because we think that in many cases the police is still routinely proceeding to rrest accused persons even if they are involved in offences punishable with up to 7 years imprisonment, in contravention of the express terms of Section 41(I)(b) or 41 A Cr.P.C.

7. It would be useful to extract the material provisions, Section 41(I)(b) or 41 A, which have been introduced by Act No. 5 of 2009, with effect from 1.11.2010 an also section 170(I) of the Code of Criminal Procedure, here:

41. When police may arrest without warrant.--(I) Any police officer may without an order from a Magistrate and without a warrant, arrest any person----------

(a)----------

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable

with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:

(I) the police office has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police office is satisfied that such arrest is necessary----

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(C) to prevent such person from causing the evidence of te offence to disappear or tampering with such evidence in any manner: or

(d) to prevent such person from making 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 the police officer: or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing.

8. Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section record the reasons in writing for not making the arrest.

41 A. Notice of appearance before police officer.-- (I) The police officer shall in all cases, where the arrest of a person is not required under the provisions of sub-section (I) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or a such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of the person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

9. Moreover, reliance on the judgements dated 04.09.2018 passed by Apex Court in the case of **Social Action Forum for Manav Adhikar Vs. Union of India, Ministry of Law and Justice and others in Writ Petition (Civil) No. 73 of 2015 with Criminal Appeal No. 1265 of 2017 Writ Petition (Criminal) No. 156 of 2017.**

In which Hon'ble Supreme Court has also issued directions:

20. We, therefore, direct the Magistrates/ Police authorities that when accused alleged with offence punishable up to 7 years imprisonment are produced before them remands may be granted to accused only after the Magistrate satisfies himself that the application for remand by the police officer has been made in a bona fide manner and the reasons for seeking remand mentioned in the case diary are in accordance with the requirements of Section 41(I) (b) and 41 A Cr.P.C., and there is concrete material in existence to substantiate the ground mentioned for seeking remand. Even where the accused himself surrenders or where investigation has been completed and the Magistrate

needs to take the accused in judicial custody as provided under Section 170(I) and Section 41(I)(b)(ii)(e) Cr.P.C. prolonged imprisonment at this initial stage, where the accused has not been adjudged guilty may not be called for, and the Magistrate and Sessions Courts are to consider the bails expeditiously and not to mechanically refuse the same, especially in short sentence cases punishable with upto 7 years imprisonment unless the allegations are grave and there is any legal impediment in allowing the bail, as laid down in **Lal Kamlendra Prap Singh Vs. State of U.P. (2009) 4 SCC 437,** and **Sheoraj Singh @ Chuttan Vs. State of U.P. and others, 2009(65) ACC 781.** The facility of releasing the accused on interim bail pending consideration of their regular bails may also be accorded by the Magistrates and Sessions Judges to appropriate cases.

21.The Magistrate may also furnish information to the Registrar of the High Court through the District Judge, in case he is satisfied that a particular police officer has been persistently arresting accused in cases punishable with upto 7 year terms, in a mechanical or mala fide and dishonest manner, in contravention of the requirements of sections 41(1)(b) and 41 A, and thereafter the matter may be placed by the Registrar in this case, so that appropriate directions may be issued to the DGP to take action against such errant police officer for his persistent default or this Court may initiate contempt proceedings against the defaulting police officer.

22.The Sessions District Judges should also be directed to impress upon the remand Magistrates not to routinely grant remand of accused to police officers seeking remand for accused if the pre-conditions for granting the remands mentioned in sections 41(1)(b) and 41 A Cr.P.C. are not disclosed in cases punishable with 7 year terms, or where the police officer appears to be seeking remand for an accused in a mala fide manner in the absence of concrete material. The issue of compliance with sections 41(1)(b) and 41 A Cr.P.C and the directions of this Court in this regard may also be discussed in the monthly meetings of the District Judges with the administration and the superior police officials.

23.We are also of the view that the Registrar General may issue a circular within a period of one month with directions to the Sessions Courts and Magistrates to monitor and oversee the applications for remand sought by the arresting police officers and to comply with the other directions mentioned herein above.

25.As already indicated above we are of the view that by routinely mentioning in the case diary that a particular condition referred to in sections 41(1)(b) or 41 A Cr.P.C. has been met for seeking police remand, would not provide adequate reason for effecting the arrest. The DGP is also directed to circulate the present order to all subordinate police officers.

10. We have been pained to note that regularly petitions are filed where the offence committed would be for a lesser period then seven years or maximum punishment would be seven years and they routinely bring by way of writ petition scrap of being arrested. The provision of Section 41-A were incorporated of this purpose only that concerned who is not charged with heinous crime does not require and whose custody is not required may not face arrest. But we are pained that this provision has not met his avoid purpose.

27.Let a copy of this order be sent to the DGP, U.P., Member Secretary, U.P. SLSA and District Judges in all districts of U.P. for compliance and communication to all the concerned judicial magistrates before whom the accused are produced for remand by the police officers within ten days.

11. In order to ensure what we have observed above, we give the following directions:

11.1. The State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41-A of Cr.P.C. 1973.

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

12. While parting we appreciated the efforts made by learned counsel for the petitioners namely Sri Ajay Vikram Yadav who has seriously urged to us that as scribe are not facing what said to case under the dowry prohibition Act as there is still no marriage, but apprehend to arrest. That the police authorities would convey our guidelines not only in this matter but in all the investigations which are to be taken.

13. A copy be circulated by learned Registrar General to the Law Secretary who shall impress upon all the police stations officers about the same.

14. We would like to draw the attention of the police authorities of the State to our order dated 18.01.2021 and the provisions of section 41-A of the Cr.P.C. Despite there being warning from the Apex Court in the matter reported in **Writ Petition (Civil) No. 73 of 2015 Social Action Forum for Manav Adhikar and another Vs. Union of India, Ministry of law and Justice and others (Supra) and in the matter of Anand Tiwari Vs. State of U.P. and others passed in Crl. Misc. Writ Petition No. 17641 of 2020 and Arnesh Kumar Vs. State of Bihar, (2014) 8 SCC 273** has directed the police authorities to try the balance between individual liberty and social order.

15. As the matter is still at the investigating stage and the section alleges 498-A IPC and section ¾ D.P. Act which is levelled against all the family members, our recent approach passed in **Crl. Misc. Writ Petition No. 64 of 2021 in Mr. Usha Anuragi and others Vs. State of U.P. and others** will also be looked into by the court below if the accused applies for bail/ anticipatory bail for such matters if they have imminent danger from the police who may not be adhering to section 41-A Cr.P.C.

16. **Arnesh Kumar Vs. State of Bihar, (2014) 8 SCC 273** (Supra) is a land mark judgment which has to be followed by police authorities along with the order passed in **Writ Petition (Civil) No. 73 of 2015 Social Action Forum for Manav Adhikar and another Vs. Union of India, Ministry of law and Justice and others (Supra)**

17. In that view of the matter, this writ petition is partly allowed.

(2022)02ILR A153
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2022

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Revision No. 355 of 2022

Billu @ Anandi & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Mohammad Khalid, Sri Pawan Kumar Yadav

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

(A) Criminal Law- Code of Criminal Procedure, 1973- Section 374(2)- Appellate Court dismissed the appeal on the ground of not pressed by counsel for appellants and affirmed the conviction- Even when the appeal was not pressed on merits and only pressed only on the point of sentence, appellate court has to see whether the conviction was proper- Criminal Appeal cannot be dismissed on the ground of not pressed.

Settled law that it is incumbent upon the appellate court to consider the appeal on merits to see if the conviction is justified, legal and proper and the same cannot be dismissed even if not pressed by the counsel for the appellant. (Para 9)

Criminal Revision allowed. (E-3)

Judgements/ Case law relied upon:-

1. St. of Har. Vs Janak Singh, (2013) 9 SCC 431

2. Crl. Apl. No. 1385-1386 of 2021, Gurjant Singh Vs The St. of Punj.

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard learned counsel for the revisionists, learned A.G.A. for the State by means of Video Conferencing and perused the record.

2. Challenge in this Revision is the judgement and order dated 3.11.2021 passed by Additional Sessions Judge (Rape Cases & POCSO Act) Sambhal at Chandausi in Appeal No. 20 of 2020 under Section 101 of Juvenile Justice (Care and Protection of Children) Act wrongly filed under Section 374 (2) Cr.P.C. (Billu @ Anandi and Another Vs. State of U.P. and Another) whereby learned Appellate Court dismissed the appeal on the ground of not pressed by counsel for appellants and affirmed the conviction order dated 21.12.2020 passed by Juvenile Justice Board, District Sambhal in Case Crime No. 536 of 2005 under Sections 376, 506 I.P.C., P.S. Rajpura, District Sambhal convicting and sentencing the appellants under Section 376 I.P.C. for a period of three years each and under Section 506 I.P.C. convicted the appellants for two years each. Further directed that both the sentences shall run concurrently.

3. Learned counsel for the Revisionists raised only one point that order dated 3.11.2021 is illegal as the

appeal has been dismissed on the ground of not pressed by the counsel for the Revisionists.

4. I agree with the aforesaid contention of learned counsel for the Revisionists.

5. Relevant portion of the order dated 3.11.2021 is quoted below:-

आदेश

"यह आपराधिक अपील प्रार्थी/अपीलार्थी आनंदी उर्फ बिल्लू वा शीशपाल की ओर से धारा-373, 504 भoदनoसन0 थाना रजपुरा जिला संभल के संबंध में प्रस्तुत की गई है, जो माननीय सत्र न्यायाधीश महोदय से हो गया है।

प्रार्थी/अपीलार्थीगण के विद्वान अधिवक्ता द्वारा अपील पर बल न देने का पृष्टांकन किया गया है। अत: क्रिमिनल बल ने देने के कारण निरस्त होने योग्य है। अत: प्रार्थी/अपीलार्थिगन की अपील बल ना देने के कारण निरस्त की जाति है। पत्रावली नियमानुसार दखिल दफ्तार हो.

दिनांक: *03.11.2021"*

6. In **State of Haryana v. Janak Singh, (2013) 9 SCC 431**, Hon'ble Apex Court has held that where Criminal Appeal preferred by the convict of offence under Section 376 I.P.C. was not pressed by the counsel for the appellant as regards the judgement of conviction and had pressed only on the point of sentence and the appellate court/High Court then reduced the sentence already undergone by the convict in jail. It has been further held by the Hon'ble Supreme Court that even when the appeal was not pressed on merits and only pressed only on the point of sentence, appellate court has to see under Section 376 I.P.C. whether the conviction was proper.

7. For the ready reference, relevant part of the afore-cited judgement of the Apex Court is quoted below:

"12. We notice that before the High Court the learned counsel for the respondents did not challenge the conviction. At the same time, he stated that the circumstances of the case and medical evidence indicated that this could be a case where the prosecutrix had gone with respondent Joginder Singh of her own will. Therefore, it is not clear whether the respondents had really instructed their counsel not to press the appeal on merits or whether the counsel on his own thought that getting the respondents released on sentence already undergone by them was an easy way out and, therefore, he preferred that option. We feel that the appeals were heard in a slipshod manner. It was open for the respondents to press the appeals on merits and pray for acquittal. Had the case been argued on merits, the High Court could have acquitted the respondents if it felt that the prosecution had not proved its case beyond reasonable doubt. Assuming the respondents did not press the appeals, the High Court had to still consider whether the concession made by the counsel was proper because it is the duty of the court to see whether conviction is legal. But, once the respondents stated that they did not want to press the appeals and the High Court was convinced that conviction must follow, then, ordinarily it could not have reduced the sentence to the sentence already undergone by the respondents which is below the minimum prescribed by law. The High Court could have done so only if it felt that there were

extenuating circumstances by giving reasons therefor. While reducing the sentence, the High Court has merely stated that it was "just and expedient" to do so. These are not the reasons contemplated by the proviso to Section 376(1) IPC. Reasons must contain extenuating circumstances which prompted the High Court to reduce the sentence below the prescribed minimum. Sentence bargaining is impermissible in a serious offence like rape. Besides, at the cost of repetition, it must be stated that such a course would be against the mandate of Section 376(1) IPC.

13. In view of the above discussion, we hold that the impugned judgment [Janak Singh v. State of Haryana, Criminal Appeal No. 648-SB of 2000, decided on 2-8-2010 (P&H)] is legally unsustainable and is liable to be set aside and the matter deserves to be remanded to the High Court for fresh disposal of the appeals filed by the respondents."

8. Recently in ***Criminal Appeal No. 1385-1386 of 2021, Gurjant Singh Vs. The State of Punjab,*** Hon'ble Apex Court has again reiterated the aforesaid principle.

9. Accordingly it is held that Criminal Appeal cannot be dismissed on the ground of not pressed.

10. In view of the above law of ***Hon'ble Apex Court in State of Haryana v. Janak Singh (Supra),*** order passed by Additional Sessions Judge (Rape Cases & POCSO Act) Sambhal at Chandausi dated 03.11.2021 dismissing the appeal on the ground of not pressed by the learned counsel for the appellants deserves to be set-aside and Revision deserves to be allowed.

11. Accordingly, Revision is allowed. Impugned order dated 03.11.2021 passed by Additional Sessions Judge (Rape Cases & POCSO Act) Sambhal at Chandausi is set-aside.

12. Matter is remitted to Additional Sessions Judge (Rape Cases & POCSO Act) Sambhal at Chandausi to dispose of the matter in accordance with provisions of law after providing adequate opportunity of hearing to the parties.

13. It is also directed that Additional Sessions Judge (Rape Cases & POCSO Act) Sambhal at Chandausi shall dispose of the appeal within a period of three months from the date of receipt of certified copy of this order as revisionist is already in jail and matter relates to Section 376 I.P.C.

(2022)02ILR A155
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.02.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Revision No. 1116 of 2019

Rakesh Kumar Pandey & Anr.
...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Arun Sinha, Siddhartha Sinha

Counsel for the Opposite Parties:
Govt. Advocate, Anil Kumar Sharma, Purnendu Chakravarty

(A) Criminal Law- Code of Criminal Procedure, 1973- Section 397/401- Section 227, 228 - Framing of Charge - The revisional jurisdiction, particularly while dealing with framing of charge, has to be even more limited. Framing of a

charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code – The Court is required to consider the "record of the case' and documents submitted there with and, after hearing the parties, either discharge the accused or where it appears to the Court and in its opinion, there is ground for presuming that the accused has committed an offence, it shall frame the charge - A detailed examination of such evidence and documents was not necessary as it would amount to consideration of evidence. At the stage of framing of charges the trial court should not conduct a mini trial. Only when the trial court finds from an examination of the Case Diary and other evidence collected by the Investigating Officer that there was no material at all to proceed against the accused, can discharge application be allowed- Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for the exercise of such jurisdiction.

At the stage of framing the Charge, the Court has only to see as to whether a prima facie offence is made out against the accused from the records of the case and where the ingredients making out the offence are made out or where there is a presumption on the basis of evidence collected of culpability of the accused in the offence committed then the Charge will be framed, however the trial court shall not conduct a detailed examination of the material relied upon by the prosecution- Where absolutely no material is found making out an offence against the accused, then the trial court would be justified in discharging the accused.

(B) Criminal Law- Code of Criminal Procedure, 1973- Section 397/401- Section 227, 228 - Learned trial court has recorded that on the basis of evidence collected by the Investigating Officer *prima facie* charges as had been proposed by the prosecution were made out-The complainant himself had later on given a statement that no incident had actually occurred, needs to be looked into only at the time of trial and should not be seen at the time of consideration of discharge application-The scope under Criminal Revision being restricted to correct an apparent error in law or a perversity in fact, this Court finds no good ground to interfere in this Criminal Revision.

Disputed questions of fact cannot be examined in a criminal revision as the same have to be adjudicated during the course of trail by leading evidence.

Criminal Revision Rejected. (E-3) (Para 27, 35, 42, 43)

Judgements/ Case law relied upon:-

1. Amit Kapoor Vs Ramesh Chander & ors 2012 9 SCC 460

2. Sanjay Kumar Rai Vs St. of U.P & Anr. In CrL. Appeal no. 472 of 2021 decided on 07.05.2021

3. Sanghi Brothers (Indore) Pvt. Ltd. Vs Sanjay Choudhary & ors, AIR 2009 SC 9

4. St. of Kar. Vs M.R. Hiremath, 2019 (7) SCC 515

5. Sreelekha Senthil Kumar Vs C.B.I. 2019 (7) SCC 82

6. Dilawar Balu Kurane Vs St. of Maha. 2002 (2) SCC 135

7. St. of Raj. Vs Ashok Kumar Kashyap 2021 SCC Online SC 314

8. S.L.P. (Crl.) No.9552 of 2021: Hazrat Deen Vs St. of U.P.; decided on 06.01.2022

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

1. Heard Sri Arun Sinha, learned counsel for the revisionist, Sri Purnedu

Chakravarty, learned counsel for the Victim and Sri Anil Kumar Sharma, learned counsel for the opposite party No.2.

2. This Criminal Revision has been filed praying for quashing of the order dated 25.07.2019 passed by the Additional Sessions Judge, Court no. 11 Lucknow in Sessions Trial No.4 of 2018 arising out of Case Crime No. 430 of 2016 under Sections 147, 148, 332, 307, 427, 504, 506, 353 I.P.C. registered at P.S. Hazrat Ganj Lucknow. By the order impugned, the Additional Sessions Judge has rejected the discharge application moved by the Revisionists. It has been stated in the affidavit filed in support of the Criminal Revision that F.I.R. was lodged against the Revisionists on 13.07.2016 falsely implicating them. It was alleged in the F.I.R. that the revisionist no.1 who is a Consolidation Officer, came to the office of Dr. Hariom, the then Consolidation Commissioner on 13.07.2016 in the afternoon at around 3:15 P.M. The purpose of visit as disclosed by the Revisionist no. 1 was to get his transfer from District Amethi to District Ballia cancelled. The slip was sent to the Consolidation Commissioner through a peon named Chandan Singh. When the Revisionists met the Commissioner, Revisionist no. 1 started putting pressure on him to get his transfer cancelled and on refusal of the Commissioner, he became very angry and suddenly started abusing the Consolidation Commissioner and his son called in four other persons inside the Commissioners' office and they all manhandled him and beat him up. The Revisionists also tried to strangulate the Commissioner. The Revisionist no.2 broke a glass kept on the table and attacked the Commissioner with it, with the intention to kill him but by that time, the office peons, Chandan Singh, Raj Kumar and Ram Kishun came in and saved the Commissioner from the next blow. Thereafter, both the Revisionists ran away.

3. An F.I.R. was lodged by the peon Raj Kumar Singh arrayed as respondent no.2. The police recorded the statement of the complainant and three other employees of the office of the Consolidation Commissioner under Section 161 Cr.P.C. They also recorded the statement of Dr Hari Om, the victim. A biased investigation was carried out by the Investigation Officer. Dr Hariom got his medical report fabricated. After registration of F.I.R. the revisionist no.1 filed a writ petition praying for quashing of the F.I.R. . This Court was pleased to stay the arrest of the revisionist no.1 till the filing of the charge sheet. During hearing of such petition for F.I.R. quashing, the Court asked the Circle Officer/Investigation Officer to indicate by his personal affidavit as to how offence under Section 307 was made out. Before filing such affidavit, chargesheet was filed as a result the petition itself became infructuous and was dismissed as such on 30.08.2016.

4. It has been stated by the Revisionists that Dr Hariom is an I.A.S. officer and an influential person and under his influence the services of the petitioner were also terminated within one and a half months from the date of incident although such termination and suspension order has been set aside by this Court on 20.02.2019 as having been passed in violation of principles of natural justice. It is stated that Revisionists have been falsely implicated. The opposite party no.2 has filed an affidavit before the trial Court deposing there in that entire case set up by the victim as mentioned in his F.I.R. is false and as a result of pressure being put upon him by

the then Consolidation Commissioner. It has further been stated that in fact it was the revisionist no.1 who had been assaulted by Dr. Hariom, Raj Kumar, Chandan Singh and Ramkishun the revisionist no.1 filed a complaint against them to the Police but no action has been taken thereon.

5. It has been further stated that revisionist no. 2 was not involved in the case as his name is "Mohit Pandey' and not "Dinesh Pandey'. Several instances of victimisation of the Revisionists at the behest of the victim Dr Hariom have been mentioned in the Revision. It has also been stated that unnamed accomplices of the Revisionists who had allegedly attacked Dr. Hariom in his office were never found out and a Final Report was submitted by the Investigating Officer to the Court concerned. The revisionist no. 1 is an extremely sick person and he could not have assaulted Dr Hariom in the manner stated in the F.I.R.. Raj Kumar Singh the complainant who is arrayed as respondent no. 2 in the Revision has also filed an affidavit in Court that Dr Hariom forced him to lodge a false case under Section 195 A I.P.C. against the revisionist. Raj Kumar Singh has also filed another case against an alleged eye witness namely Ram Kishun under Section 195 A I.P.C.. It has also been stated that after Dr Hariom was no longer posted as Consolidation Commissioner, the Ministerial Employees Union had sent a letter to the Authorities saying that no such incident happened on 13.07.2016 as mentioned in the F.I.R.

6. Sri Arun Sinha, learned counsel for the revisionist opened his arguments from giving a background of the case saying that revisionist no. 1 is a Consolidation Officer who was posted at Amethi and revisionist no.2 his Son. Dr, Hari Om, the victim was the then Consolidation Commissioner and also belongs to Amethi. His elder brother practices as an Advocate in Amethi, his Bua's Son is a Lekhpal who was working under the revisionist no.1. There was some marriage in the house of the said Lekhpal where Dr. Hari Om had pressured the revisionist no.1 to spend several lakhs of rupees in making arrangements for dry fruits and cars and other amenities. He kept on arranging the same out of his own pocket out to fear and respect for the Consolidation Commissioner, however, the Consolidation Commissioner asked for Rs.1,00,000/- in cash which could not be arranged by the revisionist No.1 and therefore, the victim Dr. Hari Om (I.A.S.) who was the then Consolidation Commissioner transferred the revisionist no.1 to Balia. The Consolidation Lekhpal who is the cousin of Dr. Hari Om is an extremely corrupt employee and the revisionist is an honest officer and did not permit corruption of the concerned Lekhpal and therefore, out of pique the revisionist was transferred to Balia by the then Consolidation Commissioner.

7. Learned counsel for the revisionist has read out paragraph no. 32 of his petition to say that the revisionist no. 1 is an extremely sick person who was diagnosed with cancer of the Kidney in 1995. One of his kidneys has been removed. He has been suffering from several ailments including heart disease. Pages 137 to 255 of the paper book are the medical reports of the revisionist no. 1.

It has been argued that the revisionist no. 1 went to meet the Consolidation Commissioner on 13.10.2016 for cancellation of his transfer to Balia because he was sick. Dr. Hari Om pushed and kicked him and had also beaten

him up and then called his peons and other employees of the office and a concocted story was framed at the instance of the policemen asking the peon from the office of the Consolidation Officer, one Raj Kumar Singh to lodge FIR on the basis of such concocted story. Raj Kumar Singh, the Peon has filed an affidavit before the learned trial court and also before this Court saying that he was forced into writing whatever he did at the police station while lodging the FIR against the revisionist nos. 1 and 2.

8. Learned counsel for the revisionists has pointed out page no. 63 of the paper bookwhich is an order passed by the Division Bench while hearing the writ petition filed by the revisionist, bearing writ petition No. 17004 (MB) of 2016, *Rakesh Pandey vs. State of U.P. and Others*, wherein the Division Bench while refusing to interfere in the FIR had directed the Circle Officer concerned to conduct investigation and file his affidavit as to under what circumstance it was being concluded that the offence under Section 307 IPC has been committed by the revisionist. The Court directed the matter to be listed on a particular date and also directed that the petitioner be not taken into custody till the next date of listing. The State respondents, thereafter, filed a short counter affidavit hurriedly bringing on record the fact that charge sheet had been readied on 12.08.2016 and had been approved by the Supervisory Authority indicating commission of offence under Section 147,148, 332, 307, 504, 506, 427, 353 IPC. The Court therefore observed that *prima facie* it could not be disputed that offence had been committed insomuch as a public servant had been attacked and manhandled while he was on duty in his office. The Court further stated that since charge sheet is not under challenge before it and incriminatory evidence has been collected against the petitioner in the course of investigation, the petitioner would be at liberty to avail the remedy provided in law at the appropriate stage of the proceedings to challenge the charge sheet regarding invoking of Section 307 I.P.C. After the petition under Article 226 of the Constitution of India for quashing of FIR was thus disposed of by this Court on 30.08.2016, the revisionist moved a discharge application before the learned trial court. The discharge application has been rejected on 25.07.2019 by the learned trial court and therefore this revision has been filed.

9. While arguing the matter, learned counsel for the revisionist has pointed out an interim order dated 27.08.2019 passed by this Court while entertained the revision. The Court had observed on the basis of observations made in the interim order passed by the Division Bench in the case relating to FIR quashing filed by the revisionist, that the trial court may continue with the proceedings but the charge under Section 307 IPC shall not be framed against the accused by the learned court below. It has been submitted by the learned counsel for the revisionist that for the past two years the order passed by the Court has not been complied with and the learned court below has not framed any charge at all and it is just fixing the matter on various dates without any effective hearing.

10. It has also been argued by the learned counsel for the revisionists that this Court in its interim order in this revision had directed the Investigating Officer to collect evidence from CCTV camera footage installed in the office of the Consolidation Commissioner but such

observation of the Court has not been taken heed of by the Investigating Officer.

11. This Court has carefully perused the interim order granted in this Revision and finds from the same that the Court had only recorded the submissions made by the learned counsel for the revisionists that the office of the Consolidation Commissioner is well equipped with security camera but despite repeated requests CCTV footage was not collected by the Investigating Officer, and investigation was done under the command of Dr. Hari Om, the then Consolidation Commissioner. The Court also recorded the submissions made by the learned counsel for the revisionists that Investigating Officer flouted the provisions of Regulation 107 of the U.P. Police Act, while submitting the charge sheet. Several other submissions made by the learned counsel for the revisionists relating to no offence being committed under Section 307 IPC was also recorded by this Court in its interim order dated 27.08.2019. But, there is no direction by this Court in its interim order either to the Investigating Officer or to the trial court to get collected evidence from CCTV footage in the office of the Consolidation Commissioner. The argument of the counsel for the revisionists is misleading to say the least.

12. Learned counsel for the revisionists argued that since the Division Bench had held that no offence under Section 307 was committed and this Court while entertaining the revision had also observed in its interim order that no charge can be framed under Section 307, it should be taken that the order on the discharge application by the learned trial court has ignored the observation of the High Court and rejected the discharge application arbitrarily.

13. Learned counsel for the revisionists has pointed out Section 227, 228 and 216 of the Cr.P.C. to say that the learned trial court ought to have considered evidence placed before it and could have framed charges only for offences that were likely to have been committed. Also, that the trial court could alter the charges or add any charge anytime before the judgement is pronounced. Also, that Section 307 was added in the charge sheet only to ensure that the trial is conducted by the Sessions Court, thus depriving the accused of remedy of appeal. If the charge under Section 307 had not been mentioned in the the charge sheet by the Investigating Officer then the trial would have been conducted in the Court of Judicial Magistrate, and then the revisionists would have one opportunity of filing an appeal against any order passed by the Judicial Magistrate, if it went against the revisionists.

14. Learned counsel for the revisionists has also argued before this Court that, the statements of all the prosecution witnesses as also defence witnesses have been filed, from the perusal whereof this Court would find that no charge under Section 307 could have been added in the charge sheet.

15. Counsel for the opposite party no. 2, namely, Raj Kumar Singh, the Peon who was the informant in the FIR has pointed out from his counter affidavit and also from the affidavit filed before the learned trial court that Raj Kumar Singh, the informant has denied the incident as alleged in the FIR to have ever taken place.

16. Learned counsel appearing for the opposite party no. 2 has pointed out from his counter affidavit paragraphs 6, 7, 8 to

say that it has been the case of the opposite party no. 2 all along that he was forced to give statement under Section 161 of the Cr.P.C. before the police because of the influence of the victim who was then Consolidation Commissioner.

17. Sri Purnedu Chakravarty, Advocate appears for the victim and says that he has not been made a party to this criminal revision although he is the one who should be heard because he was beaten up by the revisionists.

18. Sri Purnedu Chakravarty, Advocate has been given a right of hearing by this Court only because the counsel for the informant, the opposite party no. 2 has denied the incident altogether, and has said that the FIR was drafted by the somebody else under the dictates of the then Consolidation Commissioner and he was forced to sign the same and submit it in the police station concerned.

19. Sri Purnedu Chakravarty, learned counsel appearing for Dr. Hari Om, the victim has pointed out from the order impugned that the incident that took place in between 03:15 PM to 03:30 PM in the office of the Consolidation Commissioner has not been denied. It has also not been denied that revisionist no. 1 himself had gone alongwith his son to meet Dr. Hari Om and had sent his parchi/application on the basis of which he was called into the office of the Consolidation Commissioner. Learned counsel for the victim has pointed out page 257 of the paper book, which is an order passed by this Court on an application under Section 482 of the Cr. P.C. moved by Mohit Pandey S/o Rakesh Pandey saying that he has been wrongly referred to in the FIR as Dinesh Kumar Pandey, and therefore, the investigation and the charge sheet can be said to be without application of mind by the Investigating Officer and under the influence of the IAS officer concerned. The Court has refused to interfere in the charge sheet and had rejected his petition under Section 482 of the Cr.P.C. leaving it open for Mohit Pandey to submit before the learned trial court that he had wrongly been implicated on the basis of mistaken identity. It has been pointed out that the charge sheet was also challenged by the son of the revisionist. The charge sheet has not been interfered with.

20. Learned counsel for the victim has read out the entire order from internal page 3 onwards regarding the findings recorded by the learned trial court for rejecting the discharge application. It has been pointed out that no foreign material can be considered at the stage of moving discharge application before framing the charge. Sections 193, 207, 209, 226, 227, 228 of the IPC have been pointed out and also Section 216 of the Cr.P.C. to say that Sessions trial is different from the trial held by the Magistrate. It has been pointed out that in the Sessions Trial, the charge sheet is filed before the Magistrate, the Magistrate after taking cognizance on the charge sheet issues summons to the accused on the basis of documentary evidence filed alongwith the charge sheet. Thereafter, he commits the case for trail before the Sessions Court. The revisionist has neither challenged the cognizance order, nor the order passed by the Magistrate committing the case for trial to the Sessions Court. The charge sheet had also not been challenged by the revisionist no. 01. The charge sheet was challenged by his son, the challenge was rejected by this Court.

21. It has been pointed out that the power under Section 228(1) (a) has not been exercised by the Sessions Court, only

if an order passed under Section 228 (1) (a) is passed can the accused have any ground to come before this Court saying that his right to appeal has been taken away. The order that has been passed by the Sessions Court is with regard to the discharge application of the revisionists and the jurisdiction of this Court is limited over such an order under Section 397/401 Cr.P.C.

22. Learned counsel for the victim has relied upon the judgement rendered by the Hon'ble Supreme Court in the case of ***Sanghi Brothers (Indore) Pvt. Ltd. vs. Sanjay Choudhary and Others, AIR 2009 Supreme Court 9,*** (paragraph 7 and 8) as also judgments that have been cited by the learned trial court in the order impugned.

23. Learned counsel for the victim has also pointed out the judgment rendered in the case of ***Sanjay Kumar Rai vs. State of Uttar Pradesh & Anr.*** In Criminal Appeal no. 472 of 2021 decided on 07.05.2021 and paragraph 11 onwards of the same.

24. Learned counsel for the victim has also pointed out the statement of Sri Raj Kumar Singh, at page no. 33 saying that he has not disputed the meeting of the revisionist and his son with the then Consolidation Commissioner in his office, and he has also not disputed the presence of other peons like Ram Kishun, Chandan Singh and others. There is no dispute regarding the medical conducted of the victim where injuries has been shown on the face, on the head and on the neck of the victim. It was only because the Peons working in the office of the Consolidation Commissioner who came rushing to his office that the attempt at strangulation of the victim was thwarted. He has pointed out from the statement of the opposite party no. 2 and his affidavit that Raj Kumar Singh has not said anywhere that he had not given any statement under Section 161 of the Cr. P.C. to the police. The incident took place on 13.07.2016, the counter affidavit that was filed in this case as also the affidavit that was filed before the learned trial court by Raj Kumar Singh is dated August,2018 i.e. two years after the incident where Raj Kumar Singh has turned around and suddenly stated that he was forced into lodging the FIR because the influence of the then Consolidation Commissioner in whose office he was was working as a Peon.

25. This Court must first consider the scope of interference under Section 397/401 of the Criminal Procedure Code.

In ***Amit Kapoor versus Ramesh Chander and ors 2012 9 SCC 460,*** the Supreme Court was considering the scope of powers granted under Section 397 and Section 482 Cr.P.C. to the High Court. In Paragraph 2 of its judgement the Supreme Court framed the question of law thus -*"..A question of law that arises more often than not in criminal cases is that of the extent and scope of the powers exerciseable by the High Court under Section 397 independently or read with Section 482 of the Code of criminal procedure..."*. After considering the facts of the case regarding F.I.R. being lodged against the respondents and charge sheet being filed in Court and charge being framed by the trial Court on commital to the Court of Sessions, and the filing of a Criminal Revision by the respondent challenging the order of the trial Court framing the charge; the Supreme Court observed that the appellant had approached it in Appeal against the order of the High Court quashing the charge framed under Section 306 I.P.C. while permitting

the trial Court to continue the trial in relation to offence under Section 448 of the I.P.C.

26. In paragraph 8 & 9, the Supreme Court observed: -

"8. Before examining the merits of the present case we must advert to the discussion as to the ambit and scope of the power which the Courts including the High Court can exercise under Section 397 and Section 482 of the Code. Section 397 of the Code vests the Court with the power to call for and examine the records of an inferior Court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well founded error and it may not be appropriate for the Court to scrutinise the order, which upon the face of it is a token of careful consideration and appears to be in accordance with law. If one looks into various judgements of this Court, it emerges that revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, or the material evidence is ignored or Judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but merely indicative. Each case would have to be determined on its own merits.

9. Another well accepted norm is that the revisional jurisdiction of the High Court is very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice Ex Facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in the given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories as aforestated. Even framing of charge is a much advanced stage in the proceedings under Code of criminal procedure procedure.."

(emphasis supplied)

The Supreme Court thereafter considered the observations made by it in *State of Haryana versus Bhajan Lal* 1992 supp 1 SCC 335 , with regard to exercise of power under Section 482 by the High Court. It observed that even while enumerating the grounds on which power can be exercised under Section 482 Cr.P.C., the Court had uttered a note of caution to the effect that power of quashing of criminal proceedings should be exercised very sparingly and with great circumspection and that too, in the rarest of rare cases. The Court had warned that it would not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice.

27. In paragraph 10, the Supreme Court observed that if jurisdiction under Section 482 of the Court in relation to quashing of an F.I.R. is circumscribed by caution as mentioned in *State of Haryana versus Bhajan Lal*, the revisional jurisdiction, particularly while dealing with framing of charge, has to be even more limited. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused

is discharged under Section 227 of the Code. Under both these provisions the Court is required to consider the "record of the case' and documents submitted there with and, after hearing the parties, either discharge the accused or where it appears to the Court and in its opinion, there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for the exercise of such jurisdiction. *"It may even be weaker than a prima facie case. There is a fine distinction between the language of Section 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgement of the Court whereas Section 228 is tentative. That is to say, that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code."*

"It may be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no intra-court remedy is available in such cases. Of course, it may be subject to the jurisdiction of this Court under Article 136 of the Constitution of India. Normally, revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find a place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power of the Court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.." (emphasis supplied)

28. The Supreme Court went on to observe in paragraph-11 thus:-

"11. At initial stage of framing of a charge, the Court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which if put to trial, could prove him guilty. All that the Court has to see is that the material on the record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well settled law laid down by this Court in the case of State of Bihar versus Ramesh Kr Singh 1977 (4) SCC 39:

"4..under Section 226 of the Code while opening the case for prosecution the prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage, the duty of the Court to consider the record of the case and the documents submitted there with and to hear the submissions of the accused and the prosecution in that behalf. The judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If the judge considers That "there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing," as enjoined by Section 227. If on the other hand the Judge is of the opinion that there is ground for presuming that the accused has committed an offence which - - (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused" as provided in Section 228.

Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved would be incompatible with the innocence of the accused or not. The standard of test and judgement which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie Whether the Court should proceed with the trial or not: if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example, if the scales of the pan as to guilt or innocence of the accused are something like even, at the conclusion of the trial, then on the theory of benefit of doubt the cases to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 of Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227." (emphasis supplied)

29. In paragraph 12 of judgement rendered in Amit Kapoor (supra), the Supreme Court observed further: -

"the jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial Court or the inferior Court, as the case maybe. Though the Section does not specifically use the expression "prevent abuse of process of any Court or otherwise to secure ends of justice", the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a Court is the very foundation of the exercise of jurisdiction under Section 397, but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily..."

(emphasis supplied)

The Supreme Court referred to the powers granted under Section 482 Cr.P.C. to the High Court which are inherent and very wide and are not as limited as given under Section 397 of the Code. It observed that Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. However, the power under Section 482 can be exercised even in such cases where a trial Court order can be challenged under Section 397 in Criminal Revision. The only limitation in so far as Section 482 is concerned is that of self restraint and nothing more. The High Court as the highest Court exercising criminal jurisdiction in the State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extraordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by subordinate Court of its powers.

30. The Supreme Court in paragraph 19 observed that having discussed the scope of jurisdiction under Section 397 and Section 482 of the Code, and the fine line of jurisdictional distinction, *"it would be appropriate for it to list the principles with reference to which Courts should exercise such jurisdiction."* It referred to an objective analysis of various judgements of the Supreme Court and culled out some of the principles to be considered for proper exercise of jurisdiction particularly with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

"1)....even though there are no limits of the power of the Court under Section 482 of the Code but the more the power the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings particularly, the charge framed in terms of Section 228 of the Code, should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2) The Court should apply the test as to whether they are uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach a conclusion and the basic ingredients of a criminal offence or not satisfied then the Court may interfere.

3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4) where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate Courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5) where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

6) the Court has a duty to balance the freedom of a person and the right of the complainant of prosecution to investigate and prosecute the offender.

7) The process of Court cannot be permitted to be used for an oblique or ultimate, ulterior purpose.

8) Where the allegations made and as they appear from the records and documents annexed therewith to predominantly give rise and constitute a civil wrong with no element of criminality and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon critical analysis of the evidence.

9) another very significant caution that the Courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of Court leading to injustice.

10) it is neither necessary nor is the Court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the Investigating Agencies to find out whether it is a case of acquittal or conviction.

11) where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12) in exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with it by the prosecution.

13) quashing of charge is an exception to the rule of continuous prosecution. Where offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing it at that initial stage The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14) Where the chargesheet, report under Section 173 (2) of the Code, suffers from fundamental legal defects, the Court may well be within its jurisdiction to frame a charge.

15) Coupled with any or all of the above, where the Court finds that it would amount to an abuse of the process of the Court or that interest of justice will suffer otherwise, it may quash the charges. The power is to be exercised Ex Debito Justitiae that is ,to do real and substantial justice for administration of which alone, the Courts exist. (emphasis supplied)

31. The Court observed in paragraph 22 thereafter that the Legislature in its wisdom has used the expression *"there is ground for presuming that the accused has committed an offence"*. There is an inbuilt element of presumption. It referred to the judgement rendered by the Supreme Court in the case of *State of Maharashtra versus Somnath Thapa and others* 1996 (4) SCC 659 and to the meaning of the word "presume", placing reliance upon Blacks' Law Dictionary, where it was defined to mean "to believe or accept upon probable evidence"; *"to take as true until evidence to the contrary is forthcoming". In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, incriminating material and evidences put to the accused in terms of*

Section 313 of the Code, and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the Court forming its final opinion and delivering its judgement……"

(emphasis supplied)

32. Having perused the pleadings on record carefully and having heard the argument of the learned counsel for the parties, this Court has also gone through the order impugned dated 25.07.2019. The Additional Sessions Judge has mentioned the facts regarding discharge application being filed by the Revisionists, that they were falsely implicated and therefore charges should not be framed against them as proposed in the chargesheet. The F.I.R. was lodged on the advice of police officials, the investigation was biased, all injuries suffered by Dr Hariom were simple in nature and the medicolegal report was fabricated to include injury to head and neck so that a charge under Section 307 IPC was also included in the chargesheet. It was also claimed that the Revisionist no.2 had nothing at all to do with the matter except that he had accompanied his father to the office of Dr. Hariom. Even his name was wrongly mentioned in the F.I.R. as Dinesh Pandey although he was Mohit Pandey.

33. The Additional Sessions Judge thereafter recorded the arguments made orally by the prosecution with regard to investigation being carried out fairly and *prima facie* charges under Sections 147, 148, 149, 332, 307, 504, 506, 427 and 353 I.P.C. being made out and that the discharge application should not be entertained by the trial Court.

34. After recording the submissions made by the learned counsel for the parties, Additional Sessions Judge has recorded his findings on the basis of the paper book before him. He has noted the bare facts regarding Case Crime No. 430 of 2016 being registered at P.S. Hazrat Ganj Lucknow and charge sheet being filed after due investigation. He has noted the contents of the F.I.R. and the statements made by the victim Dr Hariom and other witnesses to the Investigating Officer. He also noted the arguments of the Prosecution that the accused had approached the office of Dr Hariom with a common intention and had attacked him physically after abusing him verbally. Revisionists had tried to strangulate Dr Hariom and one of the accused had also attacked him with a broken piece of glass. Had he not been saved in the nick of time by his office peons who came in on hearing the commotion, Dr Hariom would have suffered mortally.

35. The learned trial Court has referred in great detail to the statements made under Section 161 of the Cr.P.C. by the victim and other witnesses. Learned trial court has recorded that on the basis of evidence collected by the Investigating Officer *prima facie* charges as had been proposed by the prosecution were made out. The learned trial Court from paragraph 10 onwards of the impugned order has referred to several judgements of the Supreme Court with regard to the scope of interference in a discharge Application. The trial Court has referred to ***Palvinder Singh versus Balwinder Singh*** AIR 2009 Supreme Court 887; and ***Sanghi Brothers, Indore versus Sanjay Chaudhary*** AIR 2009 Supreme Court 9; as also ***State of Orissa versus Devendranath Padhi*** AIR 2005 Supreme Court 359, and ***State of Bihar versus Ramesh*** 1977 SCC Criminal 533; where the Supreme Court had

observed about the duty of the trial Court at the time of framing of charge. It had been observed that the trial Court shall consider documents and evidence produced by the prosecution in support of the chargesheet. A detailed examination of such evidence and documents was not necessary as it would amount to consideration of evidence. At the stage of framing of charges the trial court should not conduct a mini trial. Only when the trial court finds from an examination of the Case Diary and other evidence collected by the Investigating Officer that there was no material at all to proceed against the accused, can discharge application be allowed.

36. The learned trial court has referred to the observations made by the Supreme Court that at the time of framing of charge *"the Court Has only to see whether there is sufficient material for the accused to be tried and not to evaluate and weigh the evidence in such a manner as to come to a conclusion that the accused can most certainly be convicted on the charges so proposed in the chargesheet...."*.

37. The learned trial Court has referred to Supreme Court's observations in ***Helios and Matheson Information Technology Ltd versus Rajiv Sawhney*** 2012 (76) ACC 341 (Supreme Court); thus:-

"...the law is that at the time of framing of charge or taking cognizance, the accused has no right to produce any material. No provision in the Cr.P.C. 1973 grants to the accused any right to file any material document at the stage of framing of charge. That right is granted only at the stage of trial. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his evidence at the stage of framing of charge and for the examination there of at that stage which is against the criminal jurisprudence."

(emphasis supplied)

38. Learned trial court thereafter observed that in view of the law settled by the Supreme Court in several judgements regarding the duty of the trial Court while considering a discharge application at the time of framing of charge, there was sufficient material in the paperbook for the accused to be tried and that no evidence was produced by the accused in the discharge application for him to come to a conclusion otherwise and therefore rejected the application for discharge moved by the accused.

39. In ***Sanjay Kumar Rai*** (supra), the Supreme Court was considering the Appellant's challenge to the High Court's judgement rejecting his Criminal Revision against the order passed by the Chief Judicial Magistrate refusing to discharge the appellant. The counsel for the appellants' argument was that *prima facie* the story of the complainant seemed to dubious and improbable. It observed on the basis of judgement rendered by the Supreme Court in ***State of Karnataka versus M.R. Hiremath,*** 2019 (7) SCC 515; and ***Sreelekha Senthil Kumar versus C.B.I.*** 2019 (7) SCC 82; that the Court should not enter into questions of evidentiary value of the material adduced at the stage of considering discharge and that it was impermissible to look into the merits of the case while exercising power under Section 239 Cr.P.C. Regarding the facts of the case where the High Court had dismissed the Criminal Revision only on

the ground of lack of jurisdiction, it observed on the basis of judgment in *Madhu Limaye vs State of Maharashtra 1977 (4) SCC 551*, that although the High Court can exercise its jurisdiction in reviewing orders framing charges or refusing to discharge the accused, as it is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice, the discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. The Supreme Court observed that there should be interference in exceptional cases where failure to do so would likely result in serious prejudice to the rights of a citizen for example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person. It observed in paragraph 16 thus :-

"Further, it is well settled that the trial court while considering the discharge application is not to act as a mere Post Office. The Court has to sift through evidence in order to find out whether there is sufficient grounds to try the suspect. The Court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on (Union of India versus Prafull Kumar Samal 1979(3) SCC 4); Likewise, the Court has sufficient discretion to order further investigation in appropriate cases, if need be."

40. In ***Sanghi Brothers*** (supra), the Supreme Court considered judgements rendered by it in *State of Maharashtra and others versus Somnath Thapa and others* 1996 (4) SCC 659; *Stree Attyachaar Virodhi Parishad versus Dilip Nathumal Chordia* 1989 (1) SCC 715, and *State of West Bengal versus Mohammad Khalid* 1995 (1) SCC 684; that if there is a presumption on the basis of evidence collected of culpability of the accused in the offence committed, then the Court should not interfere at the stage of framing of charge and discharge the accused.

It observed in paragraph 32:- *"the aforesaid shows that if on the basis of materials on record, the Court could come to the conclusion that commission of the offence is a probable consequence; a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence, it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage".*

(emphasis supplied)

"At the stage of framing of charge the Court has to apply its mind to the question whether or not there is any ground for presuming the commission of offence by the accused. The Court has to see while considering the question of framing the charge as to whether material brought on record could reasonably connect the accused with the trial. Nothing more is required to be inquired into. The test of a prima facie case has to be applied. Even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the Court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction."

(emphasis supplied)

41. In ***Dilawar Balu Kurane versus State of Maharashtra*** 2002 (2) SCC 135,

the Supreme Court had observed that while exercising power under Section 227 of the Code of Criminal Procedure, and considering the question of framing of charge, the trial Court has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused is made out and where the material placed before the Court discloses grave suspicion against the accused, which has not been properly explained, the Court will be fully justified in framing of the charge and proceeding with the trial, however, by and large if two views are equally possible and the judge is satisfied that the evidence produced before him will give rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused.

42. However, such view although has been considered by the Supreme Court in its judgement rendered in ***State of Rajasthan versus Ashok Kumar Kashyap*** 2021 SCC Online SC 314; has not been relied upon it has instead placed reliance upon its own decision in ***State of Karnataka versus MR Hiremath*** (supra) and paragraph 25 thereof which is quoted as under :-

"25... The High Court ought to have been cognisant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 of the Code of Criminal Procedure. The parametres which govern the exercise of the jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge, the Court must proceed on the assumption that the material which has been brought on record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In State of Tamil Nadu versus and Suresh Rajan 2014 (11) SCC 709, adverting to the earlier decisions on the subject, this Court held:

29 - - at this stage probative value of the materials has to be gone into and the Court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the Court thinks that the accused might have committed the offence on the basis of material on the record, on its probative value, it can frame the charge; though for conviction, the Court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

(emphasis supplied)

As regards the arguments made by the counsel appearing on behalf of the opposite party no.2 Sri Anil Kumar Sharma that Raj Kumar Singh the complainant in the F.I.R. had later resiled from his complaint and had filed an affidavit before the trial court denying any incident having occurred on 13.07.2016 in the office of the Consolidation Commissioner, the Supreme Court has observed repeatedly, and most recently in a judgment rendered in S.L.P. (Crl.) No.9552 of 2021: *Hazrat Deen Vs. State of U.P.;* decided on 06.01.2022 *"that discrepancies cannot be a ground for discharge without initiation of trial"*. Hence the argument raised by learned counsel for the revisionist that the complainant himself had later on given a statement that no

incident had actually occurred, needs to be looked into only at the time of trial and should not be seen at the time of consideration of discharge application.

43. Having considered the law on the subject and the order impugned, this Court finds that the trial court has considered in detail each and every aspect of the matter at length and then passed an appropriate order. The scope under Criminal Revision being restricted to correct an apparent error in law or a perversity in fact, this Court finds no good ground to interfere in this Criminal Revision.

44. This Criminal Revision is accordingly ***dismissed.***

(2022)02ILR A172
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Second Appeal No. 202 of 2017

Yogesh Kesarwani & Anr. ...Appellants
Versus
Devi Shankar Shukla ...Respondent

Counsel for the Appellants:
Ravi Nath Tilhari, Deepanshu Dass, Lalta Prasad Misra, Pradeep Chandola

Counsel for the Respondent:
Brijesh Kumar, Ritesh Kumar Srivastava

A. Partition Act, 1893 - Section 4 - Transfer of Property Act, 1882 - Section 44 - Section 44 of the Transfer of Property Act indicates that a stranger to a family who becomes the transferee of an undivided share of one of the co-owners in a dwelling house belonging to an undivided family cannot claim a right of joint possession of the house with the other co-owners of the dwelling house. However, through Section 4 of the Partition Act the legislature has given the Court the power to compel a stranger who has acquired by purchasing a share in the family dwelling house, when he seeks for partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court. (Para 52-53)

The Court has to be extremely cautious in determining the valuation upon which the stranger purchaser is compelled to sell his share. The valuation has to be reasonable and should be a well accepted mode balancing the equities and rights of the respective parties. Though there is no straight jacket method which is adopted in all the cases for valuation but ordinarily the date of valuation would be the date when the right to purchase accrues. In other words, it cannot be a date prior but must be the date of making an unconditional offer to purchase either by making a separate application or otherwise by making the undertaking in pleadings. (Para 85)

Second Appeal Allowed. (E-10)

List of Cases cited:

1. Malati Ramchandra Raut & ors. Vs Mahadevo Vasudeo Joshi & ors. 1991 Sup (1) SCC 321 *(followed)*

2. Badri Prasad Narain Prasad Chaudhary & ors. Vs Nil Ratan Sarkar (1978) 3 SCC 30

3. Iliyas Ahmad & ors. Vs Bulaqi Chand & ors. AIR 1917 (Alld.) 2

4. Krushnakar & ors. Vs Kanhu Charan Kar & ors. AIR 1962 (Ori) 85

5. An unreported case of Govind Ji Doase Vs Kamji Mavji Civil Revision No. 18 of 1951

6. Kashi Nath Bhatt & ors. Vs Atma Ram & ors. AIR 1973 (Alld.) 548

7. Gopal Chandra Mitra & ors. Vs Kalipada Das & ors. AIR 1987 (Cal) 210

8. Mt. Sumitra & anr. Vs Dhannu Bhiwaji AIR 1952 Nagpur 193

9. Smt. Kamla Devi Vs Sunni Central Board of Waqfs, U.P. AIR 1949 (Alld.) 63

10. Girdhari Lal Batra Vs Krishan Lal Batra & ors. 2018 SCC Online (Del) 12547

11. Badri Narain Prasad Chaudhary & ors. Vs Nil Ratan Sarkar 1978 (3) SCC 30

12. Smt. Saira Vs Smt. Mariyam Sattar AIR 2007 (Alld.) 179

13. Ghanteshwar Ghosh Vs Madan Mohan Ghosh & ors. (1996) 11 SCC 446

14. Woodland Manufacturers Ltd. Vs Shankar Prasad & ors. 2006 SCC Online (Calcutta) 304

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

1. The issue involved in the instant second appeal revolves around the scope and ambit of Section 4 of the Partition Act, 1893.

2. The present second appeal has been preferred by the plaintiffs/appellants being aggrieved against the judgment and decree dated 14.02.2017 passed by the First Appellate Court in Regular Civil Appeal No. 63 of 2016 whereby the Lower Appellate Court allowed the defendants appeal and set aside the judgment and decree dated 20.01.2016 passed by the Civil Judge, Senior Division, Lucknow in R.S. No. 436 of 2009 whereby the counter claim of the defendant was denied, as a result the counter claim has been decreed.

3. The instant second appeal was admitted on the following two substantial questions of law which read as under:-

"i. Whether the valuation of share of the stranger in house of the shareholder must be made by the court on the date of judgment determining the respective shares of the transferee and the co-sharer ? If yes, its effect on the decree passed by the lower appellate court.

ii. Whether the "Undertaking " must be un-conditional ? and if yes whether the absence of any finding recorded by lower appellate court in favour of the present respondent that he gave un-conditional 'undertaking to buy' the benefit of Sec. 4, partition Act could have been extended? and, if not, its effect?"

Factual Matrix:

4. In order to appreciate the controversy involved, it will be relevant to notice the facts giving rise to the present appeal.

5. Devi Shankar Shukla (the respondent herein and referred to as the co-sharer) instituted a suit bearing No. 4 of 2007 before the Court of Civil Judge, Senior Division, Lucknow, seeking a decree of declaration against the following defendants namely Vijay Shankar Shukla, Ravi Shankar Shukla, Smt. Pratibha Shukla, Dr. Kripa Shankar Shukla and subsequently by amendment Sri Satya Prakash Nigam (transferee) was also impleaded as a defendant.

6. It was the case of the respondent herein that one Smt. Sadhu Devi wife of late Sri Sarjudeen Shukla was the exclusive owner in possession of the house bearing old house No. 19 and 15/8 and New Nagar Nigam House No. 50/110 situate at Jai Narayan Road, Hussainganj, Lucknow having purchased the said house by means of registered sale deed dated 13.10.1917.

7. It was also pleaded that Sarju Deen Shukla had two sons from his first wife

namely Shyam Sunder Shukla and Shyam Manohar Shukla while from his second wife namely Smt. Sadhu Devi, he had a son namely Gaya Shankar Shukla.

8. Sri Shyam Manohar Shukla died during the lifetime of Sri Shyam Sunder Shukla. The wife of Shyam Manohar Shukla namely Smt. Tulsa Devi and Shyam Sunder Shukla both in their lifetime, on 14.11.1931, had relinquished their shares in favour of Smt. Sadhu Devi in respect of the property in question.

9. Thus, Smt. Sadhu Devi was the exclusive owner in possession of the property in question and after her death, the father of the respondent herein namely Gaya Shanker Shukla became its exclusive owner. The respondent herein was born in the said property and continued to live therein with his parents. His father expired on 15.11.1992 and his mother too expired on 16.10.2005, leaving behind the respondent and three other siblings and thus the respondent claimed 1/4th share in the property in question.

10. It was also pleaded that one of the brothers of the respondent namely Sri Anoop Shankar Shukla expired on 11.05.2004 and his share devolved on his wife namely Smt. Pratibha Shukla. It was also pleaded that though by means of the registered deed dated 14.11.1931. Smt. Tulsa Devi and Shyam Chandra Shukla had relinquished their shares in favour of Smt. Sadhu Devi but later it came to light (through a sale deed executed by the defendants nos. 1, 2 and 3 of Suit No. 4 of 2007 in favour of the defendant no. 5) that Smt. Sadhu Devi had executed a gift deed in favour of the defendant no. 4 Dr. Kripa Shankar Shukla and thus, the respondent herein who was the plaintiff of the Regular Suit No. 4 of 2007 sought a declaration that the gift deed dated 14.11.1931 be declared as null and void.

11. During the pendency of the aforesaid suit, the original defendants nos. 1, 2 and 3 sold their share in favour of Satya Prakash Nigam. Thus, the respondent herein moved an application under Order 1 Rule 10 C.P.C. and impleaded Sri Satya Prakash Nigam as the defendant no. 5. During the pendency of the suit, the defendant no. 5 namely Satya Prakash Nigam further transferred the property in favour of Sri Yogesh Kesarwani and Dr. Mukesh Kesarwani (hereinafter referred to as appellants/ the stranger purchasers).

12. Dr. Mukesh Kesarwani and Sri Yogesh Kesarwani (plaintiffs of Regular Suit No. 436 of 2009 instituted a suit for partition seeking separation of their 3/4th share in House No. 50/8, Jai Narayan Road, Hussainganj, Lucknow.

13. Both the suits related to the property in question between the same parties and their successors in interest, hence, they were consolidated by the Court of Civil Judge, Senior Division, Lucknow and R.S. No. 4 of 2007 was made the leading case.

14. In the suit for partition instituted by the stranger purchasers numbered as R.S. No. 436 of 2009, the defendant Devi Shankar Shukla (respondent herein) while filing his written statement also set up a counter claim wherein he raised the plea that since he was the co-sharer, hence, in exercise of his right conferred under Section 4 of the Partition Act, 1893 he sought to purchase the 3/4th share of the stranger purchasers at the price at which the stranger purchasers had purchased the

property from Sri Satya Prakash Nigam or at such price to be determined by the Court.

15. After the exchange of pleadings, the Trial Court framed the following issues which emerged from the pleadings of R.S. No. 4 of 2007 which read as under:-

"(i) Whether in light of the averments made in the plaint, the plaintiff is entitled to 1/4th share in the ancestral house bearing 50/8 (old number) and 50/110 (new number) situate at Jai Narayan Road, Hussainganj, Lucknow, the boundaries of which are mentioned in paragraph 2 of the plaint? if yes, its effect.

(ii) Whether the plaintiff is entitled to get the gift deed dated 14.11.1931 executed in favour of the defendant no. 4 declared as null and void? if yes, its effect.

(iii) Whether in light of the pleadings, the plaintiff is entitled to get the sale deed dated 10.01.2007 executed in favour of the defendant no.5 declared as void, if yes, its effect.

(iv) Whether the defendants are illegally interfering in the peaceful possession of the plaintiff, if yes, its effect.

(v) Whether the plaintiff is entitled to any relief."

16. In light of the pleadings exchanged in Regular Suit No. 436 of 2009, the following issues were framed.

(vi) Whether the plaintiffs are entitled to get their 3/4th share separated from the defendant, if yes, its effect.

(vii) Whether the defendant is entiled to the relief claimed in his counter claim to buy the share of the stranger purchasers at Rs. 9,00,000/-and if so, its effect.

(viii) Whether the defendant is entitled to purchase the share of the stranger purchasers in terms of Section 4 of the Partition Act, 1893, if so, its effect.

(ix) Whether the plaintiffs and the defendants are entitled to any relief in terms of the prayer made in the plaint and the written statement containing counter claim ?

17. Since Regular Suit No. 4 of 2007 was made the leading case, accordingly, the evidence was led in the said suit. Sri Devi Shankar Shukla examined himself as P.W. 1 while he examined Sri Shailendra Kumar Mishra as P.W. 2 and filed documentary evidence.

18. The defendants examined Sri Yogesh Kesarwani as D.W. 1 and Priyank Shukla as D.W. 2 and also filed documentary evidence in support of their contentions.

19. The Trial Court held that the gift deed executed in favour of Kripa Shankar Shukla could not be declared as null and void as Sri Kripa Shankar Shukla died during the pendency of the Suit and the respondent herein admitted in his cross-examination that Kripa Shankar Shukla was survived by his legal heirs but they were not brought on record, hence, the suit abated. Accordingly, issue no. (ii) was decided in the negative against the respondent herein. However, while dealing with issue no. (i), it held that Devi Shankar Shukla (respondent herein) had 1/4the share in House No. 19, 50/8 (old) and 50/110 (new number) situate at Jai Narayan Road, Hussainganj, Lucknow.

20. While dealing with issues nos. (vii) and (viii) which emerged from the suit for partition instituted by the stranger purchaser, the Trial Court found that the co-sharer did not give any un-conditional offer

to purchase the share of the stranger purchasers at the market value, consequently, the said issues were decided against the respondent herein.

21. While dealing with issue no. (vi), the Trial Court concluded that since the stranger purchasers had purchased the 3/4th share from the other co-sharers after paying a valuable sale consideration and the said sale deed was duly registered, also, as the respondent herein had not given an unconditional offer to purchase the share of the earlier transferee Sri , Satya Prakash Nigam, hence, could not claim the benefit of Section 4 of the Partition Act, hence, the stranger purchasers were entitled to get their 3/4th share partitioned, accordingly, deciding the said issue in favour of the stranger purchasers/the appellant herein.

22. In light of the aforesaid findings, the issues nos. (iii) (iv) and (v) were decided against the respondent herein.

23. The Trial Court by means of judgment and decree dated 20.01.2016 held the suit bearing No. 4 of 2007 to have abated but declared the respondent herein/the co-sharer having 1/4th share in the property bearing 19, 50/8 (old) and 50/110 (new number) situate at Jai Narayan Road, Hussainganj, Lucknow. The suit of the stranger purchasers bearing No. 436 of 2009 was decreed declaring them to be owner of 3/4th share in the said property and entitled to get their share partitioned. The counter claim filed by Devi Shankar Shukla, the respondent herein was dismissed.

24. The respondent herein, being aggrieved against the said judgment and decree dated 20.01.2016 passed by the Trial Court preferred two Regular Civil Appeals under Section 96 C.P.C. The Regular Civil Appeal No. 62 of 2017 emerged from Regular Suit No. 4 of 2007 whereas Regular Civil Appeal No. 63 of 2016 arose from Regular Suit No. 436 of 2009. The Lower Appellate Court noticed that the respondent herein did not press the Regular Civil Appeal No. 62 of 2017 emerging out of Regular Suit No. 4 of 2007 and dismissed the said appeal as not pressed.

25. While dealing with Regular Civil Appeal No. 63 of 2016, the Lower Appellate Court framed the following points for determination:-

"(i) Whether the respondent herein (the appellant before the Lower Appellate Court was ready and willing to purchase the 3/4th share of the stranger purchasers in furtherance of Section 4 of the Partition Act.

(ii) Whether the Trial Court while passing the impugned judgment and decree dated 20.01.2016 has misconstrued the scope and ambit of Section 4 of the Partition Act, 1893."

26. Upon hearing the learned counsel for the parties, the Lower Appellate Court allowed the appeal and held that the house in question was a family dwelling house and in terms thereof the respondent herein was entitled to exercise his right under Section 4 of the Partition Act, 1893 and was entitled to purchase the share of the stranger purchasers for a sum of Rs. 9,00,000/-. It also recorded a finding that the date on which the respondent herein exercised his right of purchase was the material date on which the valuation was to be considered and directed the stranger purchasers to receive a sum of Rs. 9,00,000/- from the respondent herein and execute a sale deed in his favour within a

period of 3 months on expenses and stamp duty to be payable by the respondent herein.

27. The stranger purchasers (the appellant herein) have assailed the said judgment and decree dated 14.02.2017 passed by the Special Judge (Prevention of Corruption Act), Court No. 2/ADJ, Lucknow by means of the instant second appeal on the questions of law as enumerated hereinabove first:-

Submissions on behalf of the Appellants:-

28. Dr. L.P. Mishra, learned counsel for the appellants has primarily focussed his submissions on the following points.

(i) The Lower Appellate Court has committed a grave error in taking the date of valuation of the property in question as the date on which the respondents made his offer to purchase the share of the appellants in terms of Section 4 of the Partition Act. According to Dr. Mishra, the date on which the preliminary decree was passed ought to have been taken as the date of valuation of the property.

(ii) The other issue raised by Dr. Mishra is that the offer to purchase as made by the respondent was not un-conditional. It has been urged that though in the pleadings it was stated by the respondents that he was ready to purchase the share of the stranger purchasers on the market value or such value to be determined by the Court but during the course of the trial from his statement in the cross examination, he belied his pleadings and had made a statement which categorically established that the offer was conditional and this could not have been treated as substantial compliance of Section 4 of the Partition Act to enable the respondents to purchase the share of the appellants/stranger purchasers.

(iii) It was urged that the Lower Appellate Court failed to note that the respondent himself was responsible for delaying the proceedings, inasmuch as, large number of adjournments were sought by respondent and thereafter it is not justified for the respondent to urge that the date on which he made his offer to purchase the share of the appellants should be taken to be the date of valuation of the share of the stranger purchaser rather in the aforesaid circumstances the date for valuing the share could not be prior to the date of passing of the preliminary decree i.e. the date on which the contentious issues raised by the parties were resolved and decided by the Trial Court, hence, the right of the party to enforce his right under Section 4 would accrue for the first time, once the decree was passed and not prior thereto.

(iv) The learned counsel for the appellants has also submitted that the Lower Appellate Court while decreeing the counter claim of the respondent and holding that the respondent was entitled to purchase the share of the stranger purchasers at Rs.9,00,000/- has erred in exercise of jurisdiction, inasmuch as, the legislative intent as reflected in Section 4 of the Partition Act requires the Court to determine the value of the share whereas no such determination was undertaken either by the Trial Court or the Lower Appellate Court, thus, holding the figure of Rs. 9,00,000/- as the value was not only contrary to the provision of the Act but was also without any basis, hence, the manner in which the Lower Appellate Court has arrived at the finding is perverse.

(v) It is also urged by the learned counsel for the appellant that the respondent was not entitled to exercise his

right in terms of Section 4, inasmuch as, the evidence on record indicated that the house in question was not a family dwelling house. Unless and until it was established that the house in question was a family dwelling house till then it was not open for the respondent to exercise the rights in terms of Section 4 of the Partition Act nor the Court was justified in decreeing the counter claim in favour of the respondent.

(vi) It has also been submitted by the learned counsel for the appellants that the Lower Appellate Court has further committed an error by relying upon the decision of the Apex Court in the case of ***Malati Ramchandra Raut and Others Vs. Mahadevo Vasudeo Joshi and others*** reported in ***1991 Supp (1) SCC 321*** to arrive at its conclusion as the said decision was passed on the principles of Section 2 and 3 of the Partition Act which were not applicable in the present case as admittedly the instant case was squarely covered by Section 4 of the Partition Act. Hence, the reliance placed by the Lower Appellate Court on the decision of the Apex Court was not justified and moreover by doing so, in turn has negated the ratio of decision of the Apex Court in the Case of ***Badri Prasad Narain Prasad Chaudhary and Others Vs. Nil Ratan Sarkar*** reported in ***(1978) 3 SCC 30.***

(vii) Lastly, the learned counsel for the appellants has also drawn the attention of the Court to C.M. Application No. 154367 of 2021 moved under Section 152 read with Section 151 C.P.C. with the averment that the decree which has been passed by the two courts requires to be corrected/amended, inasmuch as, the boundaries of the house which has been mentioned is not correctly stated and the effect is that under the garb of the said boundaries as mentioned in the decree, the respondent would be entitled to a much larger area and at the time of execution, it would create unnecessary complications giving rise to unwarranted litigation.

(viii) It has also been pointed out and as evident from the facts narrated hereinabove, first, the respondent Devi Shankar Shukla had initially instituted a Regular Suit No. 4 of 2007 whereas the boundaries of the said house were larger and the suit of partition which was instituted by the appellants/stranger purchaser in the year 2009 was confined to a lesser area and though the suit no. 4 of 2007 stood abated but as the two suits i.e. Regular Suit No. 4 of 2007 and 436 of 2009 were consolidated and decided by the common judgment and decree, accordingly, the Trial Court as well as the Lower Appellate Court have taken the boundaries of Suit No. 4 of 2007 which could not have been done and to that extent it is urged that the application under Section 151 read with Section 152 C.P.C. be allowed.

29. The learned counsel for the appellants in support of his submissions has relied upon the following cases:-

(i) Iliyas Ahmad and Others Vs. Bulaqi Chand and Others reported in ***AIR 1917 (Alld.) 2;***

(ii) Krushnakar and Others Vs. Kanhu Charan Kar and Others reported in ***AIR 1962 (Ori) 85***

(iii) An unreported case of Govind Ji Doase Vs. Kamji Mavji, Civil Revision No. 18 of 1951, decided by the ***Court of Kutch Judicial Commissioner on*** 19.07.1951.

(iv) Kashi Nath Bhatt and Others Vs. Atma Ram and Others reported in ***AIR 1973 (Alld.) 548;***

(v) Gopal Chandra Mitra and Others Vs. Kalipada Das and Others reported in ***AIR 1987 (Cal) 210 ;***

(vi) Mt. Sumitra and Another Vs. Dhannu Bhiwaji reported in ***AIR 1952, Nagpur, 193.***

(vii) Smt. Kamla Devi Vs. Sunni Central Board of Waqfs, U.P. reported in ***AIR 1949 (Alld.) 63***

(viii) Girdhari Lal Batra Vs. Krishan Lal Batra and others reported in ***2018 SCC Online (Del) 12547;***

(ix) Badri Narain Prasad Chaudhary and Others Vs. Nil Ratan Sarkar reported in ***1978 (3) SCC 30***

Submissions on behalf of the respondent.

30. Sri B.K. Saxena, learned counsel for the respondent has controverted the submissions of the learned counsel for the appellant and has supported the judgment passed by the Lower Appellate Court.

(i) Primarily, it has been urged by Sri Saxena that in so far as the present proceedings are concerned, the pleadings would indicate that there was actually no dispute in so far as the rights of the parties is concerned. He has submitted that the appellants/stranger purchaser in their suit for partition clearly stated that they had purchased 3/4th share from the erstwhile co-sharer whereas the respondent had 1/4th share in the property. This factual position was not disputed by the respondent while filing his written statement including in his counter claim.

(ii) It is stated that the respondent apart from the pleadings the enforcement of his right under Section 4 of the Partition Act in the written statement containing counter claim, the respondent had also moved a separate application seeking enforcement of his rights to purchase the share of the stranger purchaser. Thus, at the first given available opportunity, the respondent had expressed undertaking and his willingness to purchase the share unconditionally.

(iii) It is, thus, urged that in light of the pleadings, there was actually no dispute and nothing prevented the Court to have passed the preliminary decree wherein the shares of the respective parties are determined. Hence, the date of filing of the written statement containing counter claim or in the alternative the date on which the respondent made a separate application seeking enforcement of his rights to purchase the share of the stranger purchaser would be the material date for determining the valuation of the share of the stranger purchaser and not the date of the preliminary decree. The respondents cannot be penalized to pay a higher sum prevailing at a subsequent point of time when he had already expressed his unconditional willingness to purchase the share in the first instance.

(iv) It is also urged by Sri Saxena that the submissions of the respondent in his cross-examination is being culled out in isolation to give an incorrect picture before the Court. It is stated that if the pleadings of the respondent in his written statement containing counter claim and seeing the line of questioning of the respondent during his cross-examination, it would indicate that the respondent had not made any condition to purchase the share of the stranger purchaser rather the respondent had merely turned down the suggestion of the appellant, that in case if a higher sum is offered to the respondent he would not sell his share to the appellants nor was he ready to purchase the share of the stranger purchaser at a price determined by the appellants. Thus, it is urged that the

contention of the learned counsel for the appellant that the respondent had given a conditional offer to purchase is quite incorrect & fallacious and is nothing but misreading of the evidence.

(v) The learned counsel for the respondent has also urged that admittedly the house in question was a family dwelling house. This was also evident from the statement of the witness examined on behalf of the appellants, yet, it was the appellants who had delayed the proceedings by taking a long time in filing the written statement to the counter claim filed by the respondent and thus, the delay in the proceedings cannot solely be attributed to the respondents rather the appellant himself has contributed to the delay and now having suffered a decree cannot cry foul to state that the respondent is not entitled to his right in terms of the decision rendered by the Apex Court in the case of ***Malati Ramchandra Raut (Supra).***

(vi) It is further urged by the learned counsel for the respondent that though Sections 2 and 3 on one hand and Section 4 of the Partition Act on the other hand apply on different fact situations but the fact remains that in so far as the manner of valuation and determination of value of share is concerned, the principles regarding the date on which valuation is to be done would remain the same.

(vii) It is also submitted that the Lower Appellate Court having noticed this aspect of the matter has rightly relied upon the decision of the Apex Court in ***Malati Ramchandra Raut (Supra)*** while coming to the conclusion that the valuation of the share in the property is to be done on the date when the right accrued and in the instant case, it would be the date on which the respondent had agreed to purchase the share of the stranger purchaser. It is further urged that relying upon the decision of **Malati Ramchadra Raut (Supra)** by the Lower Appellate Court, it in no manner negates the ratio of the decision of Badri Narain Prasad Chaudhary (Supra).

(viii) The learned counsel for the respondents has placed much emphasis on the fact that during the pendency of the earlier suit No. 4 of 2007, the original co-sharers had sold their 3/4th share in favour of Sri Satya Prakash Nigam. The said sale deed was executed on 10.01.2007 for the total consideration of Rs. 8,00,000/-. Sri Nigam sold the same in favour of the present appellants on 22.07.2008 for a sum of Rs. 8,87,811/- but as the market value was Rs. 9,00,000/-, thus upon the said value the stamp duty was paid.

Moreover, when the appellants instituted the suit for partition in the year 2009 even then they had valued their share at Rs. 9,00,000/- and throughout the trial they never made any statement nor led any evidence to indicate that since the time of purchase of the 3/4th share from Sri Nigam till the date of filing of the suit or even till the date of filing of their written statement to the counter claim, instituted by the respondent, the prices of the property had enhanced.

(ix) In this situation where there was practically no dispute regarding the value and extent of the share of the stranger purchaser and that the respondent had 1/4th share, thus, the Court ought to have immediately permitted the respondent to purchase the share of the stranger purchaser which was not done. Even though an application was moved requiring the Trial Court to decide the application under Section 4 of the Partition Act by the respondent but the Trial Court passed an order that the said application would be considered after the parties lead evidence and in this manner, it cannot be said that the respondent was responsible for the

delay nor his bonafides could be disputed neither it could be said that the respondent had made a conditional offer.

(x) Lastly, it has been urged by Sri Saxena that in so far as the C.M.A. No. 154367 of 2021 regarding correction is concerned, as there is an apparent discrepancy in the boundaries as mentioned in the plaint of R.S. No. 4 of 2007 and 436 of 2009 to that extent the decree may be corrected to do substantial justice between the parties.

31. The learned counsel for the respondent in support of his submissions has relied upon the following decisions of

(i) ***Smt. Saira Vs. Smt. Mariyam Sattar*** reported in ***AIR 2007 (Alld.) 179 ;***

(ii) Ghanteshwar Ghosh Vs. Madan Mohan Ghosh and Others reported in ***(1996) 11 SCC 446;***

(iii) Malati Ramchandra Raut and Others Vs. Mahadevo Vasudeo Joshi and others reported in ***1991 Supp (1) SCC 321;***

(iv) Woodland Manufacturers Ltd. Vs. Shankar Prasad and Others reported in ***2006 SCC Online (Calcutta) 304.***

Discussions and Analysis:-

32. The Court has heard the learned counsel for the parties and perused the record. The learned counsel for the parties have also submitted their written submissions along with the decisions upon which they have placed reliance. The Court has noticed the same and it shall be dealt with at the appropriate place later in the judgment.

33. Before dealing with the substantial questions of law as formulated, the Court proposes to deal with the submissions as to the house in question not being a family dwelling house as argued by the learned counsel for the appellant.

34. The submission of the learned counsel for the appellants that the property in question is not a dwelling house hence the respondent is not entitled to claim benefit of Section 4, though, is not a question of law as framed but nevertheless since the argument has been raised, hence it is being dealt with.

35. Considering the material pleadings on record as well as from perusal of the evidence both oral and documentary, this issue was not raised before the Court below. The appellant did not raise this plea in his written statement to the counter claim. None of the parties led any evidence on the point as it was not an issue. Hence, at this stage, this Court does not deem appropriate to enter in the said issue afresh. Moreover, no material has been brought to the notice of the Court to indicate that the said house was ever partitioned before the institution of the instant proceedings.

36. Merely, at some point of time, the respondents and the other co-sharer (the predecessors in interest of the appellants) were residing as per their convenience in separate portions would not mean that the house in question was formally partitioned and it lost its character of a dwelling house. Even though the relations between the co-sharers was not cordial as suggested by the learned counsel for the appellants, yet it will not deprive the house of its character of being a dwelling house.

37. The two courts below have proceeded on the premise that the house in question is a family dwelling house, hence, this Court is not inclined to interfere with

the said premise, accordingly, the submission of the learned counsel for the appellants that the property in question is not a dwelling house and thus the respondent is not entitled for the benefit of Section 4 of the Partition Act is turned down.

38. Moving on to the substantial questions of law as formulated, the Court proposes to deal with the substantial questions of law formulated at serial no. (ii) first, relating to the undertaking given by the respondent to buy out the share of the appellants.

39. The submission of learned counsel for the appellant is that the undertaking must be un-equivocal and unconditional and only then the same can be relied upon.

40. The learned counsel for the appellant in support of his aforesaid submission has relied upon the decision of this Court in ***Iliyas Ahmad and Others Vs. Bulaqi Chand and Others*** reported in ***AIR 1917 (Alld.) 2*** wherein it was held that while enforcing the right under Section 4, there must be something more than a mere offer and the undertaking give to the Court should be unconditional and a person should not be able to resile from the same.

41. The other decision on the aforesaid point is ***Krushnakar and Others Vs. Kanhu Charan Kar and Others*** reported in ***AIR 1962 (Orissa) 85*** wherein Orissa High Court has also opined that the undertaking in terms of Section-4 of the Partition Act must be unconditional.

42. In the decision of the court of Kutch Judicial Commissioner in ***Govind Ji Doase Vs. Kamji Mavji*** passed in ***Civil Revision No. 18 of 1951*** and decided on 19.07.1951 a similar view has been expressed that the undertaking should be unconditional.

43. It has been urged that in the instant case, the respondent did not make an unconditional offer, hence, he was not entitled to the benefit of Section 4 of the Partition Act.

44. The learned counsel for the appellants in order to buttress his submissions has stated that the respondent throughout has stated that he is ready and willing to purchase the share of the appellant at Rs. 9,00,000/-. He has further drawn the attention of the Court to the extracts of the cross-examination of the respondent wherein it is stated that the respondent had responded by saying that he will purchase the share of the appellants at Rs. 9,00,000/- as mentioned in the sale deed. He also declined the offer of the appellant who proposed to buy the share of the respondent at Rs. 20,00,000/- This has been shown to state that the undertaking given by the respondent is only conditional and he was not ready to pay the share of the appellants at the market value rather he wanted to buy only at Rs. 9,00,000/-

45. The learned counsel for the respondent on the other hand submits that the respondent both in his written statement as well as in a separate application bearing Paper No. C-17 had clearly given his undertaking to purchase the share of the stranger purchaser and throughout he has been ready and willing to purchase the share and in the aforesaid facts and circumstances, it cannot be said that any conditional undertaking was given.

46. The learned counsel for the respondents has further submitted that the

extracts of the cross-examination have been read out in isolation. It is submitted that on an conjoint and complete reading, it would indicate that the reply by the respondent was in context of an unproved valuer's report which was put to the respondent during cross-examination to which he responded and turned down the suggestion and offer of the appellants to purchase the share of the respondent at a higher price so also the respondents declined the suggestion to purchase the share of the appellants at the price suggested by the valuer. Nevertheless, the respondent never refused to buy at the price to be determined by the Court. Thus, it cannot be said that the undertaking was conditional.

47. Having considered the aforesaid submissions and from the perusal of the record, it is no doubt true that an undertaking as contemplated under Section 4 of the Partition Act must be unconditional. Now in the instant case, the record reveals that the respondent in his written statement as well as in the Application bearing Paper No. C-17 had given a clear undertaking that he is ready to buy out the share of the appellate at Rs. 9,00,000/- or such other sum to be determined by the Court. Even from the perusal of the cross-examination of the respondent, it cannot be said that his offer was conditional. The answers in the cross-examination have to be seen in context with the questions and it would reveal that by referring to the valuer's report (which as already noticed had not been proved in accordance with law), the respondent had stated that he will not buy the share of the appellant at the rate given by the valuer and that even if a higher sum is offered to the respondent, he will not sell his share to the appellants. However, there has been no denial by the respondent to buy the share of the appellants nor any conditional offer was made by the respondent.

48. Considering this aspect of the matter, this Court holds that in so far as the undertaking is concerned, the same was unconditional and the respondent is entitled to exercise his rights under Section 4 of the Partition Act. The Lower Appellate Court has considered the issue in its entirety and has reversed the finding of the Trial Court on the issue of undertaking. The view of the Lower Appellate Court cannot be said to be against the settled legal principles, hence, on this point no interference is called for. The substantial questions of law at Serial No. (ii) stands answered.

49. Now, considering the substantial question of law as framed by the Court at serial No. (i) dealing with the valuation of the share of the stranger purchaser, this Court finds that while doing so it will necessarily involve consideration of the fact that (i) who is to make such a valuation and (ii) what would be the material date on which the valuation is to be determined.

50. At this stage, before proceeding any further, it would be meaningful to refer to Section 4 of the Partition Act, 1893 which reads as under:-

"4. Partition suit by transferee of share in dwelling-house.--

(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder,

and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

51. It will be interesting to note the legislative intent for enacting Section 4 of the Partition Act of 1893. Significantly, the Transfer of Property Act, 1882 was an enactment prior in time to the Partition Act. Section 44 of the Transfer of Property Act deals with transfer by a co-owner and the relevant provision reads as under:-

"44. Transfer by co-owner.- *Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of transfer, the share or interest so transferred.*

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him of joint possession or other common or part enjoyment of the house."

52. The perusal of Section 44 of the Transfer of Property Act, would indicate that a stranger to a family who becomes the transferee of an undivided share of one of the co-owners in a dwelling house belonging to an undivided family can not claim a right of joint possession of the house with the other co-owners of the dwelling house. It clearly manifests the intention of the legislature that a stranger is to be kept out from the common dwelling house occupied by the co-sharer to ensure peaceful living, enjoyment of the dwelling house by the remaining co-owners being the members of the same family.

53. Now, in the aforesaid backdrop, the statements of objects and reasons for enacting the Partition Act, 1893, would indicate that the legislature proposed to give the Court the power of compelling a stranger who has acquired by purchasing a share in the family dwelling house, when he seeks for partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court.

54. The statement of objects and reasons for enacting the Partition Act, 1893, is quoted hereinafter for ready reference:-

"It is also proposed in the Bill to give the Court the power of compelling a stranger who has acquired by purchase a share in a family dwelling house when he seeks for a partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court. This provision is only an extension of the privilege given to such shareholders by Section 4, paragraph 2 of the Transfer of Property Act, and is an application of a well-known rule which obtains among Muhammadans everywhere and by customs also among Hindus in some parts of the country."

55. Thus, from the above, it can clearly be deciphered that the Act of 1893

intended to extend the privilege which was already available to a co-sharer in the family dwelling house in terms of Section 44 of the Transfer of Property Act.

56. It is in this backdrop, whenever an issue crops up before a Court regarding Section 4 of the Partition Act, it would be incumbent upon the Court to see that certain conditions as enumerated hereinafter are fulfilled before an an order can be passed enforcing the right of a person in terms of the said Section 4 of the Partition Act, 1893.

(i) It is sine-qua-non that the disputed property must be a family dwelling house where the co-owners have undivided share and one or more of such co-owners have affected a transfer of their undivided share.

(ii) For invoking Section 4 of the Partition Act the transferee of an undivided share of the co-owner should be a stranger/outsider to the family.

(iii) Such a stranger purchaser must institute proceedings for partition and separate possession of his undivided share transferred to him by the co-owners in question.

(iv) When such a claim is instituted by the stranger purchaser then any member of the family who still has an undivided share in the dwelling house must come forward to press his claim of preemption by undertaking to buy out the share of the stranger purchaser.

(v) At the time of accepting the claim for preemption made by the existing co-owners of the dwelling house in respect of the share of the stranger purchaser, it is the Court that should make a valuation of the share of the stranger purchaser and must make the existing co-sharer of the dwelling house to pay the value of the share of the stranger purchaser so that the existing co-owner is able to purchase by preemption the share of stranger purchaser in the dwelling house in its entirety so that the rights of the parties are completely satisfied and the stranger purchaser is left with no other right or share in the dwelling house and consequently, the stranger purchaser can be effectively denied entry in any part of the dwelling house.

57. The Court is required to examine in the first place and be satisfied as to the existence of the essential ingredients as enumerated above before it arrives at the conclusion whether the right of preemption can be enforced in favour of the existing co-owner. It is equally important to note that it is for the Court to determine the valuation of the share of the stranger purchaser. The parties may assist the Court in arriving at a conclusion to determine the value of the share of such stranger purchaser but even if no effort is made by any party, yet, the Court cannot abdicate its duty to ascertain and determine the value of the share of the stranger purchaser.

58. Before embarking upon the exercise of determining the value of share of the stranger purchaser, the Court is also required to assess the undertaking given by the existing co-owner regarding his clear and unambiguous intention to buy out the share of the stranger purchaser. It is only when the aforesaid ingredients are met, the stage is set to determine the value of the share.

59. Moving on to crucial issue pertaining to the date on which the valuation of the share of the stranger purchaser is to be valued. In this regard it will be worthwhile to glance through the decisions cited by the respective parties,

(i) In ***Kashi Nath Bhatt and Others Vs. Atma Ram and Others*** reported in ***AIR 1973 (Alld.) 548.*** The issue before the Court was regarding the valuation of the share of the stranger purchasers and the Trial Court had considered the date of preparation of final decree as the date on which the valuation of the share was reckoned. This was assailed before the High Court in a Civil Revision. Both, plaintiff and defendant had filed separate revisions. The plaintiff's civil revision was dismissed by holding that even though the defendant had sold out some portion of the land adjacent to the property in question after passing of the preliminary decree, yet, it would not deprive the defendant of claiming the benefit of Section 4 of the Partition Act in respect of the dwelling house in question. The Civil Revision preferred by the defendant was also dismissed and after considering the relevant aspects which may affect the valuation of the property, the Court held that Section 4 of the Partition Act does not restrict the power of the Court to fix the value of the stranger purchaser's share with reference to any particular date instead various factors have to be taken note of while determining the date of valuation and it held that no error could be found with the order impugned fixing the date of valuation as existing on the date of preparation of final decree.

Thus, the aforesaid decision does not lay down as a principle that the date of valuation has to be the date of the preliminary decree.

(ii) In ***Gopal Chandra Mitra and Others Vs. Kalipada Das and Others*** reported in ***AIR 1987 (Cal) 210*** the Division Bench of the Calcutta High Court held that the relevant date for the purposes of determining the valuation under Section 4 of the Partition Act would be the date when the co-sharer undertakes to buy the share of the stranger purchaser provided such undertaking is given after the share of the transferee has been ascertained by the Court in the preliminary decree and even though an application under Section 4 of the Partition Act can be filed at any stage even before the preliminary decree is passed but the valuation has to be made as on the date of preliminary decree as it is only after ascertainment of share by such a preliminary decree, an application under Section 4 along with the undertaking becomes legally effective.

Upon considering the decision of the Division Bench of the Calcutta High Court in Gopal Chandra Mitra (Supra), it would indicate that in paragraph 6 of the said judgment, it clearly mentioned as a fact that the stranger purchaser himself had purchased the share in the dwelling house after the preliminary decree was passed in the partition suit and therefore, the application intending to purchase the share of the stranger purchaser was made after the preliminary decree and in the aforesaid circumstances, it was stated that the valuation of the share would have to be made with reference to the date of such application and undertaking so filed. Thus, the decision of the Calcutta High Court is not a precedent that the date for ascertaining the valuation of the share of stranger purchaser is to be the date of passing the preliminary decree.

(iii) In ***Mt. Sumitra and Another Vs. Dhannu Bhiwaji AIR (39) 1952, Nagpur, 193 (2),*** the issue before the Court was regarding the valuation of the share and the suit for partition itself was filed after more than 6 years from the date of purchase during which period the price had risen and in the aforesaid backdrop, it was held that the valuation would not be as on the date of purchase rather would be as per

the value at the time of the suit. The aforesaid decision is not a clear precedent and the ratio which can be culled out is that the valuation as mentioned in the sale instrument may not be taken as the valuation of the share especially where the suit for partition was instituted after 6 years of purchase. Nevertheless, it does not hold that the date of the preliminary decree is the material date on which the valuation is to be ascertained.

(iv) The decision of ***Smt. Kamla Devi Vs. Sunni Central Board of Waqfs, U.P. AIR 1949 (Alld.) 63*** is not attracted in the present case as it is only for the proposition that the term "market value" of the property would mean the price for which it is possible for a property to be sold in the open market regardless of any consideration such as litigation. Since there is no dispute between the parties regarding the meaning to be ascribed to the term 'market value' hence', in the instant case the aforesaid decision may not have much relevance.

(v) In ***Girdhari Lal Batra Vs. Krishan Lal Batra and others, 2018 SCC Online (Del) 12547*** the issue before the Delhi High Court was more in respect of the manner in which the value has to be determined and the factors which is to be taken note of rather than the date to reckon the valuation of the share. This shall be evident from para 13 of the said judgment wherein the issues before the Delhi High Court has been mentioned i.e.

(i) Whether Section 4 of the Partition Act was applicable and ;

(ii) what has to be the mode of valuation.

In the said case, the controversy did not relate to the date on which the valuation was to be made, hence, the said decision also is not a clear precedent and may not be very helpful in arriving at the conclusion.

(vi) In ***Badri Narain Prasad Chaudhary and Others Vs. Nil Ratan Sarkar*** reported in ***(1978) 3 SCC 30,*** Section 2 and 3 of the Partition Act was in issue and the defendant-respondent before the Apex Court was a tenant of the premises who had purchased 3/16 the share of his landlord on 25.03.1957. The plaintiffs appellants before the Apex Court had also purchased 13/16 share in the suit premise on 24.04.1957 from the other co-sharers and the suit for partition came to be filed in August, 1959.

In the said case, the parties contended that the property in question was not liable to be partitioned and a proposal was made to buy out the share of the plaintiffs. The valuation was fixed and thereafter the property was auctioned between the plaintiff and the defendant repeatedly and as late as in June, 1965, the highest bid of Rs. 50,000/- was made by the plaintiff. The defendant was given a chance to match the same but he could not do so. Therefore, the Court accepted the bid of Rs. 50,000/-. This decree was thereafter challenged and the High Court held that it was not right to take into account any increase in the share and fixed the valuation at Rs. 9,000/-. The Apex Court found that the valuation as fixed by the High Court was incorrect and since, the parties had already bidded and a value of Rs. 50,000/- had already been fetched taking that to be the price and factoring the increase in the value of the property, the Apex Court remanded the matter to the Trial Court to take note of the aforesaid observations as well as permitting the parties to lead evidence and thereafter dispose of the case.

(vii) In ***Malati Ramchandra Raut and Others Vs. Mahadevo Vasudeo Joshi and others reported in 1991 Supp (1) SCC 321***, it was a case under Section 3 of the Partition Act. A suit for partition was filed

in May, 1972, the shares of the parties were admitted. In July, 1972, the defendant in reply to an application for appointment of a receiver stated that he was ready to purchase the share of the plaintiffs and requested the Court to direct a valuation.

The Bombay High Court held that the date on which the application was made to buy out the share would be the relevant date for working out the valuation, this was assailed before the Apex Court. The Apex Court noticed that the right to buy having arisen and crystallized and this would be the date with reference to which the application of the shares in question has been made, consequently, it held that the valuation though made subsequently has to be made with reference to the time at which the right arose which in the said case, (before the Apex Court) was held to be July, 1972 when the defendant had filed his affidavit seeking leave of the Court to buy out the share.

(viii) In ***Ghanteshwar Ghosh Vs. Madan Mohan Ghosh and Others*** reported in ***(1996) 11 SCC 446,*** the share was sold out for a sum of Rs. 4,00,000/- which was determined to be the share of the stranger transferee on 12.12.1986 on the date when the application was moved while the suit for partition was instituted in September, 1960 and the final decree was passed on 31.08.1971 and an application for purchase was moved during the pendency of the final decree proceedings. The aforesaid decision is an authority for the proposition to the extent that the application to purchase the share of the stranger transferee can be made at any time even during the final decree proceedings. It also considers the necessary ingredients for consideration of an application under Section 4 of the Partition Act. Further in the said case since the application was made during the pendency of the final decree proceedings hence the date of application was taken to be the material date.

(ix) In ***Smt. Saira Vs. Smt. Mariyam Sattar*** reported in ***AIR 2007*** (Alld.) 179 it was held that unless and until the final decree proceedings are decided in a partition suit till then an application under Section 4 of the Partition Act can be made.

(x) In ***Woodland Manufacturers Ltd. Vs. Shankar Prasad and Others*** reported in ***2006 SCC Online (Calcutta) 304***, the Division Bench of the Calcutta High Court considered the date of making an application to buy out the share of the stranger purchaser as the material date but further found that since the value in terms of money at relevant time was not paid, hence, it allowed a reasonable accretion to the said amount in terms to appending interest on the valued amount.

60. In regard to the date of valuation, the learned counsel for the appellants has strenuously urged that the date of ascertaining the valuation cannot be prior to the date of the preliminary decree as it is for the first time when the Court decides regarding the shares of the respective parties and other contentious issues and while doing so, it can determines the value of the share of the stranger purchaser.

61. On the other hand, it is urged by learned counsel for the respondent that the date of making an application would be the date of valuation. It is also urged that, in case, if the valuation is taken on the date of passing of the preliminary decree, then it would necessarily cause prejudice to the co-owner who would be required to pay a much higher price though the undertaking given to purchase the share of the stranger purchaser may have been given at the inception of the trial, as with passage of

time the prices of real estate increases, ordinarily.

62. Considering the submissions and the decisions cited by the respective parties as discussed above, it would reveal that in almost all the Authorities the date of application has been taken to be the material date but in all such cases the application itself was moved after the preliminary decree was passed. Another aspect to be noted is that the decisions cited by the appellants, they are all prior in time to the decision of the Apex Court in the case of ***Malati Ramchandra Raut (Supra)***.

63. The decision of the ***Malati Ramchandra Raut (Supra)*** is the only decision which has been brought to the notice of the Court wherein it has clearly been held that the valuation has to be made with reference to the time at which the right arose. For convenient perusal, the relevant paras 9 to 12 from the said report is being reproduced hereinafter;-

9. It is the duty of the court to order the valuation of the shares of the party asking for a sale of the property under Section 2 and to offer to sell the shares of such party to the shareholders applying for leave to buy them in terms of Section 3 at the price determined upon such valuation. As soon as a request for sale is made by a shareholder under Section 2, any other shareholder becomes immediately entitled to make an application under Section 3 for leave to buy the shares of the former. The right to buy having thus arisen and become crystallised, the date with reference to which valuation of the shares in question has to be made is the date on which the right arose.

10. The learned Single Judge rightly observed that there was no dispute about the extent of shares held by the defendants. The fact that the legal representatives representing the estate of a deceased defendant had not yet obtained probate or letters of administration did not mean that the right which arose in favour of that defendant, upon his making an application for leave to buy under Section 3, was a right which did not accrue to the benefit of his estate, but was postponed till the legal representatives obtained probate or letters of administration. That right was never in abeyance; it had accrued in favour of the deceased during his life when he sought leave under Section 3 and came to be vested in his estate. That being a right of purchase, the valuation of the shares has to be made as on the date of accrual of the right, and valuation being a fact finding process must be resorted to as soon as possible after such accrual.

11. Accordingly, the valuation, though made subsequently, has to be made with reference to the time at which the right arose which, in the present case, as found by the learned Single Judge, was on July 5, 1972 when the defendants filed their affidavit seeking leave to buy, or, at any rate, on October 9, 1972 when they filed their written statement reiterating that request. In a case such as this, where the extent of shares held by the plaintiffs and the defendants is not disputed, the fact that the proceedings continued by reason of the appeal filed by the plaintiffs against the order refusing to allow them to amend their plaint, or for any other reason, was not relevant to the time of accrual of a right arising under Section 3. The fact that a preliminary decree may have to be passed before passing a final decree and that no such decree has yet been made is again not relevant, on the facts of this case, to the question as to the time of accrual of a right under Section 3.

12. In the circumstances, whenever the shares in question in the properties come to be sold to the persons entitled to buy them under Section 3, the price of those shares will have to be determined on the basis of the valuation made with reference to the time of accrual of the right. This, as found by the learned Single Judge, was the price prevailing in July 1972.

64. Another aspect which can be culled out from the provision of Section 4 of the Partition Act and the decisions as cited and noticed in the preceding paragraphs that the legislature has clearly vested ample jurisdiction and discretion with the Court to determine the valuation of the share and to give such directions as it thinks fit in this regard. Neither the legislature has put any feters in the discretion of the Court in determining the valuation nor has the legislature put any restrictions regarding the date on which the valuation is to be reckoned. It is also to be kept in mind that in a suit for partition where each of the parties is the plaintiff and the defendant and while making a partition of the property, the Court has to keep and balance the equities between the parties.

65. Another crucial aspect is that the co-sharer who exercises his right of preemption actually compels the purchaser to make a forced sale. In other words, a valid transaction of sale in favour of stranger purchaser is sought to be disturbed by the intervention of the Court at the behest of a co-sharer. Thus, a casual approach to ascertain the valuation of the share would be faught with danger to cause injustice to any one party. Accordingly, the Court has to be very cautious and must adopt an approach filled with care, precision and objectivity.

66. Illustratively, if a stranger purchaser, purchases a share in a family dwelling house and brings in a suit for partition after a long time and it is only then that the co-sharer can exercise his rights under Section 4 of the Partition Act and may make an application immediately on the date of filing of his written statement or may chose to make the offer to purchase the share of the stranger transferee at the time of passing of the preliminary decree or even at the stage of final decree proceedings. The fact remains that the date of valuation can never be the date of purchase or the date of institution of the suit or the date of preliminary decree but has to be at least the date on which the co-sharer makes the offer and undertakes to buy the share of stranger purchaser, whatever be the stage of the proceedings.

67. There may be another situation where though the application and undertaking may have been moved by the co-sharer at an early stage but he does not cooperate in the proceedings , thus, causing delay in disposal of the suit then in such a situation whether the co-sharer can take the benefit of a lower price prevailing at the time of the application through the prices may have escalated by this time the application or the suit is decided.

68. Another situation may arise where after filing of the suit for partition and subsequent to making an application under Section 4 of the Partition Act but there may be certain circumstances which may lead to a sharp rise in the price of the property before the order could be passed then whether the stranger purchaser can be deprived of such enhancement at the behest of the co-sharer through a compulsive sale in terms of Section-4 of the Partition Act, if the date of application solely is taken as the criteria.

69. These are some of the circumstances which may affect the valuation of the property and it cannot be rigidly laid that only the valuation on the date of the decree or the date of the application is to be final. But as an age old adage says 'greater the power, more the responsibility'. Thus, where discretion is conferred upon the Court, such discretion has to be exercised with caution and ensuring that it does not work injustice to either party hence relevant factors affecting the valuation can be taken note of by the Court while determining the valuation.

70. It will be appropriate to note the observations of the Apex Court in ***Badri Narain Prasad Chaudhary (Supra)*** where in paras 19 to 21, it held as under:-

".....19. The suit property, being incapable of division in specie, there is no alternative but to resort to the process called owelty, according to which, the rights and interests of the parties in the property will be separated, only by allowing one of them to retain the whole of the suit property on payment of just compensation to the other. As rightly pointed out by K. Subba Rao, C.J. (speaking for a Division Bench of Andhra High Court in R. Ramaprasada Rao v. R. Subbaramaiah [AIR 1958 AP 647 : 1057 Andh LT 587 : (1957) 2 Andh WR 488 : ILR 1957 AP 566]), in cases not covered by Sections 2 and 3 of the Partition Act, the power of the Court to partition property by any equitable method is not affected by the said Act.

20. Now, in the present case, the defendant is the smaller co-sharer and he is using the property as a shop-cum-residence. Equity requires that he should be given a preferential right to retain the whole of the suit property on payment of compensation being the just equivalent of the value of the plaintiffs' share to them. The valuation of Rs 9000 fixed by the High Court, was certainly not a fair compensation for the plaintiffs' 13/16 share. This was the price at which the plaintiffs had purchased their share on April 27, 1957. But in 1958, more than one year before this suit, which was instituted on August 8, 1959, a plan or scheme for converting this locality into a market had been approved by the authorities. This must have led to an immediate spurt in the value of the land in the locality. In this connection it is pertinent to note that when in 1963, this property was, in execution of the decree of the trial court, put to auction, the highest bid fetched by it was Rs 50,000. It was therefore, highly unfair to the plaintiffs to fix the value of their share at Rs 9000, even on March 20, 1967 when the High Court's judgment was pronounced. Although the value of the property could be fixed by auction between the two parties, we feel that this method would be unsatisfactory in this case as the plaintiffs who own the major share and have unlimited resources, would outbid the defendant. In the circumstances, we think that the more equitable method would be to take the value of the property as Rs 50,000 in 1963 and allow a reasonable increase for the rise in price since 1963 to this date, taking into account the rise in price in the locality, and give the defendant the first option to retain the whole property on payment of 13/16 share of that valuation (including the increase) to the plaintiffs within a period of three months or such further period that may be granted by the court of first instance, failing which the plaintiffs will be entitled to be allotted and put in possession of the whole of the suit property, on payment to the defendant of 3/16 share of the value of the property

determined by the Subordinate Judge, Patna, in the manner aforesaid

21. For the foregoing reasons, we allow this appeal and send the case back to the Subordinate Judge, Patna, with the direction that he should take such further evidence with regard to the increase in the value of similar properties in the locality since 1963, as the parties may wish to produce, and then after hearing the parties, dispose of the case in conformity with the observations made in this judgment. There shall be no order as to costs in this Court."

71. In the instant case, as the facts would indicate that the suit for partition was instituted on 22.06.2009. The plaintiff/appellants herein, (the stranger purchaser) had purchased the share by means of registered sale deed dated 22.07.2008 and in paragraph 4, 5 and 6 clearly pleaded their right having 3/4th share while stating that the defendant-respondent had 1/4th share and that their 3/4th share be separated. They had valued their share at Rs. 9,00,000/- for the purposes of payment of Court fee.

72. The defendant filed his written statement on 12.11.2009 and did not deny the fact that the plaintiffs had purchased 3/4th share and that the defendant had 1/4th share as shall be evident from paragraphs 25 and 26 of the written statement. The defendant in paragraph 20 had clearly made an averment that he undertakes to purchase the share of the plaintiffs. Moreover, in the counter claim in paragraphs 32 and 33, he sought a decree of mandatory injunction requiring the plaintiffs to sell their share in furtherance of Section 4 of the Partition Act. The defendant had also made a separate application bearing Paper No. C-17 dated 08.12.2009 wherein he specifically required the Court to pass orders regarding purchasing the share of the plaintiffs.

73. In the aforesaid backdrop of facts as narrated hereinabove, there was no dispute between the parties regarding the extent of share in the disputed property. In the said circumstances, the only relevant issue before the Trial Court was whether in terms of Section 4, the defendant respondent was entitled to purchase the share of the stranger purchaser and if so its valuation and on what terms.

74. The record indicates that the respondent herein had also filed regular suit no. 4 of 2007 wherein he had challenged a gift deed of 1931. Admittedly, in the aforesaid suit, Kripa Shankar Shukla was impleaded as defendant no. 4 and the gift deed in favour of Dr. Shukla of 1931 was under challenge. It is also an admitted fact that Dr. Shukla expired and his legal heirs were not brought on record. Thus, by operation of law, the suit against Dr. Shukla abated.

75. The only controversy left was regarding the mode and valuation of the share of the appellants and the respondent herein. An effort was made by the appellants herein, by bringing on record of the Trial Court the valuation report of the property in question from a valuer dated 04.09.2014 but the said valuation report was not proved in accordance with law as the valuer was not examined before the Trial Court.

76. The Trial Court upheld the shares of the parties but declined to grant the benefit of Section 4 to the respondents herein on the premise that in the suit instituted by him bearing No. 4 of 2007, he had not made any offer to Sri Nigam, hence, he was not entitled to the benefit of Section-4. These

findings were reversed by the First Appellate Court and it held that the respondent was entitled to purchase the share of the appellants for a sum of Rs. 9,00,000/-

77. This Court in light of the discussion made in the preceding paragraphs finds that actually in terms of Section 4, the duty is cast upon the Court to determine the valuation of the share of the stranger purchaser. Admittedly, the same has not been done by either the Trial Court or the Lower Appellate Court. The Lower Appellate Court has merely taken the valuation as given by the appellants in their plaint and the value of the sale deed as the price upon which the appellants have been directed to sell the share to the respondents. There has been no determination regarding the valuation of the share.

78. At this stage, it will be relevant to notice that the valuation as disclosed in the sale deed is for calculation of the stamp duty in accordance with the Stamp Act and the U.P. Stamp Rules framed thereunder. They are for the limited purpose of ascertaining the stamp duty on an instrument to protect the revenue of the Government. The market value as determined in terms of the Stamp Act is for the purposes of payment of Stamp Duty only.

79. Even the valuation of the plaint is for the limited purposes of ascertaining the Court fee in terms of the Court Fee Act, 1870. However, whenever an issue regarding valuation arises, the same has to be decided by the Court after permitting the parties to lead evidence in respect of their contention.

80. However, the share of the appellant which is required to be valued and ascertained in terms of Section 4 of the Partition Act is to be done in such a manner as the Court may thinks fit. Section-4 of the Partition Act does not use the word market value. Thus, while determining the valuation, it is the duty incumbent upon the Court to ensure that the valuation upon which the stranger purchaser is compelled to sell his share is not undervalued in the sense that the stranger purchaser is not penalized so also the co-sharer who is exercising his rights to purchase the share of the stranger purchaser should not make a windfall. It is in the aforesaid context that the Court has to be extremely cautious in determining the value and also adopting a reasonable and well accepted mode balancing the equities and rights of the respective parties.

81. The whole idea regarding the valuation being that the share must be valued as far as possible as at such price which can be fairly fetched in the free market without being influenced by any distressing circumstances which may suppress the value of the property in question. It is also to be seen that no artificial escalation is to be factored to give undue advantage to stranger purchaser nor any suppression of value is to be countered to the advantage of the co-sharer intending to buy as in any case the sale under Section 4 of the Partition Act is under compulsion of a Court decree and for that reason it should not be artificially undervalued to deprive the stranger purchaser of fair valuation of his share.

82. It is in this backdrop, this Court is of the view that even though the date on which the right to purchase crystallizes i.e. on the date, the party makes an application and undertaking to buy the share of the stranger purchaser be taken as the threshold

date on which the valuation of share of the property may be ascertained but at the same time it must be seen in context and proximity of time with the date on which the order regarding sale is passed by the Court and the surroundings circumstances of each and every case to provide for such reasonable appreciation to ensure that the stranger purchaser may not be put to any unnecessary loss on account of delay in time between the date of making the application and the date on which he receives the money for the sale in favour of the co-sharer.

83. Now, by taking the valuation of the share strictly on the date of the preliminary decree, for the aforesaid reasons it may then affect the right of the co-sharer too who though may have filed an undertaking to buy at the earliest yet for reasons beyond his control, the order of sale is passed after considerable time and in the meantime the prices if rise then the co-sharer will be required to pay the enhanced amount. It is in this context that the balance has to be fine tuned to render justice between the parties while noticing the natural accretion to the value of the property and its effect on the rights of the co-sharer and the stranger purchaser, as the case may, also considering the rise or fall in the rates of real estates as applicable on the facts of each case and subject to evidence led by the parties.

84. In the instant case, though, the respondent had taken a plea in his written statement containing counter claim and also moved an application for purchasing the share of the appellants yet it was an offer, a plea to be considered and adjudicated by the Court. The respondent had not deposited the sum of Rs. 9,00,000/- before the Court so as to say that now if the natural accretion is taken note of, the respondent shall suffer immensely. Had the money been deposited, may be in such a situation, the plea of the respondent that the value alone in December, 2009 should be noticed without taking note of natural accretion and then upon the valuation made by the Court as prevalent in December, 2009 should be taken to be final and any difference between the amount deposited and value as ascertained by the Court alone be required to be paid by the respondent to buy the share of the appellants. However, it is not so. It is also noticed that though there is no requirement to deposit the money in law so for that reason, the natural and reasonable accretion is taken note of, unless proved otherwise, and as also noted in Badri Narain Prasad Chaudhary (Supra) and Woodland Manufacturers (Supra) to do complete justice between the parties.

85. In light of the detailed discussions, it would be seen that no straight jacket method can be adopted uniformally in all cases for valuation. The broader principles as noticed above will have to be kept in mind considering the facts and circumstances of each case. Ordinarily, the date of valuation would be the date when the right to purchase accrues, in other words, it cannot be a date prior but must be the date of making an unconditional offer to purchase either by making a separate application or otherwise by making the undertaking in pleadings. Upon such application, the Court must make an earnest endevour to arrive at the valuation as soon as possible. While doing so the Court will be competent to notice the conduct of the parties, the cooperation, readiness and willingness to honour their respective contentions as well as other factors which may affect the escalation or downfall in the valuation of the share.

86. Even in the case of ***Malati Ramchandra Raut (Supra)*** and ***Badri Narain Prasad Chaudhary (Supra)***, the Apex Court, though, held that the valuation of the share be made on the date the offer was made and right having crystallized but it also provided for factoring the natural and reasonable accretion to the valuation up to date. Again the idea reflected is to ensure a fair and proper valuation and balancing the equities between the contesting parties.

87. In the instant case at hand, this Court finds that there is no worthwhile evidence regarding the valuation of the property. The valuation report as submitted by the appellants was not proved in accordance with law and also it relates to the year 2015 which at best indicates a natural rise in the valuation of the property over the years but cannot be relied for the actual valuation of the share.

88. In absence of any exercise undertaken by the court to determine the actual valuation and neither the parties provided any evidence regarding the mode of valuation, accordingly, this Court finds that the judgment and decree passed by the two Courts is not sustainable and this Court would not venture into the exercise of determining the valuation as the same would require evidence, hence, it would be most appropriate that the matter be remitted to the Trial Court with the direction that it shall appoint a Government approved property valuer who would visit the property and determine the valuation of the property in question prevailing in December, 2009 i.e. the date when the defendant respondent herein made an application seeking enforcement of his rights to purchase the share of the stranger purchaser. The parties would also be entitled to lead their evidence in respect of the valuation and also indicate the natural/reasonable escalation/stagnation/fall in the prices of the property in question, as the case may be.

89. The Trial Court considering the evidence as well as the valuation report submitted by the valuer so appointed by it shall give his finding on the valuation also factoring for reasonable variation in the rise/fall in the prices of the property in light of the evidence on record in this regard. The entire exercise shall be completed within a period of six months from the date a certified copy of the judgment is placed before the Court concerned. Upon the valuation so determined, the respondent herein (the co-sharer) be first allowed to purchase the share of the plaintiffs within a reasonable period of four months thereafter and in case if he fails to do so, the parties shall be free to move the Court for getting their shares separated as per law provided there is no other legal impediment in doing so. Thus the substantial questions of law as framed at Serial No. (i) stands answered.

90. Now, in so far as the submission regarding the application moved by the appellant under Section 152 read with Section 153 of C.P.C. is concerned, since this Court has allowed the appeal and remanded the matter to the Trial Court, no further order in respect of the application under Section 152 and read with Section 153 C.P.C. bearing ***C.M.A. No. 154367 of 2021*** is required. The application shall also stands disposed of, however, the parties shall be at liberty to approach the Trial Court in this regard if any need arises.

91. In light of the detailed discussions hereinabove, the instant second appeal deserves to be allowed and the judgment

and decree dated 14.02.2017 passed by the First Appellate Court as well as judgment and decree dated 20.01.2016 passed by the Civil Judge (Senior Division), Luckow in R.S. No. 436 of 2009 is set aside. The matter be remanded to the Trial Court before whom the parties shall appear on 07.03.2022 and who shall consider the issue regarding the valuation of the share of the appellants in light of the observations made in this judgment. It is made clear that in so far as the findings regarding the share of the respective parties as well as the house in question being a family dwelling house is concerned they have not been disturbed.

Resultantly, the second appeal stands allowed in the aforesaid terms. Costs are made easy. Record of the Court below be remitted to the Court concerned forthwith.

(2022)02ILR A196
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Habeas Corpus Writ Petition No. 310 of 2021

Kamlesh Pathak ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anurag Yadav, Sri Mahendra Pratap

Counsel for the Respondents:
A.S.G.I., G.A., Raj Kumari Devi

A. National Security Act, 1980 - Section 3(2) - Preventive detention against person already in jail - a person can be detained under the National Security Act even if he is languishing in jail - conditions - to record subjective satisfaction that such a person is to be detained, it is necessary that the authority passing the detention order must be aware of the fact that; (1) the detenu is actually in custody; (2) there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and it was felt essential to detain such person to prevent him from so doing - detaining authority must disclose existence of such satisfaction and the materials on the basis of which it has been drawn - sponsoring authority is under obligation to provide complete information to the detaining authority of all those cases in connection with which the detenu is already in jail, so that the detaining authority has all the material before it to draw the satisfaction whether an order of preventive detention is required or not (Para25)

Before Court, the Detaining authority /D.M in its replySt.d that considering the probability of release of the petitioner on bail, it was found necessary to detain the petitioner in order to restore and maintain peace and normalcy in the area - Held - sponsoring authorities did not place any material as to whether any bail application in three pending cases have been moved or not by the detenue - In recommendation report of the sponsoring authority there was no mention that the petitioner was about to be released on bail - no bail application moved by the petitioner in two pending cases crime - Held, recording of the satisfaction that there was likelihood or possibility of the petitioner being released from jail was not possible as detaining authority was not aware at all about the status of three criminal cases while passing the detention order on 10.1.2021 - Detention order vitiated (Para 27, 29)

B. Preventive Detention - Constitution of India Article, Article 22 (5) - National Security Act, 1980, S. 3(2) - Delay - right of detenu to make a representation and expeditious consideration of the same -

Constitution casts obligation upon the authority making the detention order to afford the earliest opportunity of making representation against the order of detention - It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay - detenu has a right to receive a timely communication from the appropriate government on the status of his representation-be it an acceptance or a rejection (Para 32)

Unexplained delay of 6 days in considering the representation of the petitioner by the Central Government i.e. from date 28.1.2021 to 3.2.2021, the period between sending the representation by theSt. Government and receipt by the Central Government – Only explanation given by theSt. Government was that the representation was sent through most reliable mode i.e. speed post - *Held* - explanation for the delay is an eyewash - it was required that the representation should have been sent through the special messenger to ensure timely and speedy delivery of it to the concerned offices - delay on the part of the concerned Authority in strictly complying with the provisions of the NSA rendered the detention illegal - Detention order vitiated (Para 36)

Allowed. (E-5)

List of Cases cited:

1. Kumail Vs S. of U.P. & ors. decided on 1.8.2019 in Habeas Corpus Petition No. 437 of 2019

2. Rekha Vs St. of T.N. & anr. (2011) 5 SCC 244

3. Rajammal Vs St. of T.N. & anr., (1999) 1 SCC 417

4. Aslam Ahmad Zahire Ahmad Shaik Vs U.O.I. & ors. (1989) 3 SCC 277

5. Pebam Ningol Mikoi Devi Vs St. of Manipur, (2010) 9 SCC 618

6. Mst. L.M.S. Ummu Saleema Vs B.B. Gujaral & anr, (1981) 3 SCC 317

7. Sarabjeet Singh Mokha Vs The District Magistrate, Jabalpur & ors., 2021 O Supreme (SC) 654

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard the learned counsel for the petitioner, learned A.G.A. for the State and perused the record.

2. Law was set into motion with lodging of the first information report on 15.3.2020 by Sri Ashish Kumar, registered as case crime no. 189 of 2020 under Section 147, 148, 149, 307, 302, 506 I.P.C. and Section 7 Criminal Law Amendment Act, police station Kotwali Auraiya, District Auraiya.

3. As per the allegations of the first information report, the petitioner Kamlesh Pathak along with other co accused persons armed with licensee and illegal weapons tried to grab the land of Panchmukhi Hanuman Mandir. When the local people resisted, the present petitioner and his aids started indiscriminate firing due to which Advocate Manjul Chaubey and his sister Sudha Chaubey were killed and three other persons got injured. Earlier also, the petitioner had illegally grabbed the land of Kaleshwar Bhole Baba Dev Kali Mandir and forcibly appointed his younger brother as Mahant of the said temple. On the same day, i.e. on 15.3.2020 the petitioner was arrested and case crime no. 190 of 2020 under section 25 Arms Act and case crime no. 196 of 2020 under sections 147, 148, 149, 353, 307 I.P.C. and Section 7 Criminal Law Amendment Act were registered against him and co-accused. Later on case crime no. 462 of 2020 under section 3(1) of U.P. Gangsters and Anti-Social Activities

(Prevention) Act, 1986 was also registered against the petitioner and others.

4. On the recommendation reports of the Station House Officer, police station Kotwali Auraiya, Circle Officer police station Auraiya, Additional Superintendent of Police and Superintendent of Police Auraiya all dated 9.1.2021, the detention order was passed on 10.1.2021 by the District Magistrate, Auraiya exercising the power under section 3(2) of the National Security Act, 1980.

5. The instant Habeas Corpus Petition has been filed under Article 226 of the Constitution of India to quash the impugned detention order passed by the respondent no. 3, the District Magistrate, Auraiya vide no. 10/J.A.-N.S.A./2021 dated 10.1.2021 and orders dated 4.3.2021, 5.4.2021, 5.7.2021 and 1.10.2021 extending detention of the petitioner.

6. It is settled principle that preventive detention is preventive and not punitive. To prevent the misuse of this potentially dangerous power, the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however technical, is mandatory and vital.

7. Certain dates of the proceedings undertaken against the petitioner are relevant to be noted at the outset.

8. On the basis of occurrence dated 15.3.2020, the first information report as case crime no. 189 of 2020 was lodged against the petitioner and co-accused. Later on case crime no. 190 of 2020, 196 of 2020 and 462 of 2020 mentioned above were also registered against the petitioner and others. After that on the recommendation reports of the Station House Officer Kotwali Auraiya, Circle Officer Kotwali Auraiya, Additional Superintendent of Police, Auraiya and Superintendent of Police Auraiya all dated 9.1.2021, the detention order dated 10.1.2021 was passed by the Detaining Authority which was approved on 19.1.2021 by the State Government. On 21.1.2021, the petitioner submitted 9 copies of representations addressing to four authorities. The jail authority sent those representations to the District Magistrate Auraiya on the same day, which were received in the office of the District Magistrate, Auraiya on 22.1.2021. After obtaining police reports on 25.1.2021 the representation of the petitioner was rejected by the District Magistrate and said order was communicated to the petitioner through the jail authority on 25.1.2021 itself. On 27.1.2021, the State Government received the representation along with the letter of the District Magistrate Auraiya dated 25.1.2021. On 28.1.2021, the State Government sent the representation to the Central Government and Advisory Board.

9. At the ends of the State Government, on 29.1.2021, the representation was examined by the Under Secretary. On 30.1.2021 and 31.1.2021, it was holiday. The representation was examined before the Joint Secretary, on 2.2.2021, it was placed before the Special Secretary. On 3.2.2021 it was considered by the Secretary Govt. of U.P. and the Additional Chief Secretary and finally on 4.2.2021, the representation was rejected by the State Government. This order was communicated on 5.2.2021 to the petitioner through the District Magistrate by Radiogram.

10. On behalf of the Union Government, it is brought on record that

the representation along with the letter dated 28.1.2021 of the State Government was received in the concerned Section of Ministry of Home Affairs on 3.2.2021 and after going through the representation along with para-wise comments thereon of the Detaining Authority and the report as envisaged under section 3(5) of the National Security Act, 1980 were put up to the Under Secretary (NSA) on 5.2.2021. On 6.2.2021 and 7.2.2021 there was Saturday and Sunday. Thereafter, with the comments of the Under Secretary (NSA), the file was forwarded to the Deputy Legal Adviser on 8.2.2021 who sent it to the Joint Secretary (Internal Security II) on 8.2.2021. The Joint Secretary (Internal Security II) with his comments forwarded the same to the Union Home Secretary on 9.2.2021 and after due consideration, the representation was rejected by the Union Home Secretary on 9.2.2021. The file reached back to the concerned Section on 11.2.2021 through the aforesaid levels and a wireless message was sent on 11.2.2021 to the Home Secretary Government of U.P. at Lucknow, Jail Superintendent, Agra U.P., District Magistrate, Auraiya, Uttar Pradesh and the petitioner informing the said decision. On 13.2.2021, the jail authority communicated the decision to the petitioner.

11. Further, on 23.2.2021, the petitioner appeared before the Advisory Board. The Advisory Board submitted its report on 3.3.2021 to the State Government after hearing the petitioner in person stating that there was sufficient cause for the preventive detention of the petitioner under the National Security Act, 1980.

12. On receipt of the said report, the case was fresh examined by the State Government and the detention order was confirmed on 4.3.2021 keeping the petitioner under detention for a period of three months at the first instance from the date of actual detention of the petitioner i.e. since 10.1.2021. On 5.4.2021, 5.7.2021 and 1.10.2021 the detention order was extended for six months, 9 months and 12 months; respectively. The total period of one year of detention of the petitioner had come to an end, accordingly, on 10.1.2022.

13. The arguments of the learned counsel for the petitioner are of two fold; firstly, that the satisfaction recorded by the District Magistrate was not based on cogent material and the material facts were suppressed by the sponsoring authorities; secondly, that the period between 28.1.2021, the date of sending the representation by the State Government and 3.2.2021 the date when representation was received by the Central Government, the delay of 7 days in considering the representation of the petitioner by the Central Government, has not been explained, either by the State Government or the Central Government.

14. The contention is that the delay on the part of the concerned Authority in strictly complying with the provisions of the National Security Act, 1980 has rendered the detention of the petitioner illegal. It is submitted that though on the date of hearing of this petition the total period of detention was almost about to expire, but since by the detention of the petitioner, his right guaranteed under Article 22 (5) of the Constitution of India has been seriously infringed, the detention order dated 10.1.2021 as such is liable to be quashed.

15. Separate counter affidavits filed on behalf of the respondent nos. 1 to 4 have

been placed before us to substantiate the stand of the respondents, to assert that there was no irregularity much less illegality in the entire decision making process and the detention order having been passed after recording satisfaction of the competent authorities may not be interfered with.

16. To deal with the rival contentions of the parties, it would be apposite to look into the relevant provisions as under:-

Section 3(2) (3) of the National Security Act, 1980

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section: Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

17. Authorization notification no. 111/1/1-80-CX-7 T.C.III issued by the Home Secretary, Government of U.P. dated 15.10.2020 under section 3(3) of National Security Act conferring powers on the District Magistrate, Auraiya under section 3(2) of National Security Act is placed on record.

18. In his reply, the detaining authority, i.e. the District Magistrate Auraiya has submitted that taking into consideration the double murder committed by the petitioner Kamlesh Pathak, his attempt to grab the land of Panchmukhi Hanuman Mandir, his previous act of grabbing the land of Bhole Baba Dev Kali Mandir and forcibly appointing his younger brother as Mahant of the aforesaid temple, terror and fear were spread in the society and law and public order was seriously disturbed. The residents of the locality hid themselves in their houses on and after the date of the incident. After getting the reports of LIU/ police and views of Advocates association, merchants, local public and considering the criminal history of 32 cases against the petitioner, considering the probability of repetition of crime and the probability of release of the petitioner on bail, it was found necessary to detain the petitioner in order to restore and maintain peace and normalcy in the area. On the written recommendations of the Station House Officer, Kotwali Auraiya, Circle Officer Auraiya, Additional Superintendent of Police, Auraiya and Superintendent of Police Auraiya, the District Magistrate, Auraiya while recording his subjective satisfaction exercising powers under Section 3(2) of the National Security Act, 1980 passed the

detention order dated 10.1.2021 in accordance with law which was also approved by the State Government on 18.1.2021 and later recommended by the Advisory Board on 3.3.2021. The representation of the petitioner was rejected by the detaining authority, by the State Government and the Central Government, on consideration of all attending circumstances of the case.

19. It is vehemently argued by the learned counsel for the petitioner that when a person is already in jail the detention order can only be passed if the detaining authority is aware of all the necessary and material facts to record his subjective satisfaction which must be based on the grounds:

(I) The detenu is in jail, (ii) He is trying for his release from the jail, (iii) There is real possibility of his being released from jail and (iv) After his release from jail, he will repeat similar activity disturbing the public order at large.

20. After recording such satisfaction on the above stated grounds on consideration of relevant cogent material, the detaining authority can pass the order detaining a person under the National Security Act.

21. It is contended that from the averments made in the detention order it is evident that the sponsoring authorities did not place any relevant material as to whether any bail application in case crime no. 190 of 2021, case crime no. 196 of 2021 and 462 of 2021 have been moved or not. In fact, the detaining authority was not aware at all about the status of the other three criminal cases while passing the detention order on 10.1.2021.

22. It is also argued that out of criminal history of 32 cases in 13 cases the petitioner has been acquitted whereas three cases have been withdrawn. In 12 cases, final report has been submitted by the police. Thus, 28 cases have been disposed of and only four cases, namely, case crime no. 189 of 2020, 190 of 2020, 196 of 2020 and 462 of 2020 are pending against him. On the date of the detention order, bail application only in case crime no. 189 of 2020 under section 147, 148. 149, 307. 302 and 506 I.P.C. and 7 Criminal Law Amendment Act, moved before the High Court was pending. The bail application in case crime no. 196 of 2020 was allowed after the detention order was passed. Till that date, no bail application was moved in case crime no. 190 of 2020 and Case crime no. 462 of 2020. All these four cases have been slapped upon the petitioner on the basis of one incident dated 15.3.2020 and there was no link to connect the incident dated 15.3.2020 and the detention order dated 10.1.2021 as it was passed almost after ten months of the alleged incident.

23. It may be noted at this juncture, that in a catena of decisions on the issue, it has been settled that even if a person is in custody, detention order can validly be passed. The legal proposition is that a person can be detained under the National Security Act even if he is languishing in jail. However, to record satisfaction, which obviously is a subjective one, that such a person is to be detained it is necessary that the authority passing the detention order must be aware of the fact that; (1) the detenu is actually in custody; (2) there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity, and thus to demonstrate

that it was felt essential to detain such person to prevent him from so doing.

24. In **Kumail Vs. State of U.P. and others decided on 1.8.2019 in Habeas Corpus Petition No. 437 of 2019,** a Division Bench of this Court has summarized the legal position as under'

The reason to believe that there is likelihood or real possibility of the person being released on bail must be based on cogent material and not mere ipse dixit of the authority. Such satisfaction can be drawn on the basis of reports of the sponsoring authority, the nature of the offences in connection with which the detenu is in jail as also the facts and circumstances of that case including grant of bail to co-accused or general practice of courts in such matters. But once challenge is laid with regard to existence of such satisfaction, then the detaining authority in its return / affidavit must disclose existence of such satisfaction and the materials on the basis of which it has been drawn. However, if in the return it is demonstrated that satisfaction was drawn and there existed material to draw such satisfaction, the same cannot ordinarily be interfered with on the ground of insufficiency of material.

25. Thus it is clear that it is incumbent on the detaining authority to demonstrate that it was aware of all those circumstances which were material and relevant in connection with which the detenu is to be detained at the time of passing of the order of preventive detention. A fortiori, the sponsoring authority is under obligation to provide complete information to the detaining authority of all those cases in connection with which the detenu is already in jail, so that the detaining authority has all the material before it to draw the satisfaction whether an order of preventive detention is required or not.

26. In this connection when we go through the recommendation reports of the sponsoring authorities namely the Station House Officer Kotwali Auraiya, Circle Officer, police station Auraiya, Additional Superintendent of Police, Auraiya and Superintendent of Police, Auraiya which are appended with the writ petition, in none of them, it was mentioned that the petitioner was about to be released on bail in case crime no. 190 of 2020 and 462 of 2020. On the date of submitting the recommendation reports dated 9.1.2021, the bail order in case crime no. 196 of 2020 was also not in existence as it was passed on 28.1.2021. In all these reports there is mention of applying bail by the petitioner only in case crime no. 189 of 2020 under sections 147, 148, 149, 302, 307 and 506 I.P.C. and Section 7 Criminal Law Amendment Act only. On the basis of these reports, the detaining authority has also mentioned in its order that "bail application in case crime no. 189 of 2020 of the petitioner was pending in the Court vide bail application no. 46390 of 2020 and further that it was the talk of the town that the petitioner was by all means trying to get himself released on bail; repetition of the crime and possibility of disturbances of the public order by the petitioner thus, could not be ruled out.

27. It is admitted fact that till the date of the order dated 10.1.2021 no bail application had been moved by the petitioner in case crime no. 190 of 2020 under section 25/27 Arms Act, police station Kotwali Auraiya, District Auraiya and case crime no. 462 of 2020 and under Section 3(1) of the Gangster Act, 1986. So

recording of the satisfaction that there was likelihood or possibility of the petitioner being released from jail was not possible.

28. In **Rekha Vs. State of Tamil Nadu and another (2011) 5 SCC 244** the Apex Court has held that where a detention order is served on a person already in jail there should be a real possibility of release of the said person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that If no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be exception to this rule that is where a co-accused whose case stands on the same footing had been granted bail. In such cases the detaining authority can reasonably conclude that there is likelihood of the detenue being released on bail even though no bail application of his is pending since most Courts normally grant bail on this ground.

29. In the instant case, neither in the recommendation report nor in the detention order it has been noted that the detenu had moved bail application in case crime no. 190 of 2020 and 462 of 2020 and admittedly, the sponsoring authority was supposed to be aware of the fact that these two cases were registered against the detenu, it can not but be concluded that the sponsoring authority had withheld relevant material / information from the detaining authority. The detaining authority at its own end without making proper inquiry to record its satisfaction on the facts that since bail application had not even been moved in two aforesaid cases, could not have been recorded satisfaction of likelihood of the petitioner being released on bail. The order of detention, on the ground that it is vitiated on account of suppressing or withholding of relevant material and information by the sponsoring authority and as such the subjective satisfaction of the detaining authority being recorded on incomplete and insufficient facts and material deserves to be quashed.

30. Now the second ground of delay of 6 days i.e. from date 28.1.2021 to 3.2.2021, the period between sending the representation by the State Government and receipt by the Central Government is to be appreciated. The attention of the Court is drawn towards Article 22(5) of the Constitution of India in this regard.

31. The Article 22 (5) of the Constitution of India reads as under;

" (5):- When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

32. It is argued that Article 22(5) of the Constitution casts obligation upon the authority making the detention order to afford the earliest opportunity of making representation against the order of detention. The preventive detention curtails personal liberty of a person guaranteed under the Constitution of India. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. The right of detenu to make a representation and expeditious consideration of the same would be an empty formality without a corollary right of the detenu to receive a

timely communication from the appropriate government on the status of his representation-be it an acceptance or a rejection.

33. It is an admitted fact that the State Government sent the representation to the Central Government on 28.1.2021 which is said to have been received in the concerned office of the Central Government on 3.2.2021. We sought clarification on this delay from the State Government at the time of hearing. The learned Government Advocate Sri Sayed Ali Murtaza filed a letter of the Special Secretary Home, Government of U.P. dated 10.1.2022 before us after the judgment was reserved. It has been stated therein that the representation of the petitioner was sent by Speed Post on 29.1.2021 and was received in the office of the Union Government on 3.2.2021. It is also mentioned that Speed Post services of the postal department, Ministry of Communications, Government of India is the most trusted and fastest medium which provides express and time bound delivery of letters in India, having features of Internet based Track and Trace system, Delivery information on SMS, receive SMS etc. It is also submitted that so far as the delay in delivery of the said representation is concerned, though no official record is available but such delay appears probable due to the date being near the Republic Day, the adverse circumstances due to Covid-19 and the protest of the farmers at the relevant point of time.

34. Learned counsel for the petitioner placed reliance over the judgment of the Apex Court in **Rajammal Vs. State of Tamil Nadu and another, (1999) 1 SCC 417** wherein it is held that explanation for the delay and not the duration or range of delay is material. In **Aslam Ahmad Zahire Ahmad Shaik Vs. Union of India and others (1989) 3 SCC 277,** it was opined by the Apex Court that the unexplained delay of 7 days on the part of Jail Superintendent in transmitting the representation to the Central Government as a result of which the representation reached the Government 11 days after it was handed over to the Jail Superintendent had vitiated the detention. In case of **Pebam Ningol Mikoi Devi Vs. State of Manipur, (2010) 9 SCC 618,** the unexplained delay of 7 days in forwarding the representation to the Central Government was held to be fatal. In case of **Mst. L.M.S. Ummu Saleema vs B.B. Gujaral & Anr, (1981) 3 SCC 317,** it has been observed by the Apex Court that the time imperative can never be absolute or obsessive and that the occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasis the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of trust must result in release of the detenu. In case of **Sarabjeet Singh Mokha Vs. The District Magistrate, Jabalpur and others, 2021 O Supreme (SC) 654,** the Apex Court held that failure in timely communication of the order of rejection of the representation is a relevant factor for determining the delay as the detenu is protected against under Article 22 (5). It was held that failure of the Central Government and State Government to communicate the rejection of the representation of the appellant in a time bound manner is sufficient to vitiate the order of detention.

35. In the present case, admittedly 9 copies of the representations addressed to

the concerned authorities were submitted by the petitioner to the jail authority on 21.1.2021. These representations were forwarded by the jail authority to the District Magistrate where they were received on 22.1.2021 and since then through the District Magistrate via the State Government, the representation could reach the Central Government only on 3.2.2021. This delay is explained by the State Government with the assertion that it was sent through the most reliable mode, i.e. speed post and, on the other hand, the delay was probable because of intervening Republic Day, the adverse circumstance due to Covid-19 and the protest of the farmers at the relevant point of time.

36. The explanation for the delay is an eyewash. Considering the constitutional obligation of the decision making authority to consider the representation of the detenu without any delay it was required that the representation should have been sent through the special messenger to ensure timely and speedy delivery of it to the concerned offices. The casual attitude of the concerned office in sending representation through speed post shows complete lack of understanding or ignorance of the legal provisions and the constitutional obligation of the government, be it the State or Central Government. The explanation offered by the State Government for the delay occurred in receipt of the representation in the office of the Central Government cannot be comprehended.

37. Another aspect that during 28.1.2021 to 3.2.2021, the Covid-19 graph was very low and all emergency services were opened up. In what manner the protest of the farmers had affected the speedy delivery in sending the representation has not been explained. Thus, the clarification of the State Government is far from convincing.

38. For the reasons as aforesaid, the detention order is found to be vitiated, the decision making process being against the settled legal principles. As the detention order is vitiated itself, the extension orders are liable to be set aside.

39. Since the detention order has outlived its life for the fact that the writ petition could not be heard and decided within the period of 12 months, maximum period prescribed in Section 13 of National Security Act, 1980, no other direction has to be issued. However, it is held that the petitioner can not be kept under detention pursuant to the detention order passed under Section 3(2) of the National Security Act, 1980 by the District Magistrate, Auraiya.

40. The writ petition is accordingly, allowed. No order as to costs.

(2022)02ILR A205
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2022

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Application U/S 482 No. 1482 of 2022

Mohit Sharma ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Yadvendra Mani Mishra

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

(A) Criminal Law- Code of Criminal Procedure, 1973- Section 227 - Rejection of Discharge Application- At the initial stage of framing of a charge, the Court is concerned not with proof but with a strong suspicion that accused has committed an offence, which if put to trial, could prove him guilty. All that the Court has to see is that the matter on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.

At the stage of framing the Charge, trial court may frame the Charge only on the basis of strong suspicion and the evidence has not to be gone into in detail.

(B) Criminal Law- Code of Criminal Procedure, 1973- Section 227, Section 482- Perusal of the statement of the victim during investigation shows that victim is minor. Offence has been committed against her. There is sufficient material to frame charge against the applicant. Appraisal of evidence is not permissible in proceedings under Section 482 Cr.P.C.

Where the facts of the case make out the ingredients of the offence then the same is sufficient for framing the charge and the said facts, being matters of evidence, cannot be appraised by the High Court under section 482 of the Code.

Criminal Application rejected. (E-3) (Para 5, 10)

Judgements/ Case law relied upon:-

1. Amit Kapoor Vs Ramesh Chander & anr. (2012) 9 SCC 460

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard learned counsel for the applicant, learned A.G.A. for the State by means of Video-Conferencing and perused the record.

2. This Application under Section 482 Cr.P.C. has been filed with a prayer to quash the order dated 02.12.2021 passed by Addl. District & Sessions Judge/Special Judge, (POCSO Act), Court No. 1, Muzaffar Nagar in S.T. No. 410 of 2018 (State Vs. Mohit Sharma) arising out of Case Crime No. 1426 pf 2016 under Sections 363, 376-D, 377 IPC & Section 3/4 of POCSO Act, P.S. New Mandi, District Muzaffar Nagar whereby applicant's discharge application under Section 227 Cr.P.C. has been rejected.

3. Submission of learned counsel for the applicant is that applicant has been falsely implicated in this case. Applicant has not committed the alleged offence. Impugned order dated 2.12.2021 has been wrongly passed. There is no evidence against the applicant so charge cannot be framed against him, hence, this Petition.

4. Per-contra, learned A.G.A. opposed the prayer and submitted that victim in her statement under Sections 161 and 164 Cr.P.C. has implicated the applicant. Statement of victim is itself sufficient for framing the charge against the applicant.

5. In *Amit Kapoor Vs. Ramesh Chander and Another (2012) 9 SCC 460*, Hon'ble Apex Court has held in para 19 that at the initial stage of framing of a charge, the Court is concerned not with proof but with a strong suspicion that accused has committed an offence, which if put to trial, could prove him guilty. All that the Court has to see is that the matter on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.

6. Relevant portion of the aforesaid judgement is quoted hereinbelow:

"19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well-settled law laid down by this Court in State of Bihar v. Ramesh Singh [(1977) 4 SCC 39 : 1977 SCC (Cri) 533] : (SCC pp. 41-42, para 4)

''4.Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If ?the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing?, as enjoined by Section 227. If, on the other hand, ?the Judge is of opinion that there is ground for presuming that the accused has committed an offence which? ? (b) is exclusively triable by the court, he shall frame in writing a charge against the accused?, as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An

exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.?

.....

27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a ?civil wrong? with no ?element of

criminality? and does not satisfy the basic ingredients of a criminal offence, the court may be justified in quashing the charge. Even in such cases, the court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae i.e. to do real and substantial justice for administration of which alone, the courts exist.

[Ref. State of W.B. v. Swapan Kumar Guha [(1982) 1 SCC 561 : 1982 SCC (Cri) 283 : AIR 1982 SC 949] ; Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234] ; Janata Dal v. H.S. Chowdhary [(1992) 4 SCC 305 : 1993 SCC (Cri) 36 : AIR 1993 SC 892] ; Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059] ; G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] ; Ajay Mitra v. State of M.P. [(2003) 3 SCC 11 : 2003 SCC (Cri) 703] ; Pepsi Foods Ltd. v. Special Judicial Magistrate [(1998) 5 SCC 749 : 1998 SCC (Cri) 1400 : AIR 1998 SC 128] ; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705 : 1996 SCC (Cri) 497] ; Ganesh Narayan Hegde v. S. Bangarappa [(1995) 4 SCC 41 : 1995 SCC (Cri) 634] ; Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque[(2005) 1 SCC 122 : 2005 SCC (Cri) 283] ; Medchl Chemicals & Pharma (P) Ltd.v. Biological E. Ltd. [(2000) 3 SCC 269 : 2000 SCC (Cri) 615 : AIR 2000 SC 1869] ; Shakson Belthissor v. State of Kerala [(2009) 14 SCC 466 : (2010) 1 SCC (Cri) 1412] ; V.V.S. Rama

Sharma v. State of U.P. [(2009) 7 SCC 234 : (2009) 3 SCC (Cri) 356] ; Chunduru Siva Ram Krishna v. Peddi Ravindra Babu[(2009) 11 SCC 203 : (2009) 3 SCC (Cri) 1297] ; Sheonandan Paswan v. State of Bihar [(1987) 1 SCC 288 : 1987 SCC (Cri) 82] ; State of Bihar v. P.P. Sharma[1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 : AIR 1991 SC 1260] ; Lalmuni Devi v. State of Bihar [(2001) 2 SCC 17 : 2001 SCC (Cri) 275] ; M. Krishnan v. Vijay Singh [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] ; Savita v. State of Rajasthan [(2005) 12 SCC 338 : (2006) 1 SCC (Cri) 571] and S.M. Datta v. State of Gujarat [(2001) 7 SCC 659 : 2001 SCC (Cri) 1361 : 2001 SCC (L&S) 1201] .]

27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence."

7. Keeping in view the aforesaid principles of the Hon?ble Apex Court the facts of the case are being examined and analyzed.

8. Perusal of the record reveals that a case was registered at P.S. New Mandi, District Muzaffar Nagar in Case Crime No. 1426 of 2016 under Sections 363, 376D against the applicant. Police investigated the matter and recorded the statement of witnesses including the victim and after collection of evidence and conclusion of investigation, submitted charge-sheet in the matter.

9. Victim in her statement recorded under Section 161 Cr.P.C. has implicated the applicant. Her statement under Section 164 Cr.P.C., photocopy of which at page no. 59-60 of the paper-book is as follows:

"दिनांक 13/09/2016 शाम के 5:30 बजे की बात है। मैं अपने पापा श्री राजेश शर्मा के साथ अपने कॉलेज का समान लेने मु० नगर आई थी। जानसठ फ्लाईओवर से उतरते हुए पापा की मोटर साइकिल खराब हो गई तो पापा मुझे मोटरसाइकिल के पास खड़ा करके मैकेनिक ढूंढ़ने चले गए। तबी सैंट्रो गाड़ी में मेरे जीजा मोहित शर्मा पुत्र रामकुमार शर्मा, उनके फूफा रामकुमार शर्मा तथा दो अन्य लोग जिन्को मैं जान्ती नहीं लेकिन देख कर पहचान सकती हूं। आए और कहने लगे की तुम्हारे पापा ने तुमको बुलाया है चलो। मैं उनके साथ चली गई। लेकिन वह मुझे पापा के पास न ले जकार जंगल में ले चले गए और वहा मुझे मेरे जीजा ने मेरे सारे कपड़े उतरो दिए और अपने पेंट तथा अंडरवियर उतर दिया था और अपने अंगुली मेरी vagina में डाल दिया तथा अपना लिंग मेरे मुह में डाल दिया। जीजा के फुफा ने मेरे हाथ पैइर पकड राखे थे/ बाकी दो आदमियों ने भी मेरे साथ बदतमीजी की। जब जीजा ने अपना लिंग मेरे मुह में डाला तो मुझे उलटी सी आने लगी तथा मैं शोर मचाने लगी। तब ओनहोन शीशा खोलकर मुझे बहार फेक दिया तथा वहा से चले गए। मैं वहा से किसी तरह वापस आई। तथा पापा तथा दो अदमी वहा पर अगाये। उनके साथ मैं वापीस आई। हमने घाटना की रिपोर्ट 15/09/2016 को नई मंडी थाने में की। मुझे नहीं पता की दो दिन तक रिपोर्ट क्यों नहीं की। बस यही मेरा बयान है।"

10. Perusal of the above statement of the victim during investigation shows that

victim is minor. Offence has been committed against her. There is sufficient material to frame charge against the applicant. Appraisal of evidence is not permissible in proceedings under Section 482 Cr.P.C.

11. In view of the above, the present Application lacks merit and is liable to be dismissed.

12. Accordingly, this Application under Section 482 Cr.P.C. is dismissed at the admission stage itself.

(2022)02ILR A211
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2022

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Application U/S 482 No. 1540 of 2022

Ashish & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Arvind Kumar

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

(A) Criminal Law- Indian Penal Code, 1860- Sections 494, 498A, 323, 506 I.P.C. and Section 3/4 of D.P. Act – Code of Criminal Procedure, 1973- Section 482 - Quashing of proceedings- On basis of not conducting preliminary inquiry - Conducting or not conducting preliminary enquiry is the domain of Investigating Officer on which basis, F.I.R. cannot be quashed.

Merely because a preliminary inquiry was not conducted by the Investigating Officer, the same would be no ground to quash the Charge-sheet and the criminal proceedings.

(B) Code of Criminal Procedure, 1973- Section 482 - Whether victim was beaten and harassed by the applicants; whether there was demand of dowry or not; whether husband, Ashish solemnized another marriage with another lady named Deeksha are questions of fact which cannot be adjudicated upon in this proceeding. Appraisal of evidence is also not permissible in proceedings under Section 482 Cr.P.C.

Settled law that while exercising its inherent jurisdiction under section 482 of the Code, the High Court cannot appreciate evidence or disputed questions of fact as the same can only be adjudicated by the trial court after consideration of evidence.

Criminal Application rejected. (E-3) (Para 8, 12)

Judgements/ Case law relied upon/ cited:-

1. 1992 AIR (1) page 694 (St. of Har. Vs Chaudhary Bhajan Lal), cited

2. Geeta Mehlotra Vs St. of U.P. ,Crl. Appeal No. 1674 of 2012 arising out of SLP (Crl.) No. 10547 of 2010,cited

3. CRM (M) No. 83 of 2020 vide judgement dt. 25.08.2021 (J& K& Ladakh High Court), cited

4. M/s Neeharika Infrastructure Pvt. Ltd. Vs. St. of Maha. & ors., 2020 SCC Online SC 850

5. R. P. Kapur Vs The St. of Punj., AIR 1960 SC 866

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard learned counsel for the applicants, learned A.G.A. for the State by means of Video-Conferencing and perused the record.

2. This Application under Section 482 Cr.P.C. has been filed with a prayer to

quash the entire criminal proceeding including charge-sheet dated 04.09.2020 as well as cognizance and summoning order dated 11.10.2021 of Case No. 15977 of 2021 arising out of Case Crime No. 309 of 2020 (State Vs. Ashish & Others) under Sections 494, 498A, 323, 506 I.P.C. and Section 3/4 of D.P. Act against the applicant no. 1 and under Sections 498A, 323, 506 I.P.C. and Section 3/4 of D.P. Act against Applicant Nos. 2 and 3, P.S., Sipri, District, Jhansi pending in the Court of Chief Judicial Magistrate, Jhansi.

3. Submission of learned counsel for the applicants is that from the matter available on record, offences under Sections 494, 498A, 323, 506 I.P.C. and Section of D.P. Act are not made out against the applicants. Further submitted that applicant no. 1 Ashish is the husband of the victim, Seema whereas applicant nos. 2 and 3 are father-in-law and mother-in-law. Next submitted that there is six days' delay in lodgement of the F.I.R. Case has been lodged with ulterior motive and mala-fide intention to harass the applicants. There are only general allegations against the applicants, hence this Petition.

4. Per-contra, learned A.G.A. opposed the aforesaid prayer and submitted that there are specific allegations of demand of dowry and beating the victim by the applicants. Factual controversy cannot be settled in this proceeding under Section 482 Cr.P.C.

5. Learned counsel for the applicants relied upon the judgement of **Hon'ble Apex Court reported in 1992 AIR (1) page 694 (State of Haryana Vs. Chaudhary Bhajan Lal), para 26 of Geeta Mehlotra Vs. State of U.P.** passed in Criminal Appeal No. 1674 of 2012 arising out of SLP (Crl.) No. 10547 of 2010 & para 6 of Hon'ble Jammu & Kashmir and Ladakh High Court at Srinagar in CRM (M) No. 83 of 2020 vide judgement dated 25.08.2021.

6. The authorities relied upon by the learned counsel for the applicant do not apply to the facts of the present case because victim, Seema in her statement recorded under Section 161 Cr.P.C., which is at page no. 33 of the paper-book, has specifically stated that on 5.08.2020, she again went to her nuptial home with her husband, Ashish. Father-in-law, Gauri Shankar, mother-in-law, Prem Kumari and two sisters-in-law beaten her and threatened to pour kerosene oil. She anyhow escaped from there and came to her father's home. She has further stated that she came to know that her husband, Ashish has solemnized another marriage with Deeksha, daughter of Pahalwan, Resident of Talaur, P.S. Shahjahanpur, District Jhansi during lockdown.

7. Learned counsel for the applicant specifically mentioned the judgement of High Court of Hon'ble Jammu & Kashmir and Ladakh at Srinagar in CRM (M) No. 83 of 2020 wherein on the basis of non conducting of preliminary enquiry, F.I.R. relating to matrimonial dispute was quashed.

8. Conducting or not conducting preliminary enquiry is the domain of Investigating Officer on which basis, F.I.R. cannot be quashed.

9. In ***M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharastra and Others, 2020 SCC Online SC 850,*** the Hon'ble Apex Court has held:

"iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the rarest of rare case (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule."

10. Following other authorities can be cited on the aforesaid point: ***R. P. Kapur vs. The State Of Punjab, AIR 1960 SC 866, State of Haryana and others Vs. Ch. Bhajan Lal and others, AIR 1992 SC 604.***

11. Perusal of the record reveals that an F.I.R. was lodged against the applicants in Case Crime No. 309 of 2020 under Sections 498A, 323, 506 I.P.C. and Section 3/4 of POCSO Act. I.O. after collection of evidence and conclusion of investigation, submitted charge-sheet in the matter, thereafter Chief Judicial Magistrate, Jhansi took cognizance on 11.10.2021 and summoned the applicants to face trial.

12. Whether victim was beaten and harassed by the applicants; whether there was demand of dowry or not; whether husband, Ashish solemnized another marriage with another lady named Deeksha are questions of fact which cannot be adjudicated upon in this proceeding. Appraisal of evidence is also not permissible in proceedings under Section 482 Cr.P.C.

13. In view of the above, I am of the considered opinion that this Application lacks merit and is liable to be dismissed.

14. Accordingly, this application under Section 482 Cr.P.C. is dismissed.

(2022)02ILR A213
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Application U/S 482 No. 6709 of 2009

Dhiraj Gupta ...Applicant
Versus
Imran Khan & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anil Mullick

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

(A) Criminal Law- The Negotiable Instruments Act, 1881-Section 138, Section 94 -The General Clauses Act, 1897-Section 17, Section 27 - Code of Criminal Procedure, 1973-Section 482- Demand Notice- receipt of said notice is said to have not returned to the complainant-Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post-The service of notice through registered post was proper and there was no rebuttal evidence to show that the complainant had deliberately and intentionally sent the legal notice to some wrong address or that the applicant had resided at some other place. Furthermore, the applicant must have the knowledge of the cheque having bounced from his bank statement also. The receipt of notice or its service on the applicant is a matter of fact which can only be seen by the Trial Court.

Service of notice would be deemed to be proper and sufficient where it is sent to the correct address and even if the postal acknowledgement is returned for some reason, due service has to be presumed and although the same may be rebutted but then the question of receipt of notice would be a matter of appreciation of evidence which cannot be appreciated in the exercise of jurisdiction under section 482 of the Code.

Criminal Application rejected. (E-3) (Para 11)

Judgements/ Case law relied upon:-

1. Ajeet Seeds Limited Vs K. Gopala Krishnaiah, AIR 2014 SC 3057

2. St. of Punj. Vs Kasturi Lal & ors, AIR 2005 SC 4135.

3. St. of Har. & ors. Vs Bhajan Lal & ors.1992 Supp.(1) SCC 335

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Anil Mullick, learned counsel for the applicant, learned AGA for the State-respondent and also perused the material available on record.

2. By means of the present application under Section 482 Cr.P.C., the applicant has invoked inherent jurisdiction of the Court with a prayer to quash the summoning order dated 02.09.2008 passed by Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No.2, Meerut, in Case No.2126 of 2008, Imran Khan Vs. Dhiraj Gupta, under Section 138 of Negotiable Instruments Act, Police Station- Sadar Bazar, District- Meerut.

3. Facts, in brief, giving rise to the present application are that the complaint under Section 138 of Negotiable Instruments Act has been filed by the complainant Imran Khan wherein it has been alleged that the applicant Dhiraj Gupta had borrowed Rs.60,000/- from the complainant for his business and issued a post-dated cheque no.903149 dated 25.02.2008 to the tune of Rs.60,000/- of Gym Khana Branch, Meerut of Punjab National Bank. The complainant had deposited the cheque on 29.02.2008 and the same was bounced with the remark "funds insufficient". A demand notice was sent by registered post to the applicant within a limitation period of 15 days. The receipt of said notice is said to have not returned to the complainant. An affidavit was filed regarding the statement recorded under Section 200 Cr.P.C. The applicant herein is said to have not returned the borrowed money even after sending the notice and the cheque having bounced. The learned Magistrate has summoned the applicant vide order dated 02.09.2008. It has been argued that the impugned order dated 02.09.2008 has been passed without application of mind and is a cryptic order. Learned counsel for the applicant has vehemently argued that there is no receipt regarding service of notice sent on behalf of the complainant/opposite party no.2.

4. Learned AGA has opposed the application and stated that the order impugned passed by the learned Magistrate is a detailed and speaking order. The order mentions the crux of the offence, the statement of the witnesses and the documents relied thereupon, therefore, the application deserves to be dismissed.

5. Learned AGA has also contended that in view of Section 94 of the Negotiable Instruments Act, 1881, the service of notice cannot be termed as insufficient.

6. For ready reference, Section 94 of the Negotiable Instruments Act, 1881 reads as under:-

"Notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid."

6. Section 17 of the General Clauses Act, 1897, reads as under:-

"Substitution of functionaries

(1) In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

(2) This section applies also to all [Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth January, 1887."

7. In the case of ***Ajeet Seeds Limited Vs. K. Gopala Krishnaiah,*** reported in ***AIR 2014 SC 3057,*** Hon'ble the Apex Court has held in para-9 of sub-para-14 as under:-

"Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. [Vide Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647; State of M.P. v. Hiralal and Ors., (1996) 7 SCC 523 and V. Raja Kumari v. P. Subbarama Naidu and Anr., (2004) 8 SCC 74] It is, therefore, manifest that in view of the presumption available Under Section 27 of the Act, it is not necessary to aver in the complaint Under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

8. The powers under Section 482 Cr.P.C. can be invoked in the matter as follows:-

i) To give effect to any order under the Code.

ii) To prevent abuse of the process of any Court.

iii) Otherwise to secure the ends of justice.

9. *"Ex debito justitae"* to do real and substantial justice for the administration of justice alone the Court exists. The aforesaid law has been settled in ***AIR 2005 SC 4135 (State of Punjab vs. Kasturi Lal and others).***

10. The inherent powers should not be exercised to stifle the legitimate prosecution and it should not be exercised at the drop of pen. The present application does not fall under any of the categories enumerated under Section 482 Cr.P.C. or enunciated in the case of ***State of Haryana and Others Vs. Bhajan Lal and Others*** reported in ***1992 Supp.(1) SCC 335*** and the relevant paragraph no.102 of the judgement is extracted hereunder:-

"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 extra-ordinary 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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the 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."

11. Considering the submissions advanced by the learned counsel for the parties and the judgements referred above as also perused the material available on record, this Court is of the considered opinion that the service of notice through registered post was proper and there was no rebuttal evidence to show that the complainant had deliberately and intentionally sent the legal notice to some wrong address or that the applicant had resided at some other place. Furthermore, the applicant must have the knowledge of the cheque having bounced from his bank statement also. The receipt of notice or its service on the applicant is a matter of fact which can only be seen by the Trial Court. The impugned order, therefore, warrants no interference.

12. The present application is found devoid of merits and is hereby dismissed.

13. Interim order, if any, stands vacated.

14. Certify this order to the Lower Court immediately.

(2022)02ILR A217
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Application U/S 482 No. 15266 of 2007

Mahendra Pal Singh (Lekhpal) & Anr.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sushant Mishra

Counsel for the Opposite Parties:
A.G.A., Smt. Usha Srivastava, Sri V.K. Srivastava

(A) Criminal Law- Code of Criminal Procedure, 1973- Section 197- Section 482- Public Servants- Cognizance of offences without sanction- Applicants are public servants and further they were discharging their official duties- The object of sanction for prosecution whether under Section 197 of the code of criminal procedure is to protect a public servant discharging official duties and functions from harassment by initiation of frivolous criminal proceeding. The protection is available only when alleged act done by the public servant is reasonably connected with the discharge of his official duty, an offence committed outside the scope of the duty of the public servant would certainly not require sanction. If in doing official duty public officer if committed any mistake or has been summoned in excess of duty even then the sanction of the Government as provided under Section 197 of the Criminal Procedure Code is mandatory. It is well settled that an application under Section 482 Cr.P.C. is maintainable to quash the proceedings, which are ex facie bad for want of sanction. If, on the face of complaint, the act alleged appears to have a reasonable relationship with official duty power under Section 482 Cr.P.C. would have to be exercised to quash the proceedings to prevent abuse of process of Court.

It is settled law that where the alleged act by the public servant has been done in the official or purported discharge of his official duties, then without obtaining the sanction for prosecuting him u/s 197 of the Code, no cognizance of the offences can be taken by the magistrate and any such criminal proceeding should be quashed by exercising the powers u/s 482 of the Code.

Criminal Application allowed. (E-3) (Para 11, 13, 16, 20)

Judgements/ Case law relied upon:-

1. Matajog Dubey Vs H. C. Bahri AIR 1956 SC 44

2. Pukhraj Vs St. of Raj. & anr. 1973 (2) SCC 701

3. D.T. Virupakshappa Vs C. Subash, AIR 2015 (12) SCC 231

4. D. Devaraja Vs Owais Sabeer Hussain ,2020 (113) ACC 904

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. The instant application under Section 482 Cr.P.C. has been filed to quash the summoning order dated 14.03.for demarcation.2007 passed by Judicial Magistrate IIIrd, Room No.12 Farrukhabad in complaint case No.28 of 2006 (Siya Ram Vs. Mahendra Pal and others).

2. The brief facts of the case are that applicant No.1 is a Lekhpal in the Consolidation department and applicant No.2 is a Kanoongo in the Consolidation department and both are the public servants. During consolidation proceedings, a joint plot was allotted to opposite party No.2 and one Ram Singh. Opposite party No.2 filed an application on 28.08.2006 before Settlement Officer of Consolidation for making measurement of plot No. 372. The Settlement of Consolidation Officer by order dated 29.08.2006 directed the Consolidation Officer to make measurement in accordance with law.

3. In pursuance of the order of Settlement Officer of Consolidation dated 29.08.2006, necessary reports were submitted by Consolidation authorities and applicant Nos. 1 and 2 on 15.11.2006 conducted measurement of disputed plots with the help of local police and submitted their report before the Assistant Consolidation Officer. The report dated 15.11.2006 has been annexed as Annexure No.2 to the affidavit accompanying with the present application, in which it is mentioned that measurement has been taken place taking due care of the crop standing in the disputed plot. Opposite party No.2 filed a complaint on 27.11.2006 before the Judicial Magistrate, Farrukhabad with the allegation that applicant Nos.1 and 2 have illegally made measurements of the plot, in which crops were standing and there was an order dated 15.11.2006 to stop the measurement,2 the2 copy of the complaint has been annexed as Annexure No.3 and order dated 15.11.2006 has been annexed as Annexure No.4 to the affidavit. The Judicial Magistrate IIIrd, Room No.12, Farrukhabad by order dated 14.03.2007 summoned the applicant under Section 427 IPC, without considering the facts that applicants are public servant and they were discharging their official duties.

4. This case was listed on 10th July, 2007 and following order was passed on that date:

"Heard the learned counsel for the applicants and the learned A.G.A.

It is contended by the learned counsel for the applicants are the lekhpal and Kanoono respectively. They have made measurement of the land on the basis of the order passed by the C.O. concerned. They have discharged their duties and the allegations against them are false and frivolous.

Issue notice to O.P. No.2 returnable within four weeks.

In view of the facts and circumstances, further proceedings of complaint case No.28 of 2006 pending in

the Court of Judicial Magistrate, III Room No.12 Farrukhabad, shall remain stayed till the next date of listing.

List after four weeks"

5. In pursuance of the order dated 10.07.2007, opposite party No.2 appeared through counsel before this court and filed his counter affidavit.

6. Heard Mr. Sushant Mishra, learned counsel for the applicants and Dr. Hridayawati Mishra, learned A.G.A. for State.

7. Nobody appeared on behalf of the opposite party No.2

8. The learned counsel for the applicants argued that applicant Nos.1 and 2 are public servants and they were discharging their duties to measure the plots, as such the private complaint against the applicants are not maintainable unless necessary sanction as provided under Section 197 of Code of Criminal Procedure is obtained. It is further argued that applicants were not aware about the further order passed by the Settlement Officer Consolidation to stop the measurement. It is further argued that applicants have retired during pendency of the case before this Hon'ble Court, so their case may be considered sympathetically.

9. On the other hand, learned A.G.A. has submitted that the applicants should appear before the Magistrate in pursuance of summoning order dated 14.03.2007 and take whatever defence they want, therefore, no interference is required and application is liable to be dismissed.

10. Learned counsel for the opposite party No.2 although is not present, but I have perused the counter affidavit filed by him, in which it has been stated that no ground for interference under Section 482 Cr.P.C. is made out against the summoning order dated 14.03.2007 and the application under Section 482 Cr.P.C. is liable to be dismissed.

11. There is no dispute about the fact that applicants are public servants and further they were discharging their official duties, as such the arguments advanced by the learned counsel for the applicants that private complaint against the public servant for want of sanction would vitiate criminal proceeding has got substance.

12. To effectively adjudicate the issue raised in this case, it is necessary to examine the scope and effect of Section 197 of the Criminal Procedure Code. Section 197 of Criminal Procedure Code is as follows:

"Section 197 in The Code Of Criminal Procedure, 1973

197. Prosecution of Judges and public servants.

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence

employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: 1 Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression" State Government" occurring therein, the expression" Central Government" were substituted.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression" Central Government" occurring therein, the expression" State Government" were substituted.

(3A) 1 Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 , receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magis- trate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

13. The object of sanction for prosecution whether under Section 197 of the code of criminal procedure is to protect a public servant discharging official duties and functions from harassment by initiation of frivolous criminal proceeding.

14. The Hon'ble Supreme court in a case of **Matajog Dubey vs. H. C. Bhari AIR 1956 SC 44** has held:

".....Public servants have to be protected from harassment in the discharge

of official duties while ordinary citizens not so engaged do not require this safeguard.....There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by thhe public servant in the discharge of his official duties. No one can take such proceedings without such sanction....."

15. In **Pukhraj vs. State of Rajasthan and another (1973 2 SCC 701)**, the Hon'ble Supreme Court has held:

"2.....While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person, who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act cone or purporting to be done in the execution of duty The section cannot be confined to only such acts as are one by a public servant directly in pursuance of his public officer, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the ''capacity in which the act is performed', ''cloak of offence' and ''professed exercise of the office' may not always be appropriate to describe or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty....."

16. Every offence committed by different officer does not attract section 197 of the Code of Criminal Procedure. The protection given under Section 197 of the Criminal Procedure Code has its' limitation. The protection is available only when alleged act done by the public servant is reasonably connected with the discharge of his official duty, an offence committed outside the scope of the duty of the public servant would certainly not require sanction. If in doing official duty public officer if committed any mistake or has been summoned in excess of duty even then the sanction of the Government as provided under Section 197 of the Criminal Procedure Code is mandatory.

17. On the question of the stage at which trial court has to examine whether sanction has been obtained and if not whether the criminal proceedings should be nipped in the bud, there are decisions of Apex Court.

18. On the point of stage at which trial court has to examine sanction question Hon'ble Supreme Court in **D.T.**

Virupakshappa Vs. C. Subash, AIR 2015 12 SCC 231 has held that High court had erred in not setting aside an order of trial court taking cognizance of a complaint in exercise of power under Section 482 Cr.P.C.

19. The Hon'ble Supreme Court in the case of **D. Devaraja vs. Owais Sabeer Hussain reported in [2020 (113) ACC and 904]** has held that if the sanction as provided under Section 197 of Criminal Procedure Code has not been taken, the order taking cognizance by the Magistrate will be illegal and the High Court should exercise the power under Section 482 Cr.P.C. to quash the proceeding which was bad for want of sanction.

20. On the basis of law laid down by Hon'ble Supreme Court as mentioned above, it is well settled that an application under Section 482 Cr.P.C. is maintainable to quash the proceedings, which are ex facie bad for want of sanction. If, on the face of complaint, the act alleged appears to have a reasonable relationship with official duty power under Section 482 Cr.P.C. would have to be exercised to quash the proceedings to prevent abuse of process of Court.

21. In view of the facts and circumstances stated above, I am of the view that learned Magistrate has illegally taken cognizance of the offence summoning the applicants under section 427 IPC, which is ex facie bad for want of sanction. The application under Section 482 Cr.P.C. is allowed. The summoning order dated 14.03.2007 passed by the Judicial Magistrate IIIrd Room No.12 Farrukhabad in complaint case No.28 of 2006 is set aside and complaint is also quashed for want of sanction in exercise of power under Section 482 Cr.P.C. No order as to costs.

(2022)02ILR A222
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.12.2021

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Application U/S 482 No. 17510 of 2008

Vinod Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Chandra Bhan Gupta

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

(A) Criminal Law- Code of Criminal Procedure - Section 482- Indian Penal Code, 1860- Section 499/ 500- Defamation- Offence punishable under Section 500 I.P.C. is to protect a fundamental right of a person i.e. "reputation' which is part of right to enjoyment of life and liberty and property having an ancient origin- The word *"Bhu Maphia'* (*Hkw&ekfQ;k*) has not been used in the news item- if the word *"Bhu Maphia'* (*Hkw&ekfQ;k*) has been used by any other newspaper then applicant cannot be prosecuted for the same- Complaint also in which there are nine praragraph out of which six paragraph contain news item of different newspaper and paragraph no.7, 8 & 9 there are general allegations collectively against all the news item in different newspaper which would not amount to defamation against the applicant- The learned Chief Judicial Magistrate without applying the mind summoned the applicant along with 18 other opposite parties treating all the news item as common although from reading the news item no case of

defamation under Section 499 & 500 I.P.C. is made out- No offence under Section 500 I.P.C. is made out, hence proceedings initiated by Magistrate in the case in hand is patently illegal and amount to abuse of process of Court. Therefore, to secure ends of justice interference of this Court under Section 482 Cr.P.C. is justified and called for.

Where the applicant has not made the alleged imputation in the news item harming the reputation of the complainant and in the complaint general allegations have been used against news items of different newspapers, then it cannot be said that the applicant has defamed the complainant- summoning of the applicant where no offence has been committed by him is bad in law and hence liable to be quashed.

Criminal Application allowed. (E-3) (Para 14, 15, 16, 18)

Judgements/ Case law relied upon:-

1. Kiran Bedi Vs Committee of Inquiry & anr.(1989) 1 SCC 494

2. R.P. Kapur Vs St. of Punj. AIR 1960 S.C. 866

3. D. Devaraja Vs Owais Sabeer Hussain, 2020 (113) ACC 904

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. The instant application under Section 482 of Code of Criminal Procedure (hereinafter referred to as "Code') has been filed to quash the proceeding of the Complaint Case No.412 of 1999, under Section 500 I.P.C. *(Ajeet Singh Tomar Vs. Khichchu Singh and others)* pending in the Court of Judicial Magistrate, Gautambudh Nagar.

2. The relevant facts of the case are that applicant was working as a reporter in the Amar Ujala daily newspaper since long and he never published any news which is incorrect, a news item on the basis of press conference has been published in the Meerut edition daily newspaper Amar Ujala dated 15.07.1999 that the Pradhan- Khichchu Singh of Shahpur Goverdhanpur told that Ajeet Singh Tomar @ Bajrangi son of Shri Horam has illegally taken possession of the Gaon Sabha land recorded as pasture land and in this regard complaint has been also made to the District Magistrate as well as to the Commissioner. He also alleged that 510 *bighas* of land situated at Chakshalapur has been sold out by Ajeet Singh Tomar & his brothers, the dispute in respect to these plots is pending in the Court of Haryana State. He further alleged that the complaint was made to District Magistrate- Gautambudh Nagar to inqure into the matter relating to unauthorised & illegal possession of land, the Gram-pradhan further alleged that culprits have threatened to kill him. Villagers of the village have also complained to NOIDA authority and the NOIDA authority has written a letter to District Magistrate to inquire into the irregularity. Ajeet Singh Tomar in his statement has said that on his complaint government has registered seven cases in respect to forged sale-deed at Police Station-Sector- 39. He further states that on abovementioned land of Gaon Sabha, a temple is situated for the last 10 years and he has no concern with the land of Gaon Sabha. Ajeet Singh Tomar also demanded inquiry against the charges labelled by Gram Pradhan, the extract of news item is as follows:-

"अमर उजाला " मेरठ 15 जुलाई, 1999

ग्राम समाज की जमीन कब्जा कर बेच देने का आरोप

अमर उजाला ब्यूरो नोएडा, 14 जुलाई।

शाहपुर गोवर्धन पुर के प्रधान खिच्चू सिह ने कई गाववालें के ग्राम समाज की भूमि बेच देने का आरोप लगाया है।

प्रधान ने बताया कि ग्राम रोहिल्लापुर के खाता सं०63 व खसरा नं० 8 रकबा 3 वीघा 10 विस्वा (ग्राम समाज) खाता नं० 63 खसरा सं० 64 की 14 वीघा 6 विस्वा (सिंचाई विभाग), शाहपुर गोवर्धनपुर के खसरा नं० 194 की 200 कच्चा वीघा (गऊचर भूमि) व ग्राम चकसलारपुर के खसरा नम्बर 2/1, 2/4, 2/3, 2/6, व हरिजनों की 50 वीघा जमीन पर अजित सिंह तोमर उर्फ बजरंगी पुत्र श्री होराम ने अवैध रूप से कब्जा कर लिया है। इसके बारे में जिलाधिकारी व मेरठ मण्डल के आयुक्त से शिकायत की गयी प्रधान के अनुसार यही नही अजीत व उसके भाईयों ने चकसालरपुर की लगभग 510 वीघा जमीन भी बेच दी उसने बताया कि विवाद के कारण इस भूमि को लेकर हरियाणा की अदालत में मुकदमा चल रहा है।

खिच्चू सिह ने पत्रकारों को बताया कि उसने 28 जून 99 को जिलाधिकारी गौतमबुद्धनगर, को पत्र लिखकर जमीनों पर हो रहे अवैध कब्जों की जांच कराने की मांग की थी इससे पूर्व 14 मई 98 को भी इस सिलसिले में शिकायत की गयी थी। ग्राम प्रधान का आरोप है कि शिकायत के बाद आरोपियों ने उसे जान से मारने की धमकी दी।

उसका यही कहना है कि ग्रामीणों द्वारा इन मामलों की शिकायत नोएडा, प्राधिकरण के विशेष कार्याधिकारी (डी) से की गयी थी। इस पर विशेष कार्याधिकारी ने 15 जून 99 को जिलाधिकारी को पत्र लिखकर अनियमितताओं की जांच करने का आदेश दिया।

उधर रोहिल्लापुर निवासी अजीत सिंह तोमर ने एक बयान में दावा किया कि उनकी शिकायत पर शासन ने थाना सेक्टर 39 में फर्जी बैनामें के सात मुकदमें दर्ज किए है।

उन्होंने कहा कि ग्राम सभा के जिस भूमि पर कब्जे की बात है वहां एक मंदिर 10 वर्ष से बना हुआ है। उससे उनका कोई लेना देना नही इसी तरह सिंचाई विभाग की जमीन पर सड़क बनी हुई है। अजीत सिंह तोमर ने ग्राम प्रधान द्वारा लगाये गये आरोपो की जांच कराने की मांग की संवाददाता सम्मेलन मे ग्राम प्रधान के अलावा देवेन्द्र शर्मा, अनिल, अमनसिह, गुलाबसिंह (उपप्रधान) रणजीतसिंह, विशनसिह, श्रीराम व मदनलाल चढढा व सुनील कुमार चढढा उपस्थित थे।

(सत्य प्रतिलिपि)"

3. The aforementioned news was published in several newspaper in their own languages. Complainant ,opposite party no.2 (Ajeet Singh Tomar), filed a Complaint in the Court of Chief Judicial Magistrate, Gautam Budh Nagar on 12.08.1999 impleading 19 persons in which applicant was arrayed as opposite party no.11, in the complaint it was alleged that on the basis of news published in Amar Ujala on 15.7.1999, his image has been tarnished & news published is totally false, as such, accused is liable to be prosecuted under Section 500 I.P.C.

4. A perusal of record reveals that statement of complainant-opposite party no.2 was recorded under Section 200 of Cr.P.C. on 27.8.1999 and a statement of one Sukhpal alias Kapoor was recorded on 8.9.1999. The learned Magistrate by order dated 12.11.1999 summoned the applicant & 18 others, under Section 500 I.P.C. on the ground that prima-facie the word *"Bhu Maphia'* (*भू–माफिया*) comes under the definition of defamation. Revision filed against the summoning order dated 12.11.1999 was dismissed by Session Judge by order dated 30.4.2008 as not maintanable.

5. Heard Shri Chandra Bhan Gupta, learned counsel for the applicant and learned A.G.A. for the State. Nobody put-in-appearance on behalf of opposite party no.2 in spite of the notice issued to him on 14.7.2008. The order dated 14.7.2008 passed by this Court is as follows:-

"Heard learned counsel for the applicant and the learned A.G.A.

The applicant, through the present application under Section 482 Cr.P.C. has invoked the inherent jurisdiction of the Court with the prayer that the proceeding of Complaint Case No.412 of 1999, Ajeet Singh Tomar Vs. Khichchu Singh and other, under Section 500 of IPC, pending in the Court of C.J.M. Gautam Budh Nagar be quashed.

Learned counsel for the applicants contended that malicious prosecution has been launched against the applicant only for the purposes of harrasement.

Learned counsel for the applicants is directed to serve respondent no.2 through RPAD within a period of a week from today. Respondent no.2 is allowed three weeks time to file counter affidavit from the date of service of notice upon him. AGA is also allowed the same time to file counter affidavit on behalf of rest of the respondents.

List this case in the week commencing 18th August, 2008.

Till the next date of listing, further proceedings of Complaint Case No.412 of 1999, Ajeet Singh Tomar Vs. Khichchu Singh and other, under Section 500 of IPC, pending in the Court of C.J.M. Gautambudh Nagar shall remain stayed as against the applicant only."

6. The learned counsel for the applicant contended that from the news item published in Hindi News Paper Amar Ujala dated 15.7.1999, no offence of defamation is made out against the applicant, therefore, summoning of applicant under Section 500 I.P.C. by learned Chief Judicial Magistrate, Gautambudh Nagar is abuse of process of law, as such, proceeding of the case is liable to be set aside. He further submitted that applicant has not given any opinion of his own, only statements of Gram Pradhan-Khichchu Singh as well as Ajeet Singh Tomar were published in the newspaper. The counsel further submitted that the applicant has not used the word *"Bhu Maphia'* (*भू–माफिया*) in the newspaper but learned Chief Judicial Magistrate considered the combined facts of the news items published by several newspapers in different manner regarding statement of Gram Pradhan & Ajeet Singh Tomar & illegally summoned all the opposite parties including the applicant which is wholly illegal, as such, the proceeding for complaint against the applicant amounts to harassment of accused applicant by initiating unlawful and illegal proceedings.

7. The learned A.G.A. on the other hand supported the impugned summoning order dated 12.11.1999 and contended that learned Magistrate has rightly summoned the accused-applicant under Section 500 I.P.C. after taking evidence under Section 200 and 202 I.P.C., no interference is called for, prima facie offence punishable under Section 500 I.P.C. is made out, therefore, application under Section 482 Cr.P.C. deserve to be dismissed.

8. I have heard learned counsel for the applicant as well as state and perused records as also authorities & relevant law on the subject.

9. First of all the Court will examine the ingredient of Section 499 and Section 500 I.P.C. which reads as under:-

"499. Defamation.--Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

Explanation 1.--It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.--It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.--An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.--No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

*First Exception.--**Imputation of truth which public good requires to be made or published.--I**t is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.*

*Second Exception.--**Public conduct of public servants.--**It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.*

*Third Exception.--**Conduct of any person touching any public question.--**It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.*

*Fourth Exception.--**Publication of reports of proceedings of Courts.--I**t is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.*

Explanation.--A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

*Fifth Exception.--**Merits of case decided in Court or conduct of witnesses and others concerned.--**It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.*

*Sixth Exception.--**Merits of public performance.--**It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the*

character of the author so far as his character appears in such performance, and no further.

Explanation.--A performance may be substituted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

*Seventh Exception.--**Censure passed in good faith by person having lawful authority over another.**--It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.*

*Eighth Exception.--**Accusation preferred in good faith to authorised person.**--It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.*

*Ninth Exception.--**Imputation made in good faith by person for protection of his or other's interests.**--It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.*

*Tenth Exception.--**Caution intended for good of person to whom conveyed or for public good.**--It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.*

500. Punishment for defamation.--Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both."

10. Offence of defamation, therefore, consist of three essential ingredients,

(i) making or publishing an imputation concerning a person.

(ii) such imputation must have been made by words either spoken or intended to be read or by signs or by visible representations.

(iii) the said imputation must have been made with the intention of harming or with the knowledge or having reason to believe that it will harm the reputation of the person concerned.

11. Thus to bring an offence under Section 500 I.P.C. prosecution has to show

(a) that an imputation was made consisting of words spoken or written or intended to be read or made by signs or visible representations

(b) that the imputation concerned the complainant i.e. the person defamed and the person who has come forward qua complaint alleging that defamation concerned him are identical persons

(c) that the accused made or published the incriminating imputation and

(d) that the intention behind making and publishing words causing harm to the reputation of such person.

11. Offence punishable under Section 500 I.P.C., therefore, is to protect a fundamental right of a person i.e. "reputation' which is part of right to enjoyment of life and liberty and property having an ancient origin as explained by Honb'le the Supreme Court in a case reported in ***(1989) 1 SCC 494 Kiran Bedi***

Vs. Committee of Inquiry and another wherein Court reproduced the observations from ***D.F. Marion Vs. Davis 10 55 ALR 171*** as under:-

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

12. Now I propose to consider whether news item said to have been published in Hindi daily newspaper "Amar Ujala" taking on the face of it to be correct satisfy the requirement of Section 499 I.P.C. so as to constitute an offence of defamation punishable under Section 500 I.P.C.

13. The published news items contain following heading

"*ग्राम समाज की जमीन कब्जा कर बेच देने का आरोप*"

14. The news item further talks of statement of Gram Pradhan Kichchu Singh against Ajeet Singh Tomar @ Bajrangi in the press conference regarding illegal possession over Gaon Sabha state land; second part talks of a cases pending in the Court at the instance of parties in respect to land belonging to Gaon Sabha & State and third part deals with the statement of Ajeet Singh Tomar that he has no concern with the Gaon Sabha & state land. It is material to state that applicant has not given any opinion in his own against Ajeet Singh Tomar alias Bajrangi. Even the word *"Bhu Maphia'* (*भू–माफिया*) has not been used in the news item of "Amar Ujala" if the word *"Bhu Maphia'* (*भू–माफिया*) has been used by any other newspaper then applicant cannot be prosecuted for the same.

15. I go through the complaint also in which there are nine praragraph out of which six paragraph contain news item of different newspaper and paragraph no.7, 8 & 9 there are general allegations collectively against all the news item in different newspaper which would not amount to defamation against the applicant.

16. The learned Chief Judicial Magistrate without applying the mind summoned the applicant along with 18 other opposite parties treating all the news item as common although from reading the news item of Amar Ujala dated 15.3.1999 no case of defamation under Section 499 & 500 I.P.C. is made out.

17. Now on the question of jurisdiction under Section 482 Cr.P.C. whether interference would be justified or not it will be appropriate to consider the judgment of Hon'ble Supreme Court reported in ***AIR 1960 S.C. 866, R.P. Kapur Vs. State of Punjab*** wherein Hon'ble Supreme Court has held that inherent jurisdiction can be exercised to quash proceedings in a proper case either to prevent abuse of process in Court or otherwise to secure ends of justice. Ordinarily criminal proceeding instituted against accused persons must be tried in accordance with procedure prescribed in Cr.P.C. and this Court should be reluctant to interfere with the said proceedings at an interlocutory stage but an order of summoning is not an interlocutory order since it compels that accused person to come to the Court and face trial and his valuable right of freedom to some extant are affected, hence in such cases if it can be

shown that there is legal bar against institution or continuance of proceedings, Court would interfere. For example, absence of requisite sanction could be one of such matters where Court would be justified for quashing the proceedings exercising power under Section 482 Cr.P.C. Next category is where allegations contained in F.I.R. or complaint, if taken at their face value and accepted in entirety to be correct still do not constitute the offence alleged. While framing its opinion Court will not examine or appreciate any evidence and it will only look to the complaint or F.I.R. to decide whether offence alleged is made out or not. If no offence is made out, Court would be justified to interfere. Then the third category is where allegations made against accused persons may constitute offence alleged but there is either no "legal evidence" adduced in support of case or evidence adduced, clearly and manifestly, fails to prove the charge. In such case also interference under Section 482 Cr.P.C. would be justified.

18. The case in hand will come under Second category as from reading the complaint in which new item of Hindi daily newspaper dated 15.3.1999 is quoted in paragraph no.2 of the complaint, no offence under Section 500 I.P.C. is made out, hence proceedings initiated by Magistrate in the case in hand is patently illegal and amount to abuse of process of Court. Therefore, to secure ends of justice interference of this Court under Section 482 Cr.P.C. is justified and called for.

19. Honb'le Supreme Court in recent case reported in ***2020 (113) ACC 904, D. Devaraja Vs. Owais Sabeer Hussain*** has discussed the scope of Section 482 Cr.P.C. & found that the interference under Section 482 Cr.P.C. for quashing the criminal proceeding is justified, the paragraph no.77 of the said judgment is as follows:-

"It is well settled that an application under Section 482 of the Criminal Procedure Code is maintainable to quash proceedings which are ex facie bad for want of sanction, frivolous or in abuse of process of court. If, on the face of the complaint, the act alleged appears to have a reasonable relationship with official duty, where the criminal proceeding is apparently prompted by mala fides and instituted with ulterior motive, power under Section 482 of the Criminal Procedure Code would have to be exercised to quash the proceedings, to prevent abuse of process of Court."

20. In view of the discussion made above, the application is ***allowed.*** The proceeding of the Complaint Case No.412 of 1999, under Section 500 I.P.C. (*Ajeet Singh Tomar Vs. Khichchu Singh & Others*) pending in the Court of Judicial Magistrate, Gautambudh Nagar against the applicant only is quashed. It is made clear that by this order the proceedings against remaining accused has not been quashed. There is no order as to costs.

(2022)02ILR A229
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Application U/S 482 No. 18110 of 2009

Satvir Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajiv Gupta, Sri Uma Nath Pandey

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

(A) Criminal Law- Code of Criminal Procedure, 1973- Section 482 – Section 2(d)- Section 200 (a) -Indian Penal Code, 1860- Section 504- Charge sheet has been submitted under Section 504 IPC, which is a non-cognizable offence and in view of the explanation to Section 2(d) of the Cr.P.C., the charge sheet is to be treated as a complaint.

It is a statutory mandate that where a police report under section 173(2) of the CrPc / Charge sheet is submitted in a non-cognizable offence, then the magistrate has to treat the same as a complaint and proceed in the matter like a complaint case.

Criminal Application allowed. (E-3) (Para 8)

Judgements/ Case law relied upon:-

1. Dr. Prakash Kumar Sharma Vs St. of U.P. & anr, 2007(59) ACC 998

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

1. Heard Sri Uma Nath Pandey, learned counsel for the applicant and learned A.G.A. for the State.

2. The applicant by means of the present Criminal Misc. Application, under Section 482 Cr.P.C., assails the proceedings of Case Crime No.4997 of 2008 (State Vs. Satvir & others) under Section 504 IPC based on charge sheet No.227 dated 18.06.2008 as also the order dated 16.07.2008 passed by the Chief Judicial Magistrate, Gautam Budh Nagar, whereby and whereunder the applicant had been summoned to face trial under Section 504 IPC.

3. The facts giving rise to the Case Crime No.4997 of 2008 are that one Sri Raje S/o Surjan Singh (opposite party No.2), lodged a FIR at Police Station Kasna, District Gautam Budh Nagar, alleging that on 11.04.2008 at about 11:30 PM in the night when he was sleeping in the verandah along with his family, one Raju S/o Ratan Lal came at his house and started exhorting them to came out. Along with Raju S/o Ratan Lal, the applicant Satvir Singh is alleged to be present holding a gun, Aman holding a pistol is alleged to have fired at the house. The first informant along with his family members, somehow managed to rescue themselves. Kushal S/o Ratan Lal is alleged to have jumped over the wall and opened the gate of the house whereafter Ajab Singh and Gajab Singh, sons of Satvir Singh (applicant) are stated to have brandished "pharsa" and threatened the informant and his family members.

4. The police after investigation submitted a charge sheet against the applicant under Section 504 IPC. The learned Chief Judicial Magistrate, Gautam Budh Nagar, taking cognizance of the charge sheet summoned the applicant to face trial by order dated 16.07.2008.

5. This Court vide order dated 12.11.2009 stayed the further proceedings of the Case No.4997 of 2008, under Section 504 IPC till the next date of listing.

6. Learned counsel for the applicant submits that the order summoning the applicant is not sustainable, inasmuch as the charge sheet has been submitted under Section 504 IPC, which is a non-cognizable offence and in view of the explanation to Section 2(d) of the Cr.P.C., the charge sheet is to be treated as a complaint. The

Magistrate is required to proceed with the case as complaint case. The learned counsel for the applicant places reliance upon the explanation to Section 2(d) of the Code of Criminal Procedure, which reads as under:-

"Explanation- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police office by whom such report is made shall be deemed to be the complaint."

7. He submits that on the basis of the aforesaid explanation, which has been interpreted by a Single Judge decision of this Court in ***Dr. Prakash Kumar Sharma Vs. State of U.P. and another,*** reported in ***2007(59) ACC 998,*** holding that when the charge sheet is only of non-cognizable offences, in view of the aforesaid provisions, the charge sheet should be treated as a complaint.

8. The argument is well founded and resultantly the order taking cognizance is set aside. The Magistrate may pass an order taking cognizance, if he so chooses, by proceeding in the matter as a complaint case, under Chapter XV of the Cr.P.C. He may also keep in mind the proviso (a) to Section 200 Cr.P.C. which reads as follows:-

"Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in discharge of his official duties or a Court has made the complaint;

That is if the complainant who gives the information in writing is a public servant, who is acting in discharge of its official duties, it may not be necessary to examine the complainant and the witnesses and the Magistrate may pass an order under section 190(1)(a) of the Code of Criminal Procedure taking cognizance of the case instead of section 190(1)(b) Cr.P.C."

9. In view of the above, the Magistrate shall pass appropriate order, within two weeks from the date of receipt of a certified copy of this order.

10. With these observations, this application stands **allowed.**

(2022)02ILR A231
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2021

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Application U/S 482 No. 35914 of 2008

Ashok Kumar Nigam ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Manas Bhargava

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

A. Code of Criminal Procedure, 1973 – Section 204 -Summoning Order - The Magistrate has not applied his judicial mind and not recorded reasons before summoning the accused to stand trial in complaint case being oblivious of the fact that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. The order of the Magistrate must reflect that he has applied his mind to the facts of the case and the law applicable thereto.

B. Magistrate has to record his finding that the statements recorded by him are sufficient to proceed.

C. The court cannot pass cryptic order without discussing the evidence and other circumstances. (Paras 11,12)

Application disposed of. Matter remanded to the Magistrate for reconsideration. (E-12)

List of Cases cited:-

1. Krishna Lal Chawla Vs St.of U.P.(Paras 13, 14)

2. M/s Pepsi Foods Ltd. Vs Special Judicial Magistrate & ors. 1998 U.P. Cr.R. 118

3. S.M.S. Pharmaceuticals Limited Vs Neeta Bhalla (2005)8 SCC 89 followed.

(Delivered by Hon'ble Brij Raj Singh, J.)

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

2. By the present application under Section 482 Cr.P.C. the applicant has invoked the inherent jurisdiction of this Court with a prayer to allow this application and quash the entire proceedings of complaint case No. 5120 of 2007 (Smt. Asha Nigam Vs. Ashok Kumar Nigam and others) under Section 406, 323, 504, 506 I.P.C., P.S.- Kakadeo, Kanpur pending in the court of M.M. - Xth, Kanpur Nagar and also quash its consequential summoning order dated 02.07.2008.

3. In this case, the complaint was filed by the opposite party No.2 and the same has been entertained after recording the statement under Section 200 Cr.P.C. The Court below has summoned the applicant vide order dated 02.07.2008.

4. The scheme of Chapter-XV of Cr.P.C. is comprehensive and in detail. The object behind the provisions of Section 202 Cr.P.C. is to scrutinize carefully the averments in the complaint with a view to prevent a person named therein. A person should not be called on frivolous complaint. Summoning of an accused in a criminal case is a serious matter which is to be examined carefully on the face value of the allegations, the evidences in support thereof Section 200 and 202 Cr.P.C. is quoted below :

"200. Examination of complaint.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate :

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 :

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

201. Procedure by Magistrate not competent to take cognizance of the case.- If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,-

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court.

202. Postponement of issue of process. - (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, 1 [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police office, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

5. Section 203 Cr.P.C. is envisaged for dismissal of the complaint. In case Magistrate after considering the statements on oath of the complaint and witnesses and the result of the enquiry under Section 202, if has formed the opinion for proceeding he can dismiss the complaint by recording the reasons briefly. Section 204 Cr.P.C. is the provision where Magistrate has to form the opinion for taking cognizance.

6. There is no specific mode or manner of enquiry provided under Section 202 of the Code. Under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code examination of the complainant is necessary with option of examining the witnesses present if any. The Magistrate has to decide whether or not there is sufficient ground for proceeding against the accused to proceed in an enquiry envisaged under Section 202 of the Code.

7. Learned counsel for the applicant submits that the learned Magistrate has passed the order without application of mind and he has not discussed the evidences on record as to how he is satisfied to summon the applicant. He further submits that after recording the statement of opposite party No.2, he has passed the order without applying his judicial mind. He has placed the reliance of order passed by Hon'ble Apex Court in the case of ***Krishan Lal Chawla Vs. State of U.P. and Another.*** The relevant para nos.13 & 14 of the aforesaid judgment is quoted here-in-under:-

"13. The aforesaid powers bestowed on the Magistrate have grave

repercussions on individual citizens' life and liberty. Thus, these powers also confer great responsibility on the shoulders of the Magistrate - and must be exercised with great caution, and after suitable judicial application of mind. Observations in a similar vein were made by this Court in ***Pespi Foods Ltd. Vs. Special Judicial Magistrate,(1998) 5 SCC 749:***

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused." (emphasis supplied) This Court, thus, clearly emphasised that the power to issue a summoning order is a matter of grave importance, and that the Magistrate must only allow criminal law to take its course after satisfying himself that there is a real case to be made.

14. Similarly, the power conferred on the Magistrate under Section 202, CrPC to postpone the issue of process pursuant to a private complaint also provides an important avenue for filtering out of frivolous complaints that must be fully exercised. A four Judge Bench of this Court has eloquently expounded on this in ***Chandra Deo Singh v. Prokash Chandra Bose & Anr., AIR 1963 SC 1430:***

"7. ...No doubt, one of the objects behind the provisions of Section 202 CrPC is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant..." (emphasis supplied) Thus, it is clear that, on receipt of a private complaint, the Magistrate must first, scrutinise it to examine if the allegations made in the private complaint, inter alia, smack of an instance of frivolous litigation; and second, examine and elicit the material that supports the case of the complainant."

8. He has also placed the reliance of the order passed by co-ordinate Bench of this Court in **Application U/S 482 No. - 11135 of 2020** ***(Hamid Ali Vs. State of U.P. and Another).***

9. Reference may also be made to the judgement of this Court in the case of

Hariram Verma and 4 Others Vs. State of U.P. and Anohter, reported in ***2017 (99) ALL CC 104,*** wherein the following observations have been made in paragraphs 7 to 11:

"7. A perusal of this impugned summoning order indicates that learned Magistrate had noted in the impugned order the contents of complaint and evidences u/s 200 and 202 Cr.P.C., but had neither any discussion of evidence was made, nor was it considered as to what overt act had allegedly been committed by accused. This contention of learned counsel for the applicants cannot be ruled out that leaned counsel have noted the contents of complaint and statements without considering its probability or prima facie case, and whether he had actually considered statements u/s 200, 202 Cr.P.C. or the documents of the original. At stage of summoning, the Magistrate is not required to meticulously examine or evaluate the evidence. He is not required to record detailed reasons. A brief order which indicate the application of mind is all that is expected of him at the stage."

8. But in impugned order there is nothing which may indicate that learned Magistrate had even considered facts of the case in hand before passing the summoning order. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence or law. Therefore it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law."

9. In ruling **"M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, 1998 UPCrR 118"** Hon'ble Supreme Court held :-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

10. In ***"Paul George vs. State, 2002 Cri.L.J. 996"*** Hon'ble Supreme Court held :-

"We feel that whatever be the outcome of the pleas raised by the appellant on merit, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas.- - - - - It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of the jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons or discussion may not be necessary but some brief

indication by the application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merits of the matter or nature of pleas raised does not meet the requirement of decision of a case judicially."

11. In ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89*** the Apex Court had held :

"Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."

10. Prima facie the evidence means the evidences and statements in the summoning case has to be seen against the accused which are sufficient to constitute the offence. The enquiry under Section 202 Cr.P.C., is limited only to test the truth or falsehood of allegations made in the complaint. It is thus to be seen whether the material placed by the complainant prima facie makes out case for summoning the accused or not.

11. In the present case the Magistrate has not conducted any enquiry so as to satisfy himself that the allegation in the complaint constitute and offence. He has to further record his finding that statements recorded by him are sufficient to proceed. The ground for proceeding against the applicant is provided under Section 204 Cr.P.C. The Magistrate has not applied his mind and summons have been issued. It is needless to say that summoning in criminal case is a serious matter affecting the dignity, self-respect and image in the society. The criminal proceedings cannot be allowed for harassment.

12. I have gone through the judgments and perused the record. It is abundantly clear that learned Magistrate has not applied his judicial mind. He has simply said that he is satisfied on the basis of the statement recorded under Sections 200, 202 Cr.P.C. and therefore he

summoned the accused. The Court has to record reasons while summoning the accused in complaint case. The Court cannot passed cryptic order without discussing the evidences and other circumstances. I am setting aside the order dated 02.07.2008 and remanding the matter to the concerned Court for passing afresh order.

13. It is open for learned counsel for the applicant to raise all the pleas available to him.

14. Learned counsel for the applicant will file certified copy of this order within a period of twenty days' from today thereafter, the concerned Court will take decision within a period of two months after affording opportunity of hearing to the parties concerned.

15. Needless to say that Court concerned shall pass afresh order in accordance with law.

16. The application is accordingly, **disposed of.**

(2022)02ILR A237
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.12.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 No. 43568 of 2012

Smt. Nisha & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anurag Pathak, Sri Harshit Pathak

Counsel for the Opposite Parties:
A.G.A., Sri Jitendra Kumar Shishodia

A. Extension of Stay Orders - In Asian Resurfacing of Road Agency Private Limited & ors. v CBI (2018)16 SCC 299 it has been held that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of 6 months from the date of decision unless in an exceptional case by speaking order such stay is extended and in cases where stay is granted in future the same will end on expiry of 6 months from the date of such order unless similar extension is granted by a speaking order. Pursuant to the direction given by Apex Court Hon'ble High Court, Allahabad has issued directions to all the judicial officers subordinate to the High Court vide CL No. 12/Admin 'G'-2 dated 26.04.2018 for compliance of the directions given by Apex Court in the case of Asian Resurfacing.

B. In Fazalullah Khan v M/s M. Akbar Contractor(D) by LR's 2019(8) ADJ 615 it has been held that interim orders granted by the Apex Court are not vacated and continued beyond a period of 6 months by reason of pendency of appeal, it cannot be said that the interim would automatically stand vacated. Thus, the applicants cannot derive any benefit of the said judgment.

Application dismissed. (E-12)

List of Cases cited:-

1. Asian Resurfacing of Road Agency Pvt. Ltd. & ors. Vs CBI (2018)16 SCC 299

2. Fazalullah Khan Vs M/s M. Akbar Contractor(D) by LR's 2019(8) ADJ 615

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

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

2- The instant application dated 27.11.2021 has been moved seeking

extension of interim stay order dated 18.12.2012, which was not extended further after 12.4.2019.

3- It is submitted by the learned counsel for the applicants that vide order dated 18.12.2012 further proceedings of Complaint Case No. 77 of 2012, under Sections 323, 504, 506, 403 I.P.C., pending before the Civil Judge (J.D.)/J.M., Deoband, Saharanpur was stayed till the next date of listing with a direction to list the case after eight weeks before the appropriate Bench, but the trial court under the garb of judgment of the Apex Court in the case of **Asian Resurfacing of Road Agency Private Ltd. and another Vs. Central Bureau of Investigation, (2018) 16 SCC 299** has proceeded in the matter. Much emphasis has been given by contending that the aforesaid judgment of the Apex Court in the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra) has been over ruled by the subsequent judgment of the Apex Court in the case of **Fazalullah Khan Vs. M. Akbar Contractor (D) By LRS. and Others, 2019 (8) ADJ 615 (SC),** therefore, the interim stay order dated 18.12.2012 is liable to be extended.

4- Per contra, learned A.G.A. opposed the prayer of the applicants by contending that judgment of the Apex Court in the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra) has not been over ruled till date. He further submits that the submission advanced on behalf of the applicants is not liable to be accepted as the same is wholly misconceived, therefore, the relief as sought by the applicants is liable to the rejected.

5- Having heard the arguments of the learned counsel for the parties, I find that the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra) has been decided by three Judges Bench of the Apex Court. The relevant paragraph nos. 35, 36 and 37 of the said judgment are reproduced herein below:

"35. In view of above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this, situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.

36. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Section 397 or 482 Cr.P.C. or Article

227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to re-appreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period. Though no mandatory time limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated. Mandate of speedy justice applies to the PC Act cases as well as other cases where at trial stage proceedings are stayed by the higher court i.e. the High Court or a court below the High Court, as the case may be. In all pending matters before the High Courts or other courts relating to PC Act or all other civil or criminal cases, where stay of proceedings in a pending trial is operating, stay will automatically lapse after six months from today unless extended by a speaking order on above parameters. Same course may also be adopted by civil and criminal appellate/revisional courts under the jurisdiction of the High Courts. The trial courts may, on expiry of above period, resume the proceedings without waiting for any other intimation unless express order extending stay is produced.

37. The High Courts may also issue instructions to this effect and monitor the same so that civil or criminal proceedings do not remain pending for unduly period at the trial stage."

6- Pursuant to directions given by the Apex Court in the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra), the Registrar General of the High Court of Judicature at Allahabad has issued directions to all the judicial officer subordinate to High Court of Judicature at Allahabad vide C.L. No. 12/Admin. 'G-II' dated 26.04.2018 for compliance of the directions given by the Apex Court in the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra).

7- Thereafter on 22.07.2019, the two Judges Bench of the Apex Court in the case of *Fazalullah Khan* (supra) considering the judgment of three Judges Bench of the Apex Court in the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra) has made following observation :

"We are constrained to pen down a more detailed order as the judgment of this Court in Asian Resurfacing of Road Agency's case (supra) is sought to be relied upon by difference courts even in respect of interim orders granted by this Court where the period of 6 months has expired. Such a course of action is not permissible and if the interim order granted by this Court is not vacated and continues beyond a period of 6 months by reason of pendency of the appeal, it cannot be said that the interim order would automatically stand vacated."

8- From the perusal of the aforesaid observation, it is apparent that the judgment of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra) has not been over ruled by the Apex Court, but it has been clarified that in case interim orders granted by the Apex Court where the period of six months has expired and the interim order

granted by the Apex Court is not vacated and continues beyond the period of six months by reason of pendency of appeal, it cannot be said that interim order would automatically stand vacated. As such, interim orders granted by the Apex Court have been excluded and have been placed in a separate category other than High Court and trial court.

9- Here it is also relevant to mention that the Apex Court while deciding the Miscellaneous Application No. 1577 of 2020 filed in the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra) has passed an order dated 15.10.2020, which is quoted herein below :

"Having heard Mr. Dilip Annasaheb Taur, learned counsel for the applicant and Mr. S.V. Raju, learned ASG for the respondent, we are constrained to point out that in our directions contained in the judgment delivered in Criminal Appeal Nos. 1375-1376 of 2013 [Asian Resurfacing of Road Agency Pvt. Ltd. & Anr. vs. Central Bureau of Investigation] and, in particular, para 35, it is stated thus:

"35. ... . In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced."

Learned Additional Chief Judicial Magistrate, Pune, by his order dated 04.12.2019, has instead of following our judgment in letter as well as spirit, stated that the Complainant should move an application before the High Court to resume the trial. The Magistrate goes on to say: "The lower Court cannot pass any order which has been stayed by the Hon'ble High Court, Bombay with due respect of ratio of the judgment in Asian Resurfacing of Road Agency Pvt. Ltd. & Anr. (supra)." We must remind the Magistrates all over the country that in our pyramidical structure under the Constitution of India, the Supreme Court is at the Apex, and the High Courts, though not subordinate administratively, are certainly subordinate judicially. This kind of orders fly in the face of para 35 of our judgment. We expect that the Magistrates all over the country will follow our order in letter and spirit. Whatever stay has been granted by any court including the High Court automatically expires within a period of six months, and unless extension is granted for good reason, as per our judgment, within the next six months, the trial Court is, on the expiry of the first period of six months, to set a date for the trial and go ahead with the same.

With this observation, the order dated 04.12.2019 is set aside with a direction to the learned Additional Chief Judicial Magistrate, Pune to set down the case for hearing immediately.

Miscellaneous Application is disposed of accordingly."

10- In view of the aforesaid discussion, it is apparently clear that there is strict direction of the Apex Court that the subordinate courts all over the country shall follow the directions given in the case of *Asian Resurfacing of Road Agency Pvt. Ltd. & another* (supra) in letter and spirit.

11- As such, the submission of learned counsel for the applicants, as mentioned above, is not liable to be accepted.

12- The instant application lacks merit and is accordingly rejected.

13- Office is directed to send a copy of this order to the concerned court below.

(2022)02ILR A241
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2021

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ A No. 8869 of 2021
with
Writ A No. 8512 of 2021
with
Writ A No. 8867 of 2021
with
Writ A No. 8870 of 2021

Dheer Singh(Home Guard) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Niraj Kumar Tripathi, Sri Shailesh Verma

Counsel for the Respondents:
C.S.C.

A. U.P. Home Guards Act, 1963- Section 7 - Power of appointment and selection of Home Guards vests with the St. which is exercised through it's officers. The person selected and enrolled is subordinate to a public servant and he receives the salary/wages on a monthly basis, there exists the relationship of master and servant and he performs duties in connection with the affairs of the St..

B. Any personnel enrolled u/S 7 of the Home Guards Act will not be a holder of civil post and will not enjoy any protection available u/A 311 of Constitution of India but as soon as he is called to perform any duty u/S 8 of the Act he will become holder of a civil post and enjoy the protection of Article 311 of Constitution of India.

C. The termination order on the ground that the petitioners formed an association is not sustainable as Article 19(1)© confers a Fundamental right on every citizen to form a Union/Association or Cooperative Society which right can only be circumscribed by framing a law under article 19(2) of Constitution of India which would have to be a law as provided under Article 13(3) of Constitution of India.

Held: Petition allowed. (E-12)

List of Cases cited: -

1. St. of U.P. & ors. Vs Dashrath Singh Parihar & anr. 2007 All.C.J. 1165

2. Chhaya Tripathi Vs St. of U.P. & ors. Writ A No. 15793/2018

3. Omvir Singh & anr. Vs St. of U.P. & ors. Writ A No. 16195 of 2005

4. Rajvir Singh Vs St. of U.P. & ors. LAW(ALL)2018-10-61

5. Harveer Singh Vs St. of U.P. & anr. Writ A No. 60671 of 2016

6. Ram Avadh Yadav Vs St. of U.P. & ors. Writ A No. 145 of 2020

7. Riasat Ali Vs St. of U.P. & ors. 2003(4) AWC 3046

8. Roop Chand Vs St. of U.P. & ors. Special Appeal(Defective) No. 904 of 2010

9. Arun Kumar Shukla Vs St. of U.P. & ors. 2018(2) ADJ 353

10. Vibhuti Narayan Singh Vs St. & ors. 1986 UPLBEC 1130

11. Abdul Hamid & anr. Vs St. of U.P. & anr. Writ Petition No. 9028 of 1990

12. Hriday Narayan Yadav Vs St. of U.P. & ors. Writ A No. 19141 of 2019

13. St. of U.P. Vs Chandra Prakash Pandey & ors. JT 2001(4) SC 145

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri Shailesh Verma and Shri M.M Sahai, Advocates for the petitioners and R.P. Dubey, learned Additional Chief Standing Counsel, Shri Vibhav Dutt, Standing Counsel, Mohd. Naushad Sidduqui, Standing Counsel, Shri Virendra Kumar Pal, Standing Counsel, Shri Ramesh Pundir, Standing Counsel, Shri Santosh Kumar, Standing Counsel and Shri Jitendra Kumar Singh, Standing Counsel for the State-respondents.

2. The issue raised in all the writ petitions are being decided by mean of this common judgment for the sake of convenience, the facts as mentioned in the case of Dheer Singh Vs. State of U.P. and others in Writ - A No.8869 of 2021 are being taken up. Individual cases will be dealt separately.

3. The present petition has been filed alleging that the petitioner was enrolled as a Home Guard in the year 1998 under Section 7 of the U. P. Home Guards Adhiniyam,1963 and in terms of mandate of section 8 of the Act was called upon to discharge of his duties, he was placed in various places in District Amroha, he was being paid honorarium as provided under the U.P. Home Guards Act, 1963.

4. Challenge in the present case is to the order dated 13.02.2019, whereby the services of the petitioners have been dispensed with mainly on the ground that the petitioners were involved in forming a Workers' Association. Name of four of the petitioners is mentioned in the order dated 13.02.2019, it was further mentioned that the said Act of forming an Association was not acceptable and the Commandant General, Home Guard Headquarters vide letters dated 02.09.2013 and 31.07.2013 had directed for dismissing the Association. It is further revealed that the news of formation of an Association by the petitioners was published in the Newspaper "Hindustan" and based on the said news the petitioners were served with a show cause notice dated 04.01.2019, to comply with the Principle of Natural Justice. In the impugned order, it is recorded that the petitioners did not file a reply and the said act of not filing the reply was itself recorded as an act of indiscipline. It further records that the petitioners had themselves admitted that they were not the member of the Association known as U.P. Home Guard Avaitnik Adhikari Avam Karmachari Association. It is recorded that the reply submitted by the petitioners was not considered to be appropriate and which established that the petitioners had associated themselves with the Association, which was an act of indiscipline. It is further recorded that the petitioners had earlier given an affidavit in September, 2011 swearing not to even take the name of the Association in future and had also apologized for the facts of associating with the Association and had prayed for mercy and had promised that they will not repeat the mistake again and despite the said affidavit, became a governing Member of the said Association, which is contrary to their common affidavit given earlier. It also records that Commandant General vide his letter dated 31.07.2017 had issued directions for dismissal of such employees and in pursuance to the said directions the services of the petitioners were dismissed. The said order was challenged before this Court.

5. Sri Shailesh Verma, learned counsel appearing on behalf of the petitioners argues that the order impugned is bad on following grounds:-

The said order is bad as no procedure as prescribed under the U.P. Home Guards Act, 1963, has been followed prior to passing of the said order. He argues that the post of the petitioners was a Civil Post and thus, it was incumbent upon the respondents to have complied with the mandate of Article 311 (2) of the Constitution of India. He further argues that the order is bad as the same has been passed under directives from the Commandant General and thus there is no application of mind of the authority passing the said. He further argues that the order is clearly against the rights of the petitioners enshrined under Article 19(1)(c) of the Constitution of India, which is a fundamental right of the petitioner to form an Association or Unions. He argues that no law in terms of Article 19(2) has been passed and an absence of a law under Article 19(2) the rights enshrined under Article 19(1) cannot be curtailed.

6. In response to the said arguments, Sri Mohd. Naushad Siddiqui, learned Standing Counsel argues that the post held by the petitioners cannot be termed to be a Civil Post as such the protection of Article 311 (2) of the Constitution of India is not available to the petitioners. He further argues that the orders impugned have been passed after complying with Principle of Natural Justice and giving adequate opportunity of hearing. He further argues that once petitioners had given an undertaking in the form of affidavit filed in the year 2011, acting against the same was wholly arbitrary and illegal and an act of indiscipline, for which the petitioners have been rightly punished. In support of his argument that post of the petitioners is not a Civil Post, he places reliance on Explanation to Section 10 of the 1963 Act. Lastly he submits that the writ petition is liable to be dismissed.

7. Learned counsel for the petitioners has placed reliance on the following judgments in support of his contention that the petitioners are holding of Civil Post, namely, Division Bench judgment of this Court in the case of **State of U.P. and others Vs. Dasrath Singh Parihar and another, (2007 All. C.J. 1165).** He places reliance on the judgment of this Court decided on 23.08.2018 in **Writ - A No.15793 of 2018, (Chhaya Tripathi Vs. State of U.P. and others)** and judgment dated 11.10.2018 passed in **Writ - A No.16195 of 2005 (Om Beer Singh and another Vs. State of U.P. and others).**

8. Counsel for the respondents on the other hand has placed reliance in Full Bench judgment dated 01.10.2018 passed in the case of **Rajveer Singh Vs. State of U.P. and others; LAW(ALL) 2018 10 61.** He further places reliance on the judgment of this Court in **Writ - A No.60671 of 2016 (Harveer Singh Vs. State of U.P. and another**. He further places reliance on the judgment of this Court dated 09.12.2020 passed in **Writ - A No.145 of 2020 (Ram Awadh Yadav Vs. State of U.P. and others)** and Division Bench judgment of this Court in the case of **Riasat Ali Vs. State of U.P. and others,** reported in **2003 (4) AWC 3046.** Further he placed reliance on the judgment dated 06.10.2010 passed in **Special Appeal Defective No.904 of 2010 (Roop Chand Vs. State of U.P. and others)** and the judgment of this Court

passed in the case of **Arun Kumar Shukla Vs. State of U.P. and others, 2018 (2) ADJ 353.**

9. In the light of the submissions, the first question to be decided is whether the post held by the petitioners can be considered to be holders of a "Civil Post" in the light of the judgments relied upon and quoted above.

10. Before deciding the question, the Act namely, the Home Guard Adhiniyam is being briefly discussed. The Act came into force on 30th December, 1963 and was promulgated for constituting a force for utilizing its services for duties in times of emergency and for serving as an auxiliary to the police for the maintenance of law and order. The constitution of the Home Guard is provided under Section 3, which provides for raising and maintaining a volunteer force to be called of the Home Guards and the functions to be performed are specified in Section 4. The superintendence of the administration of the said Home Guards is provided for in Section 6 and is to be done by the State Government through the Commandant General. Section 7 provides for the manner of enrolment of the volunteers and Section 8 confers the powers on the District Magistrate or the District Commandant or the Commandant General to call of the said enrolled persons for performing the duties and functions as specified in Section 4 of the said Act. Section 10 provides that the Home Guard acting in discharge of the functions under the Act shall be deemed to be a public servant within the meaning of Section 21 of the IPC. The liabilities placed upon the Home Guards enrolled are laid down under Section 11, which bind the Home Guards for serving in any unit of the Home Guard, in which he is attached and the initial period required to be served is three years from the date of his enrolment, which can be extended. The procedure with regard to the discharge, suspension and designation are laid under Section 12 and the penalties that can be imposed on the said Home Guards are provided for under Section 13.

11. The State Government is empowered to make Rules and Regulations for carrying out the performances of the said Act. Since the passing of the said Act and the passage of time, the utility of the persons enrolled under the Home Guards has continued and in terms of the mandate of Section 8, they have been called to perform the duties. It is also to be borne in mind that the State Government has framed rules for governing the services of Group-A and Group-B post holders of Home Guards, their manner of recruitment, the terms and conditions of their services. Although, no rules have been framed for Group-C and Group-D, however, they are entitled to be absorbed/promoted to Group-B and a quota for promotion is also fixed in the rules provided for recruitment of Group-A and Group-B.

12. The State Government has issued the Government Orders providing for manner of enrolment of the Home Guards, providing for their eligibility criteria, the age ,physical abilities, as well as the other eligibility conditions and whole process of selection is provided for in the Government Order No. 1549/Chhah Naasu-11-32 Hoga/11, dated 1st September, 2011. Prior to the said, the Government Order No. 2099/Chhah Naasu-10-438 Hoga/07, dated 6st September, 2010 was issued providing for the manner of recruitment and in fact a Committee also has been constituted for making said selections. It further provides

for awarding marks obtained on various parameters.

13. Several welfare measures have been taken by the State Government such as providing for compassionate appointment to the dependents of the Home Guards, who die while in harness or are incapacitated while performing their duties, vide Government Order No. 2013/Chhah Naasu-12-188 Hoga/06, dated 27th September, 2012. The rules with regard to the recruitment on the vacant posts of Home Guards have further been amended by Government Order No. 3089/95-15-08 Prakeerna/1, dated 12th January, 2016.

14. It is also to be noticed that the salary/wages to the Home Guards are paid out of the Sate funds and it term of their appointment also continues for years, thus from the Act and the various Government Orders and the Rules, what is clear is that power of appointment and selection vests with the State, which is exercised though its Officers. The person selected and enrolled is subordinate to a public servant and he receives the salary/wages on a monthly basis, there exists the relationship of master and servant and he performs duties in connection with the affairs of the State.

15. Before deciding the nature of the post it is essential to note that, this Court was confronted with this question way back in the year 1986 in the case of **Bibhuti Narain Singh Vs. State and others reported in 1986 UPLBEC 1130,** a Single Judge of this Court held that the post held by the Home Guards to be a Civil Post, whereas, another Single Judge of this Court while deciding **Writ Petition No.9028 of 1990 (Abdul Hameed and another Vs. State of U.P. and another)** vide judgment dated 28.10.1991 held that the post was not a "Civil Post". In view of the conflicting decision, the matter was referred before the Division Bench which decided the issue in judgment delivered in case of **Riasat Ali** vs State 2003(4) AWC 3046, holding that the Home Guards under the Act and Rules did not hold a Civil Post. The said judgment was followed by this Court in the Case of **Roop Chand Vs. State of U.P. (supra).** While delivering the judgment in the case of **Roop Chand (supra),** the Court also agreed with the view taken in the case of **Riasat Ali (supra)** nevertheless dismissed the writ petition holding that the right of appeal is available under the Rules. The judgment in the case of Arun Kumar Shukla **(supra)** relied upon by the respondent did not decide the issue of the question whether the post held by the petitioner is a Civil Post or not, the same as such the same is not being considered. The judgment of this Court passed in the case of **Hriday Narayan Yadav Vs. State of U.P. and others (Writ - A No.19141 of 2019)** placing reliance in the case of **Riasat Ali Vs. State of U.P.** held that it is still good law and the protection under Article 311 of the Constitution of India was not available to the Home Guards.

16. The Division Bench of this Court in the case of **State of U.P. and others Vs. Dasrath Singh Parihar and another (supra),** was confronted with the said issue as to whether the Home Guards held the post which can be said to be a Civil Post enjoying the protection available under Article 311 of the Constitution of India or not. The said Division Bench considered the judgments of the Single Judges as well as the judgment in the case of **Riasat Ali (supra)** as also the judgment of Supreme Court in the case of **State of U.P. Vs. Chandra Prakash Pandey and others,**

reported in **JT 2001 (4) SC 145.** After considering the entire gamut of case laws did not agree with the reasoning given in the case of **Riasat Ali (supra)** and recorded its opinion as under:-

"20. Therefore, in our opinion, by mere enrolment, a Home Guard will not hold a civil post but once a Home Guard is called for duty under Section 8 of the Act, he will be holding a civil post. The view, which we are taking, is further supported by the provisions of the Rules, which have been framed by the Governor exercising the powers conferred by the proviso to Article 309 of the Constitution. Rule 2 which deals with the status of service clearly mentions that the Uttar Pradesh Home Guard Service is a State Service comprising group "B' post."

17. In the said judgment, the Division Bench also considered as to whether the matter should be referred to a Larger Bench or not, in view of the earlier judgment in case of **Riasat Ali (supra)**, the Division Bench did not refer the matter to the Larger Bench and the reasons for not doing so were recorded as under:-

*"22. A further question may arise that in spite of our irresistible conclusion that the respondent was a holder of civil post should we refer this matter to a larger Bench in view of the fact that **Riasat Ali (supra)**, however, held otherwise.*

*23. While coming to the conclusion that the respondent was holding a civil post, we had followed the decision of the Supreme Court in **State of U.P. Vs. Chandra Prakash Pandey and others JT 2001 (4) S.C.145** and explained the Division Bench decision of this Court in **Riasat Ali (Supra)** in which paragraph 18 of the judgment clearly states that though the Home Guards may have the incident of the civil post, they cannot be treated as such only because of the explanation attached to Section 10 of the Act. We, therefore, do not think that any reference is required to be made in the present case to a larger Bench.*

For the reasons stated above, we are, therefore, in complete agreement with the views expressed by the learned Judge. The Special Appeal is, therefore, liable to be dismissed and is, accordingly, dismissed. There shall be no order as to costs."

18. It may not be out of place to mention that the division bench in clear terms held that Home Guard merely by enrolment does not hold a Civil Post, however, once he is called for performing duty under Section 8 of the Act, he will be holding a Civil Post, the court discussed the individual case of **Dasrath Singh Parihar** to hold that he was a Company Commandant and thus he was entitled to protection under Article 311 of the Constitution of India.

19. Counsel for the Petitioner argues that the Rules framed by the State known as U.P. Home Guard Service Rules 1982, referred to para 20 of the judgment in the case of **Dasrath Singh Parihar (supra)**, are the Rules, which has been framed only in respect of Class A and Class B. Officers which are specified and not in the case of Home Guards for which admittedly no rules have been framed,however,they still would be entitled to protection under article 311.

20. An analysis of the judgment of this Court in the case of **Dasrath Singh Parihar (supra)** specially para 20 thereof makes it clear that it is divided into two parts,the Court after holding that once the

Home Guards are enrolled, they would not be holding the Civil Post, unless they are assigned the works or duties under Section 8 of the Act and once they are assigned the duties, the post held by them would clearly be a Civil Post. 21. The observations made in second part of paragraph no 20 of the said judgment only fortifies or justifies the first part by holding that the view can be fortified by the Rules. He thus argues, even if no Rules have been framed with regard to the petitioners, it cannot be said that the first part of the finding of this Court as recorded in para 20 would not apply.

22. He also argues that once this Court has clarified and taken a view after considering the judgment in the case of **Riasat Ali (supra)** and following the Supreme Court Judgment, the legal position merits very clearly that the Home Guards, on there being assigned the duties would qualify to be a Civil Post.

23. The judgment in the case of **Hriday Narayan Yadav (supra)** does not take notice of the judgment of this Court in case of **Dasrath Singh Parihar (supra)** and thus cannot be termed a binding precedent similarly the judgment of this Court in the case of **Roop Chand (supra)** does not notice the judgment in the case of **Dasrath Singh Parihar (supra)** and as such cannot be termed as binding precedent.

24. Coming to the Full Bench judgment of this Court in the case of ***Rajveer Singh (Supra)***, cited by the Standing Counsel to argue that in view of the explanation added to Section 10, the Full Bench has held that the post hold by the Home Guard is not a civil post. The said argument merits rejection inasmuch as the question referred before the Full Bench was as under:-

*"(1). Whether Division Bench judgment in **Riasat Ali Vs. State of U.P.** 2003 (4) AWC 3046 holding that a Home Guard under U.P. Home Guards Act, 1963 is not holder of a civil post in view of expression to Section 10 is correct or Division Bench judgment in Special Appeal No. 143 of 2012 (Ram Kumar Vs. State of U.P. & Others) relying on Full Bench judgment in Sheela Devi & Another Vs. State of U.P. & Others 2010 All.C.J. 1371, which is a case relating to Anganbari Karyakatri and Supreme Court's judgment in Davinder Singh & Others Vs. State of Punjab & Others 2010 (13) SCC 88 which is in the context of Punjab Home Guards Act, 1947 and Punjab Home Guards and Civil Defence (Field) Class III Service Rules, 1983 holding that Home Guard is a holder of civil post, is correct."*

25. The Full Bench considered the scope of the U.P. Home Guards Act and discussed the concept of enrolment of the Home Guard of the State. It interpreted that Home Guard defined under Section 2 (e) of the said Act It further proceeded to discuss Section 7 of the said Act, which provides for the manner of enrolment as a Home Guard.

26. The Full bench proceeded to examine the issue after noticing the nature of conflict pointed out by learned single judge by observing as under:-

"13. We now proceed to examine the nature of the conflict which has been pointed out by the learned Single Judge while framing the reference. <u>The first question which has been framed, is on the basis, as to whether a home guard as enrolled under the 1963 Act under Section 7 thereof is holder of a civil post or not, keeping in view the explanation added to Section 10 of the Act."</u>

27. The Court further interpreted the distinction between the two sets of establishment within the Home Guards namely, those who are engaged as volunteer and enrolled in terms of Section 7 of the Act and those who form a part of the permanent establishment under the 1982 Rules. The Court observed in para 11 as under:-

"It is here that it is necessary to draw the distinction between the two sets of establishment within the Home Guards, namely, those who are engaged as volunteers and enrolled in terms of Section 7 of the 1963 Act and those who form part of the permanent establishment under the 1982 Rules. It has to be kept in mind that these two nature of engagements are entirely different from each other, one under the 1982 Rules being substantive in nature by way of selection and appointment whereas that under Section 7 of the 1963 Act being voluntary and by way of an enlistment which is to be carried out through as enrollment process as prescribed thereunder."

28. The most important part referred to in the Full Bench judgment is contained in paragraph 12, which is a under:-

"In the present case, the dispute which has to be resolved is confined only to such enlisted and enrolled persons as per Section 7 of the 1963 Act. *The judgment which has been referred to by the learned Single Judge on the basis whereof a conflict has been pointed out, namely that of* ***Riasat Ali Vs. State of U.P.*** *2003 (4) AWC 3046, also refers to the 1982 Rules,* ***but in our opinion has not appropriately drawn the distinction between the two sets of establishment, and therefore, the question of applicability of 1982 Rules in the case of such voluntary enrollment will not arise. To that extent the judgment in the case of Riasat Ali Vs. State of U.P. (supra) incorrectly refers to the said rules, inasmuch as, in the case of Riasat Ali (supra) the issue was not related to any engagement made under the 1982 Rules."***

29. In the light of the said, the Court proceeded to consider the status of the persons enrolled under Section 7 of the said Act and proceeded to hold that the view taken by the Division Bench in the case of **Riasat Ali (supra)** was affirmed in view of the explanation attached to Section 10.

30. The question whether the persons, who were called for performance of their duties under Section 8 would be the holders of civil post or not ,was neither considered nor decided by the Full Bench.

31. At this juncture, it becomes imperative to notice, as also noticed by the Full Bench, there are two sets of persons who are covered under the scope of U.P. Home Guards Act, 1963, one being the persons who are only enrolled by virtue of Section 7 of the said Act and the second would be the employees who are called for performance of duties as specified and elaborated under Section 8 of the said Act. Section 7 and Section 8 of the said Act are being reproduced:-

"7. Enrolment etc. - *(1) Subject to such conditions as may be prescribed, any person desiring to be enrolled as home guards shall make an application in the prescribed form.*

If such applicant is in private service he shall make such application through his employer, or if in service under the State through the authority competent to grant him permission to join the force.

(2) A home guard shall be formally enrolled and on enrolment make a declaration in the form set out in the First Schedule and receive a certificate of appointment in the form set out in the Second Schedule under the seal and signature of such officer as may be

prescribed, by virtue of which he shall be vested with the powers and privileges and be subject to the duties of a home guard.

(3) Officers and other members of the Home Guards shall wear such uniforms as may be prescribed.

***8. Calling out of Home Guards.-** Subject to the provisions of this Act and the rule made thereunder-*

(a) [the District Magistrate or the District Commandant] may by order call out any home guard attached to a unit posted in the district for duty in any area within that district;)

(b) the Commandant-General or such officer of the Home Guards as may be authorised by him in this behalf, may call out any home guard for duty in any part of the State or outside the State."

32. This Court in the case of Dasrath Singh Parihar (supra) had also noticed the said distinction in between two class of employees, one being only enrolled as Home Guards covered under section 7 and the second being the persons, who were called to perform duties in terms of the provisions of Section 8 and after noticing the said distinction, proceeded to hold that the persons, who are called for performance of duties under Section 8 would be holders of "civil post".

33. The Standing Counsel has laid much emphasis on the explanation to Section 10 of the said Act. Section 10 of the said Act is being quoted hereinunder:-

***"10. Home Guards to be public servants but not civil servants. -** A home guard acting in the discharge of his functions under this Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.*

*Explanation.-A home guard shall not be deemed to be a holder of a civil post **merely by reasons of his enrolment as home guards."***

34. Section 10 on its plain reading provides that a Home Guard acting and discharging of his function shall be deemed to be a public servant within the meaning of Section 21 of the IPC and enjoyed the protections and powers as conferred by Section 21 of the IPC. The explanation only clarifies the section to the extent that a Home Guard will not be holder of a civil post merely by the **"reasons of his enrolment"** as Home Guards. Thus on a plain interpretation of the provisions of Section 10, it is clear that persons enrolled under Section 7 will not be deemed to be public servant within the meaning of Section 21 of the IPC and would not also be holder of a civil post, whereas once they called for performance of duties under Section 8, they would enjoy the protection of Section 21 of the IPC and the explanation would not be applicable to them as they are not merely enrolled but are performing the duties when called upon under Section 8 of the said Act.

35. The concept of holder of a civil post has its genesis from Article 311 of the Constitution of India, which came up for interpretation in the case of State of Assam and others Vs. Shri Kanak Chandra Dutta, AIR 1967 SC 884, wherein the Supreme Court laid down the parameters to determine whether the duties performed by a person can be described as civil post so as

to enjoy the protection under Article 311 of the Constitution of India. Paragraphs 9 and 10 of the said judgment are being quoted hereinbelow:-

"9. The question is whether a Mauzadar is a person holding a civil post under the State within Article 311 of the Constitution. There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Article 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State. See marginal note to of Article 311. In Article 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. See the marginal notes to Articles 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

10. In the context of Articles 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution. See Article 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310(2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasises the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post."

36. The judgment of the Supreme Court in the case of ***State of Assam Vs. Kanak Chandra Dutta (Supra),*** was considered and explained in the subsequent judgment of the Supreme Court in the case of ***State of Karnataka and others Vs. Ameerbi and others; (2007) 11 SCC 681,*** wherein the Supreme Court noticing the law laid down in the case of ***State of Assam Vs. Kanak Chandra Dutta (Supra)***, explained it as under:-

"19. Applying the said principes of law, it was held that a Mauzadar holds a civil post under the State as: (i) the State has the power and the right to select and appoint him; (ii) he is subordinate to public servant; (iii) he receives remuneration by

way of a commission and sometimes a salary; (iv) there exists a relationship of master and servant; (v) he holds an office on the revenue side of the administration to which specific and onerous duties in connection with the affairs of the State are attached; (vi) the office falls vacant on the death or removal of the incumbent; (vii) he is responsible officer exercising delegated powers of the Government; (viii) he is appointed Revenue Officer."

37. The said judgment of the Supreme Court in the case of State of Assam Vs. ***Kanak Chandra Dutta (Supra)*** was also considered by the Supreme Court in the case of ***State of U.P. Vs. Chandra Prakash Pandey; 2001 AIR (SC) 1298***, wherein after noticing the various judgments refered to and in paragraph 27 of the judgment referring to judgment of the Supreme Court in the case of ***State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and others; 1983(2) SCC 33*** observed as under

"12. In the case of State of Gujarat v. Raman Lal Keshav Lal Soni [(1983) 2 SCC 33 : 1983 SCC (L&S) 231] again a Constitution Bench of this Court was considering the question as to whether the Panchayat service constituted under Section 203 of the Gujarat Panchayats Act, 1962 was a civil service of the State and the members of the service were government servants. The Court after due consideration enumerated the following indicia for deciding whether a particular person is a member of civil service of the State and a government servant in para 27 which runs thus: (SCC p. 49)

"We do not propose and indeed it is neither politic nor possible to lay down any definitive test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not." (emphasis added)"

38. The Standing Counsel lays emphasis on the explanation to Section 10 to argue that even the persons who are called on to perform their duties under Section 8 would not be holders of the civil post. The said contention has to be negated in view of the judgment of the Supreme Court in the case of ***State of Assam Vs. Kanak Chandra Dutta (Supra),*** which laid down the manner, in which the post has to be interpreted to be a civil post. Once the factors as laid down by the Supreme Court are existent, the nature of the post has to be determined with reference to the meaning and the nature of duties performed by such persons,the relationship with the state and the administrative control of the state. Even otherwise, the benefit of Article 311 cannot be controlled or whittled down by the statutory enactment by the State.

39. In the present case, the explanation to Section 10 does not in any

way whittle down the benefits of Article 311, which flow in favour of the persons, who are performing the duties under Section 8 of the said Act, as it very clearly lays down that it applies only in the case of the personnel, *who are enrolled* under Section 7. If the intent of the State while enacting the said Act was to exclude even the persons who are performing the duties under Section 8 to be not holder of a civil post, the legislature would have provided so (it is another question whether the legislature could have done that to wipe away the benefits of a constitutional provision).

40. In view of the legal principles of determining the nature of the post as laid down in case of ***State of Assam Vs. Kanak Chandra Dutta (Supra)***, and explained in ***State of Karnataka and others Vs. Ameerbi and others read with the scheme of the Act and the nature of state control as discussed in the foregoing paragraphs*** and following the judgment of this Court in the case of ***Dasrath Singh Parihar (Supra)***, I have no hesitation in holding that any personnel enrolled under section 7 of the Home Guards Act will not be a holder of Civil Post and will not enjoy any protection available under Article 311 of The Constitution of India but as soon as he is called to perform any duty under Section 8 of the Act he will become holder of a Civil Post and will enjoy the protection of Article 311 of The Constitution of India .

41. As admittedly no service rules have been framed except for class A and B post holders ,the state is advised to take steps for framing the rules ,however, till such rules are framed all action in respect of services of the Home Guards who are called upon to perform duties under Section 8 will have to be in conformity with Article 311

42. In view of my coming to the conclusion as recorded above, I proceed to examine the individual cases on the facts of each case .

Writ-A No. 8869 of 2021 (Dheer Singh vs State of U.P. And 4 Others)

Writ-A No. 8512 of 2021 (Kuldeep Kumar vs State Of U.P. And 4 Others)

Writ-A No. 8867 of 2021 (Rajendra Kumar Verma vs State Of U.P. And 4 Others)

Writ-A No. 8870 of 2021 (Ajay Pal Singh vs State Of U.P. And 4 Others)

43. In all the above cases , the ground taken for dismissing the services, are only that the petitioners have engaged in formation of an association.

44. The said cannot be justified for reasons:

As the petitioners were performing duties in terms of Section 8 of the Act and were thus holding a "civil post" and as no procedure has been followed prior to their termination vide the impugned orders dated 13.2.2019 the same is clearly in violation of Article 311 and thus bad in law. The termination order in these cases is further bad as it is reasoned on the ground of petitioners forming an association is also not sustainable as Article 19(1) (c) confers a fundamental right on every citizen to form Union/Association or Co-operative Society which right can only be circumcised by framing a law as prescribed under Article 19 (2) of the Constitution of India. Admittedly, no such law has been framed by the State. Needless to say that the law as referred to be Article 19 (2) would have to be a "law' as provided under Article 13 (3) of the Constitution of

India. Even otherwise, the order dated 2.9.2013 and 31.7.2013 restraining the formation of an Association cannot be termed as *'reasonable restriction by law'* as required under Article 19 (2) of the Constitution of India, further even if, for the sake of arguments the orders issued restraining the formation of Association be considered as a law in terms of Article 13 (3) of the Constitution of India, the same is also clearly in violation of Article 14 of the Constitution of India as there appears to be no justification for placing the restriction for forming an Association.

45. In view of the findings as recorded above and agreeing with the submissions made by counsel for the petitioners, the petitions deserve to be allowed. The orders impugned are set aside with directions that the petitioners shall be permitted to continue and shall be paid their salary/wages to which they were entitled prior to dismissal in accordance with law.

46. The writ petition stands **allowed** in terms of the said. As regards the arrears, I am not inclined to pay the same on the basis of "no work no pay".

47. I record my appreciation for the assistance given by Shri Hritudhwaj Pratap Sahi, Advocate to assist this Court on the question of scope of civil post in respect of the duties performed by the petitioner.

(2022)02ILR A253
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ B No. 52 of 1991

Mohammad Sami & Ors. ...Petitioners
Versus
Addl. Director of Consolidation, Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
H.S. Sahai, Haider Abbas, Mohd. Yasin, Rakesh Kr. Pandey Dani, Rakesh Kumar Pandey, Usman Siddiqui

Counsel for the Respondents:
C.S.C., A.S. Chaudhary, J. Saeed, P.V. Chaudhary, Z. Jilani

(A) Civil Law - Adverse possession - Land Record Manual, Paras A80, A81 - PA 10 - Adverse possession contemplates continuity of possession as against the true owner & that true owner had full knowledge, that the person in possession, was claiming a title and possession hostile to the true owner - burden of proof - in case where a person is claiming adverse possession against the recorded tenure holder and recorded tenure holder denies that he had not received any P.A.10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure holder was duly given notice in prescribed form P.A.10 (Para 20)

During the consolidation proceedings, opposite party no.2 filed objection in respect of three plots i.e. 294, 295 and 296 claiming sirdari rights on the basis of his adverse possession - Two consolidation authorities concurrently held that as per the provisions of Paras A80 and A81 of the Land Records Manual, father of original petitioners was not given notice of PA-10 before recording possession of opposite party no.2 on his tenure holding, therefore, opposite party no.2 could not claim adverse possession in respect of the land in dispute - thumb impression found in 1370 Fasli was without showing name of the noticed person, no thumb impression or signature are given in 1372 Fasli - name of opposite party no. 2 was recorded in Khatauni without giving notice of PA-10 &

without following the mandatory provision - but without adverting to such finding, the Assistant Director of Consolidation (ADC) held opposite party no. 2 to be in possession of the land on the basis of the entry of his father in Column-12 in the Khatauni of 1356 Fasli – ADC not correct in setting aside the concurrent findings of fact, order passed by ADC set aside

Writ Petition allowed. (E-5)

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

1. The present writ petition has been filed seeking quashing of the order dated 29.1.1991 passed by the Assistant Director of Consolidation, Faizabad (Now Ayodhya Ji), whereby Revision No.31/15 filed by Ale Hasan, opposite party no.2 (now dead) under Section 48 of the U.P. Consolidation of Holdings Act, 1953 (for short "the Act') was allowed.

2. The Assistant Director of Consolidation vide impugned order while allowing the revision, had directed for deletion of the name of the petitioners from the land in Gata Nos.294/0-19-15, 295/0-18-0 and 296/0-17-0 which are part of Khata No.48 and for recording the name of opposite party no.2 as intermediary bhumidhar in the record of 1360 Fasli.

3. During the consolidation proceedings, opposite party no.2 (since deceased) filed objection in respect of the land of three plots of Khata No.48 i.e. 294, 295 and 296 claiming sirdari rights on the basis of his adverse possession. The dispute between the parties could not be reconciled before the Assistant Consolidation Officer and the matter was referred to the Consolidation Officer. Opposite party no.2 in order to establish the adverse possession, filed copies of the Khatauni of 1350 Fasli and un-certified copy of Khasra of 1355 Fasli. Opposite party no.2 also filed Khatauni of 1356 Fasli, wherein the disputed plots were recorded in Part-II of Khatauni, but in Khasra of 1359 Fasli, it was found that name of opposite party no.2 was written in the remarks column after scoring out the name of some other person.

4. The Consolidation Officer vide order dated 26.12.1979 rejected the objection filed by opposite party no.2 after considering the evidence and submissions placed by the parties. The Consolidation Officer framed two issues for decision, which are as under :-

"1. Whether Ale Hasan is sirdar under Section 210 of U.P.Z.A. & L.R. Act in respect of disputed three plots of Khasra No.48 and ;

2. Whether the petitioners herein are in possession of the land in dispute as sirdar and whether the entry in Column-9 in favour of Ale Hasan is a forged entry ?"

5. The Consolidation Officer held that entry in Column-9 in favour of opposite party no.2 was not made in accordance with Paras A80 and Para A81 of Land Records Manual and, therefore, opposite party no.2 could not claim adverse possession in respect of the land in dispute. So far as the receipts regarding land rent and canal dues were concerned, it was said that petitioners had already filed an FIR about the missing of these receipts and, therefore, the same could not be relied on to hold the possession of opposite party no.2 over the land in dispute and thus, the Consolidation Officer rejected the objection of opposite party no.2.

6. Being aggrieved by the said order dated 26.12.1979 passed by the

Consolidation Officer, opposite party no.2 filed an appeal before the Settlement Officer, Consolidation. The Settlement Officer, Consolidation vide order dated 23.4.1982 dismissed the appeal filed by opposite party no.2. The Settlement Officer, Consolidation held that opposite party no.2 himself had admitted that his father was Shikmi Khasthkar of the disputed land, which means he was a sub-tenant of the disputed land. A sub-tenant recorded in 1358 Fasli could not claim to be adhivasi and, he could not become sirdar as claimed by him. As per the provisions of Sections 240A and 240B of U.P.Z.A. & L.R. Act, every adhivasi became sirdar on the date immediately preceding the appointed date i.e. 30.10.1954 after the State Government notification issued in the official gazette. For ready reference, Sections 240A and 240B read as under:-

*"**240A. Acquisition of rights, title and interest of land-holder in the land held by adhivasi.** - (1) As soon as may be after the commencement of the U.P. Land Reforms (amendment) Act. 1954. the State Government may, by notification published in the official Gazette, declare that as from a date to be specified therein the rights, title and interest of the land-holder in the land which, on the date immediately preceding the said date, was held or deemed to be held by an adhivasi, shall as from the beginning of the date so specified (hereinafter called the appointed date), shall cease and vest, except as hereinafter provided, in the State free from all encumbrances.*

(2) It shall be lawful for the State Government, if it so considers necessary, to issue, from time to time the notification referred to in sub-section (1) in respect only of such area or areas as may be specified and all the provisions of subsection (1) shall be applicable to and in the case of every such notification.

***240B. Consequences on acquisition of rights, title and interest under Section 240-A**. - Where a notification under Section 240-A has been published in the official Gazette, then, notwithstanding anything contained in Chapters II and IX of this Act, but save as otherwise provided, the following consequences shall ensue in the area to which the notification relates, namely-*

(a) every person who, on the date immediately preceding the appointed date, was or has been deemed to be an adhivasi shall with effect from the appointed date, become [bhumidhar with non-transferable rights] of the land referred to in Section 240-A and held by him as such and shall have all the rights and be subject to all the liabilities conferred and imposed upon [bhumidhars with non-transferable rights] by or under this Act;

....."

7. Being aggrieved by the said order dated 23.4.1982 passed by the Settlement Officer, Consolidation, opposite party no.2 had preferred a revision before the Assistant Director of Consolidation. The Assistant Director of Consolidation had reversed the concurrent findings of fact recorded by the two consolidation authorities below and allowed the revision as mentioned above.

8. Learned counsel for the petitioner has submitted that law of adverse possession contemplates that there is not only continuity of possession as against the true owner, but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of

another person, he can not establish his title by adverse possession unless it is further proved by him that the tenure holder had knowledge of such adverse possession. He has further submitted that the Consolidation Officer has meticulously observed that as per the provisions of Paras A80 and A81 of the Land Records Manual, father of original petitioners was not given notice of PA-10 before recording possession of another person on his tenure holding, which is evident from Khasra of 1368 Fasli annexed with PA-10, wherein Plot Nos.294 and 295 are mentioned while 1369 Fasli, 1370 Fasli, 1371 Fasli and 1372 Faslis were also annexed with PA-10, wherein Plot Nos.294, 295 and 296 are mentioned, but thumb impression found in 1370 Fasli was without showing name of the noticed person. In 1371 Fasli thumb impression was found on same footage and no thumb impression or signature are given in 1372 Fasli, which would reveal that father of the original petitioners, namely, Khairullah was not noticed with PA-10 in accordance with law before recording possession of another person on his tenure holding, which is a mandatory requirement under Paras A-80 and A-81 of the Land Records Manual.

9. It has further been submitted that in violation of the aforesaid mandatory requirement, the possession recorded over the disputed land, is without authority of law, illegal and invalid being against the mandatory requirement of Paras A-80 and A-81 of the Land Records Manual. It has also been submitted that opposite party no.2 himself has admitted that his father was Shikmi Khasthkar (sub-tenant) of the disputed land. In view of the provisions of Sections 240A and 240B of the U.P. Land Reforms (Amendment) Act, 1954, a person who was in cultivatory possession of the land in 1359 Fasli, became an adhivasi with effect from 1.7.1952 and, once a land holder rights ceased and vested in the State, the adhivasi became a sirdar as consequential measure. He has further submitted that every adhivasi became sirdar on the date immediately preceding the appointed date i.e 30.10.1954 after the publication of the Government's notification in the official gazette.

10. Learned counsel for the petitioner has further submitted that w.e.f. 1.7.1952, right, title and interest of the land holder on the land immediately preceding the said date, was held or deemed to be held as an adhivasi. Every adhivasi became sirdar (bhumidhar with non -transferable rights) on the date immediately preceding the appointed date i.e. 30.10.1954. It has also been submitted that from the evidence adduced by the parties, it is evident that neither opposite party no.2 nor his father was adhivasi/sirdar of the disputed land and two consolidation authorities had concurrently held so in their orders. It has also been submitted that revisional authority has not only re- appreciated the whole evidence, but has misread the same while setting aside the concurrent findings of fact recorded by the two authorities below.

11. Learned counsel for the petitioner has placed reliance on the judgment of this Court rendered in ***C.W.M.P. No.32871 of 1996, Gurmukh Singh and others Vs. Deputy Director of Consolidation, Nainital and others, decided on 20.12.1996 (1997 RD 276),*** to buttress his submission.

12. It has also been submitted that it was not essential for an adhivasi or a person deemed to be an adhivasi to be in actual possession of the land on 29.10.1954

in order that he should acquire sirdari rights under Section 240-B of the U.P.Z.A. & L.R. Act, provided that his adhivasi rights are not extinguished before that date by lapse of time or otherwise. If he was out of possession on that date while still retaining the rights, it did not matter whether he was dispossessed by his landholder or by a stranger or for what period his dispossession lasted. He has further submitted that chak was carved out in favour of the original petitioners and they are in possession over the disputed land. It is, therefore, submitted that writ petition should be allowed and the impugned order being unsustainable, is liable to be quashed.

13. On the other hand, Sri P.V. Chaudhary, learned counsel for opposite party no.2, has submitted that disputed land relate to Khata No.48 consisting of Plot Nos.249/0-19-15, 295/0-18-0 and 296/0-17-5, situate in Village Sahnemau, Pargana and Tehsil Akbarpur, District Faizabad (Now Ambedkar Nagar). The said land was recorded in the name of the petitioners. Consolidation operation started and the village concerned came to be notified under Section 4 of the Act in or about 1970-1971. He has further submitted that father of opposite party no.2 was recorded without title in the knowledge of the petitioners (tenants) right from 1354 Fasli (year 1947) and, therefore, he perfected his right over the land and must be recognised under Section 20 of the U.P.Z.A. & L.R. Act.

14. Learned counsel for opposite party no.2 has also submitted that before enforcement of U.P.Z.A. & L.R. Act, 1950, which came into operation on 26.1.1951(1358 Fasli), United Provinces Tenancy Act was in operation and, as the name of opposite party no.2 was recorded right from 1354 Fasli (year 1947), his right must be recognized under Section 180(2) of the United Provinces Tenancy Act. It has further been submitted that even under Section 20 of the U.P.Z.A. & L.R. Act, a person, who was in possession of any land on the appointed date, he is recognized as an adhivasi. Opposite party no.2 remained in possession over the land in continuation of his father right from 1354 Fasli i.e. year 1947 and, the recorded tenant never tried to evict him upto the start of consolidation operation in the year 1970-1971. Therefore, under Section 209 of the U.P.Z.A. & L.R. Act, rights of opposite party no.2 got perfected under Section 210 of the U.P.Z.A. & L.R. Act. It has also been submitted that when the provisions of U.P.Z.A. & L.R. Act came into operation, the limitation for ejectment of a person occupying the land without title was three years. He has further submitted that notice of PA-10 was not required inasmuch as this provisions was introduced in the Land Records Manual on 25.2.1958 and thereafter, it was deleted on 31.7.1965, whereas the entry of possession of opposite party no.2 was there much before 1354 Fasli (year 1949).

15. Learned counsel for opposite party no.2 has also submitted that opposite party no.2 was in possession of the land and, it was proved by receipts regarding rent as well as canal dues submitted by him, and the argument of learned counsel or the petitioners that tenure holder lost the receipts, for which an FIR was lodged, is wholly untenable and could not have been accepted. Payment of the rent and the canal dues were made by opposite party no.2 himself. Name of the recorded tenant was mentioned in the rent receipts because he was recorded in the Khatauni. It is submitted that finding recorded by the revisional authority that though the receipts were in the name of the petitioners, but the

payment was made by opposite party no.2, can not be discarded. It has also been submitted that opposite party no.2 had perfected the title in view of the provisions of Section 20 of the U.P.Z.A. & L.R. Act and under Section 210 of the U.P.Z.A. & L.R. Act. He has, therefore, submitted that writ petition being without any merit and substance, is liable to be dismissed.

16. I have considered the submissions advanced on behalf of learned counsel for the petitioners as well as by the learned counsel for opposite parties.

17. The revision has been allowed by the Assistant Director of Consolidation only on the ground that in the Khatauni of 1356 Fasli, opposite party no.2 has been mentioned in Column-12 for more than three years as person in possession without right. It has further said that since opposite party no.2 had produced the rent receipts and canal dues though in the name of the petitioner, which would prove that opposite party no.2 was in possession over the land and he was paying the rent.

18. Though the Assistant Director of Consolidation has power under Section 48 of the Act to interfere with the finding of fact recorded by the authorities below, but the power can not be exercised in the manner as has been exercised by the Assistant Director of Consolidation in the present case. Two authorities have concurrently held on the basis of evidence produced by the authorities that name of opposite party no.2 was recorded without following the due procedure and without adverting to such finding, the Assistant Director of Consolidation has held opposite party no.2 to be in possession of the land on the basis of the entry of his father in Column-12 in the Khatauni of 1356 Fasli.

19. The Assistant Director of Consolidation has not adverted to the findings recorded by the two authorities below regarding the perfection of title on the basis of possession of opposite party no.2 as adhivasi, which was negatived by them. Opposite party no.2 had claimed the actual possession of the land on three disputed plots as mentioned above. However, two authorities have concurrently held that name of opposite party no.2 was recorded in Khatauni of 1354 Fasli and upto 1355, 1359 Faslis without following the mandatory provision without giving notice of PA-10 as is provided in Paras A80 and A81 of the Land Records Manual.

20. In the case of *Gurmukh Singh* (supra), this Court in paragraph 6 of the judgement held as under :-

"6. It is clear from para 102-C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is claiming adverse possession against the recorded tenure holder and he denies that he had not received any P.A.10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure holder was duly given notice in prescribed form P.A.10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The

law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure holder had knowledge of such adverse possession."

21. Even on facts, it is found that entries in subsequent Fasli years i.e. 1368, 1369, 1370, 1371 and 1372 appear to be forged inasmuch as in Khatauni of 1368 Fasli, there is PA-10 mentioned, in which Plot Nos.294 and 295 are mentioned, while in Khataunis of 1369, 1370, 1371 and 1372 Faslis, there is PA-10, wherein Plot Nos.294, 295 and 296 are mentioned, but thumb impression was found in 1370 Fasli without showing name of the noticed person. In 1371 Fasli thumb impression was found on same footage and no thumb impression or signature are found in 1372 Fasli. Thus, no notice of PA-10 in accordance with law was given to the recorded tenure holder before recording the name of opposite party no.2 in Column-9. The rent and canal dues receipts, which are in the name of the petitioners, can not be relied on and, it can not be said that opposite party no.2 was in possession of the land in question as the rent receipts were in the name of the original tenure holder and, as per the original tenure holder, they got lost, for which he had lodged an FIR.

22. In view thereof, I am of the view that the Assistant Director of Consolidation was not correct in setting aside the concurrent findings of fact recorded by the two authorities below regarding entries of opposite party no.2 and, therefore, the order passed by the Assistant Director of Consolidation is not tenable in law and is liable to be set aside.

23. Writ petition is accordingly ***allowed*** and the impugned order dated 29.1.1991 passed by the Assistant Director of Consolidation, Faizabad (Now Ayodhya Ji) is hereby set aside. Consequences to follow.

(2022)02ILR A259
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PRITINKER DIWAKER, J.

Consolidation No. 6574 of 2016

Ram Prakash ...Petitioner
Versus
Deputy Director of Consolidation, Hardoi & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Prabhakar Vardhan Chaudhary, Advocate

Counsel for the Respondents:
Mr. Manjive Shukla, Addl. Chief Standing Counsel

(A) Civil Law - Delay Condonation - U.P. Consolidation of Holdings Act, 1953, S. 11, S. 53B - Limitation Act, 1963, S. 5 - Delay in filing Appeal - If an appeal is filed beyond the time limit, party is entitled to seek condonation of delay in filing appeal - an application has to be filed specifying the grounds on which delay in filing the appeal is sought to be condoned - firstly delay condonation application has to be considered - It is only after that the

application is allowed, the appeal can be entertained and heard on merits - Before that the appeal cannot be taken up and considered on merits – However both can be taken up & heard on the same day - there is nothing in law which requires hearing of appeal on merits to be postponed mandatorily after acceptance of the application seeking condonation of delay

Reference Answered. (E-5)

List of cases cited :-

1. Dev Narain Singh Vs Dy. Director of Consolidation, Sultanpur & ors Consolidation No. 604 of 2014 dt 5.9.2014

2. Girja Shanker & ors Vs Deputy Director of Consolidation & ors. 1996 RD 465

3. Ramesh Chandra Sankla Vs Vikram Cement (2008) 14 SCC 58

4. Bhagwat & ors. Vs Deputy Director of Consolidation & ors. (1990) RD 162,

5. Parbhu & anr. Vs Deputy Director of Consolidation, Ghazipur & ors. (2013) 1 ADJ 554

6. Jais Lal Vs Deputy Director of Consolidation, Jaunpur & anr. (2014) 1 ADJ 248

7.Budh Sagar & ors. Vs Jai Prakash & ors. (2013) 1 ADJ 381

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

1. On a reference made by learned Single Judge for consideration of the issue, as extracted below, the matter has been placed before the Division Bench:

"If an order has been challenged before the consolidation authority is barred by the period of limitation as provided under the statute (in the present case before the appellate authority/Settlement Officer Consolidation -1, Hardoi) along with an application for condonation of delay then in that circumstances whether the application for condonation of delay under Section 5 of the Limitation Act should be decided first or the same can been decided along with merit of the case?"

2. The issue was referred to Larger Bench for the reason that there are two divergent views given by Single Benches of this Court in **Consolidation No. 604 of 2014 (Dev Narain Singh Vs. Dy. Director of Consolidation, Sultanpur & others)** decided on September 5, 2014 and **Girja Shanker and others Vs. Deputy Director of Consolidation and others 1996 RD 465.**

3. In **Dev Narain Singh's case (supra)** the view expressed by learned Single Judge of this Court was that it is not mandatory for the appellate authority to decide the application for condonation of delay first and then hear the appeal on merits. On the other hand, in **Girja Shanker's case (supra)**, a single Judge of this Court opined that an order passed by appellate authority condoning the delay in filing the appeal is not an interlocutory order, hence, revision under Section 48 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "1953 Act") is maintainable against that order. It was, thus, observed that it is mandatory for the appellate authority to decide the application seeking condonation of delay first and then fix a later date to hear the appeal on merits, so as not to deprive the party aggrieved, if any, of his right to avail the remedy admissible to him against the order passed on the application filed under Section 5 of the Limitation Act, 1963 (hereinafter referred to as "1963 Act").

4. Learned counsel for the petitioner submitted that Section 11 of 1953 Act provides for filing of appeals against the

order passed by Assistant Consolidation Officer or the Consolidation Officer. The period prescribed for filing the appeal is 21 days from the date of the order. Sub-section (2) thereof provides that Settlement Officer (Consolidation) hearing an appeal under Sub-section (1) shall be deemed to be a Court. Section 53-B of the 1953 Act was referred to submit that Section 5 of the 1963 Act is applicable for applications, appeals, revisions and other proceedings under the 1953 Act. Reference is also made to Section 48 of the 1953 Act to submit that the Director Consolidation may call for and examine the records of any case decided or proceedings taken by the subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings.

5. The argument raised by learned counsel for the petitioner is that if any appeal is filed after the period prescribed in Section 11 of the 1953 Act along with an application seeking condonation of delay, the application seeking condonation of delay has to be decided first and, thereafter, the appeal has to be adjourned for hearing on merits. It cannot be simultaneous. If a party is aggrieved by an order passed by appellate authority on an application seeking condonation of delay, he may be able to avail of his remedy during the interregnum period. Such a process has to be followed as no one should be deprived of his right of appeal available to him against an order passed by appellate authority on the application seeking condonation of delay. An order passed by appellate authority under Section 5 of 1963 Act is a final order and cannot be considered to be an interim order, hence, revisable.

6. Learned counsel for the State submitted that a bare reading of the provisions of the 1953 Act specially Section 11 read with Section 53-B thereof shows that an appeal is to be filed within certain specified time, however, in case, delayed, an application under Section 5 of the 1963 Act can be filed seeking condonation of delay. There is no quarrel with the proposition of law that an application seeking condonation of delay in any proceedings has to be decided first and it is only thereafter that the main appeal can be heard. Prior to that it is not an appeal in the eyes of law. If any such application is filed the same has to be decided first and in case the delay is condoned, there is no bar on the appellate authority to take up and decide the appeal on merits on the same day. An order passed by appellate authority on an application filed under Section 5 of 1963 Act cannot be said to be revisable as such. Keeping in view the nature of proceedings, it may be final order if considered in the light of the fact that the application for condonation of delay if rejected, the appeal will also go. However, in case only the application is allowed and appeal is heard on merits, order cannot be said to be final as far as the proceedings of the case are concerned. He further submitted that in the proceedings under the 1953 Act, there is no need even to file a separate application seeking condonation of delay as even prayer can be made in the memo of appeal seeking condonation of delay.

7. He further submitted that there is limited application of the C.P.C. in the proceedings under the Act. He also referred to a judgment of Supreme Court in **Ramesh Chandra Sankla Vs. Vikram Cement (2008) 14 SCC 58,** observing that Court should decide all the issues and not merely a preliminary one. This procedure will check the delay in the course of justice.

8. Heard learned counsels for the parties and perused the paper book.

SCHEME OF THE ACT:

9. For appreciating the issues referred by the learned Single Judge for consideration by Larger Bench, it would be appropriate to refer the relevant provisions of the 1953 Act:

"11. Appeals.- (1) Any party to the proceedings under Section 9-A, aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer under that section, may, within 21 days of the date of the order, file an appeal before the Settlement Officer, Consolidation, who shall, after affording opportunity of being heard to the parties concerned, give his decision thereon which, except as otherwise provided by or under this Act, shall be final and not be questioned in any Court of law.

(2) The Settlement Officer, Consolidation, hearing an appeal under sub-section (1) shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any law for the time being in force notwithstanding.

x x x x

48. Revision and reference.- (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order other than an interlocutory order passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

x x x x

53-B. Limitation.- The provisions of Section 5 of the Limitation Act, 1963, shall apply to the applications, appeals, revisions and other proceedings under this Act or the rules made thereunder."

10. A perusal of Section 11 of 1953 Act shows that any party to the proceedings under Section 9-A thereof, if aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer may prefer an appeal before the Settlement Officer, Consolidation within 21 days of the date of the order. Any decision given by the Settlement Officer, Consolidation in appeal is final and cannot be questioned in any Court of law.

11. The Settlement Officer, Consolidation while hearing the appeal is deemed to be Court of competent jurisdiction. Section 53-B of the 1953 Act provides that provision of Section 5 of 1963 Act shall apply to the applications, appeals, revisions and other proceedings under the Act or the rules made thereunder. Meaning thereby, if an appeal is filed beyond the period of 21 days, as provided under Section 11 of 1953 Act, aggrieved party can move an application seeking condonation of delay under Section 5 of 1963 Act.

12. Section 48 of 1953 Act provides that Director Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order, passed by such authority. The aforesaid power can be exercised with reference to any order except an interlocutory order. Such a power can also be exercised by Director Consolidation on a reference made by any authority subordinate to him.

EARLIER JUDGMENTS:

13. In **Girja Shanker's case (supra)**, which in the opinion of learned counsel for the petitioner lays down correct law, a Single Bench of this Court opined that an order passed by appellate authority condoning the delay in filing the appeal is not an interlocutory order, hence, revision under Section 48 is maintainable against that order.

14. In **Bhagwat and others Vs. Deputy Director of Consolidation and others (1990) RD 162**, a Single Bench of this Court opined that an order deciding an application seeking condonation of delay cannot be said to be interlocutory and revision against that order was maintainable. An application for condonation of delay has to be decided first by the appellate authority and in case allowed, the appeal may be decided on merits on a subsequent date.

15. In **Parbhu and another Vs. Deputy Director of Consolidation, Ghazipur and others (2013) 1 ADJ 554,** the issue under consideration was, as to whether revisional authority without condoning the delay could hear the revision on merits. The opinion expressed by the Court was that the order passed by revisional authority deciding the revision petition on merits without condoning the delay was erroneous. Direction was issued for deciding the application for condonation of delay first and thereafter the revision petition was to be taken up for hearing.

16. In **Jais Lal Vs. Deputy Director of Consolidation, Jaunpur and another (2014) 1 ADJ 248,** a Single Judge of this Court had opined that the appellate authority has to decide the question of limitation first either by condoning the delay or refusing to condone the same. In case, the delay is condoned, the matter can be decided on merits but not prior to one month from the date the order is passed for condonation of delay. It is for the reason that the aggrieved party should have opportunity to question that order before the higher forum.

17. In **Budh Sagar and others Vs. Jai Prakash and others (2013) 1 ADJ 381**, a Single Bench of this Court opined that the appellate authority is to pass the order on the application seeking condonation of delay first and thereafter proceed to hear the case on merits.

18. In **Dev Narain Singh's case (supra)**, a Single Bench of this Court opined that it is not mandatory for the appellate authority to decide the application for condonation of delay first and then hear the appeal on merits. An application for condonation of delay can be considered along with main appeal at the time of final argument.

DISCUSSIONS:

19. We are not going into the issue as to whether an order passed by appellate authority on an application seeking condonation of delay is an interim order or final as the same has not been referred for consideration by the Division Bench. Different situations may arise in an appeal filed along with application seeking condonation of delay. Firstly, the application for seeking condonation of delay may be dismissed. As a consequence thereof, the appeal will also fail. Another situation may be that application seeking condonation of delay is allowed and thereafter the appeal may either be accepted or rejected.

20. If any statute provides certain period for filing of appeal, an appeal filed beyond the time limit will certainly be not entertained. If the provisions of 1963 Act are applicable and party is entitled to seek condonation of delay in filing appeal, an application has to be filed specifying the grounds on which delay in filing the appeal is sought to be condoned. It is only after that the application is allowed, the appeal can be entertained and heard on merits. Before that the appeal cannot be taken up and considered on merits.

21. As far as the issue regarding hearing of the application seeking condonation of delay and the appeal simultaneously is concerned, in our view, firstly the application has to be considered. Only thereafter, the appeal can be considered on merits but there is nothing in law which requires hearing of appeal on merits to be postponed mandatorily after acceptance of the application seeking condonation of delay. Both can be taken up on the same day. However, the appeal has to be heard on merits only after the application seeking condonation of delay has been accepted.

22. In view of the aforesaid discussion, we answer the question referred to the Division Bench that an application seeking condonation of delay has to be decided first before the appeal is taken up for hearing on merits. However, it can be on the same day and there is no requirement of adjourning the hearing of appeal on merits after acceptance of the application seeking condonation of delay.

23. Let the matter be listed before learned Single Judge as per roster for further proceedings in the case.

(2022)02ILR A264
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters Under Article 227 No. 269 of 2022

Lakshmi Kant Shukla ...Petitioner
Versus
Ram Niranjan ...Respondent

Counsel for the Petitioner:
Pankaj Gupta

Counsel for the Respondents:
Ghaus Beg, Anurag Shukla

A. Code of Civil Procedure, 1908 – Order VI Rule 17 - Amendment application. When cannot be allowed.- A proviso has been inserted in Order VI Rule 17 C.P.C. which says that "no application for amendment shall be allowed after trial has commenced, unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before commencement of trial". In Vidyabai & ors. v Padma Latha & anr.r AIR 2009 SC 1433 it has been observed that the said proviso is couched in mandatory form and the court's jurisdiction to allow an application for amendment is taken away unless the conditions

precedent therefor are satisfied viz. it must come to the conclusion that inspite of due diligence the parties could not have raised the matter before commencement of the trial.

B. Date of First Hearing- In the said case the Hon'ble Supreme Court has also held that the date on which issues are framed is the date of first hearing. Filing of affidavit in examination in chief of the witnesses would amount to commencement of proceedings.

C. In Kailash v Nankhu (2005)4 SCC 480 it has been held that in a civil suit trial begins, when the issues are framed and the case is set down for recording of evidence. The ratio as laid down in Kailash(supra) has been followed in Salem Advocate Bar Association v U.O.I. (2005)6 SCC 344.

D. Amendment application cannot be allowed under Order VI Rule 17 C.P.C. if entirely a new case is made out for amendment. Municipal Corporation of Greater Bombay v Lala Pancham & ors. 1965(1) SCR 542(Constitution Bench) followed.

E. Constitution of India - u/A 227 - When to be exercised.--- Power U/A 227 is supervisory in nature and has to be exercised very sparingly and only where there is a clear and patent error in law or perversity in the appreciation of facts is made out. Radhey Shyam v. Chhavinath (2015)5 SCC followed.

Petition dismissed. (E-12)

List of Cases cited:-

1. Vidyabai & ors. Vs Padma Latha & anr. AIR 2009 SC 1433

2. Kailash Vs Nankhu (2005)4 SCC 480

3. Salem Advocate Bar Assc. Vs U.O.I. (2005)6 SCC 344

4. Municipal Corporation of Greater Bombay Vs Lala Pancham & ors. 1965(1) SCR 542(Constitution Bench)

5. Radhey Shyam Vs Chhavinath (2015)5 SCC followed.

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

(Oral)

(1) Heard Shri Pankaj Gupta, learned counsel appearing for the petitioner and Shri Anurag Shukla, appearing for the opposite party.

(2) The petitioner has challenged the order dated 22.12.2018 passed by the learned Civil Judge (Junior Division), Kunda, Pratapgarh, in Original Suit No.330/2012 rejecting his application for amendment moved under Order 6 Rule 17 of the CPC as also the order dated 14.02.2021 passed by the learned District Judge, Pratapgarh, in Civil Revision No.14 of 2019 [**Lakshmi Kant Shukla Vs. Ram Niranjan**].

(3) It has been submitted by the learned counsel for the petitioner that the petitioner had filed a Suit No.330 of 2012 on 18.05.2012 for permanent injunction against Hari Shankar and Ram Niranjan praying that the respondents be restrained from interfering in his Abadi land over which the petitioner is in possession. During the pendency of the Suit, the name of Hari Shankar was deleted and Ram Niranjan alone remained the defendant. The Commission was issued and a report prepared on 09.07.2012. Again a Survey Commission was issued by the court concerned and a report prepared and submitted on 10.02.2018. A written statement was filed by the defendant and issues were framed in the Suit, but till date, the parties have not adduced any evidence. An application was moved by the defendant. During preparation of the case for arguments, it was noticed by the counsel of the plaintiff that the material

facts had not been stated and therefore an application under Order 6 Rule 17 of the CPC for amendment of the Suit was moved on 28.11.2018. The amendment moved did not affect the nature of the Suit and the Suit property remained abadi and Sahan land of the petitioner. The petitioner only wished to explain his right to Abadi land and Sahan land on the basis of a Will made out in his favour by one Hari Mohan, the maternal grand father of the petitioner. Such application was rejected on 22.12.2018 by observing that the amendment is highly time barred and it changed the nature of the Suit. The learned Trial Court did not disclose as to how the nature of the Suit would change. No opinion was also recorded in the order impugned that the Trial had begun and evidence was being led by the parties. It has been argued that since the trial had not begun, the first clause under Order 6 Rule 17 of the CPC which entitles a party to move amendment application at any stage of the Suit would apply and not the Proviso to the Rule.

(4) It has been argued by Shri Pankaj Gupta that the petitioner's mother being widow was living with her father at Village Shakardaha and the petitioner being born and raised in his maternal grand parent's house was in possession of the property in question. It has also been submitted that the purpose of amendment is only to avoid unnecessary multiplicity of the litigation. Such amendments are normally allowed to avoid further litigation between the parties. Learned counsel for the petitioner has placed reliance upon the judgment rendered by Hon'ble the Supreme Court in **Shiv Mohan Pal Vs. Shiv Mohan Pal @ Hakla reported in 2020 (38) LCD 450** and argued that the petitioner having legal grounds, filed a Civil Revision challenging the order passed by the learned Trial Court numbered as Civil Revision No.14 of 2019 it was arbitrarily rejected by the District Judge, Pratapgarh.

(5) Learned counsel for the petitioner during the course of arguments, has placed reliance upon the judgment rendered by this Court in a Co-ordinate Bench in **Shiv Mohal Pal Vs. Shiv Mohan Pal @ Hakla reported in 2020 (38) LCD 450**, wherein this Court has placed reliance upon a judgment rendered by the Hon'ble Supreme Court in **Ramesh Kumar Agarwal Vs. Rajmala Exports Private Limited reported in (2012) 5 SCC 337**, where it was observed that Courts must not refuse "bonafide, legitimate, honest and necessary amendments" and that they should never permit malafide and dishonest amendments, the approach in such matters should be liberal. The purpose and object of Order 6 Rule 17 of the CPC is to allow either party to amend his pleadings in such manner and on such term as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Court while deciding such prayers should not adopt a hyper technical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with costs. Normally, the amendments are allowed in pleadings to avoid multiplicity of litigations.

(6) This Court in Shiv Mohal Pal (Supra) has placed reliance upon a judgment rendered by the Privy Council and other cases by English Courts of law, also to come to the conclusion that the Trial Court in the particular case before it had rightly allowed the plaintiff's application for amendment in his plaint.

(7) This Court has carefully perused the judgments in Shiv Mohan Pal where a

reference has been made to a judgment rendered in **Revajeetu Builders & Developers Vs. Narayanaswamy & Sons, reported in (2009) 10 SCC 84**, wherein some of the important factors which may be kept in mind while dealing with an application filed under Order 6 Rule 17 of the CPC have been enumerated in the following terms:-

"**20. In Revajeetu Builders & Developers v. Narayanaswamy & Sons** this Court once again considered the scope of amendment of pleadings. In para 63, it concluded as follows:

"***Factors to be taken into consideration while dealing with applications for amendments***

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adju cation of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

(8) This Court in Shiv Mohan Pal observed that while considering the Order 6 Rule 17 of the CPC the expressions upon "*at any stage of proceedings*", and for the "purpose of determining the real question in controversy" are important. The whole object and purpose of the aforesaid provision is to avoid multiplicity of proceedings, to shorten the litigation, and to settle the dispute between the parties. It is for this purpose that the rule permits amendment at any stage of proceedings as may be necessary for the purpose of determining the real question and controversy between the parties. The expression "*at any stage of proceedings*" is not circumscribed or limited by any condition and the Legislature in its wisdom has left the same wide open without imposing any kind of limitation to its elasticity and if it is necessary for the purpose of determining the real question in controversy, then amendments can be allowed at any stage of the proceedings i.e. before or during the stage of Trial, or even after the Judgment or in Appeal. The Power to grant amendment of pleadings is basically intended to further the ends of justice and is not barred by any technical limitations.

(9) Shri Anurag Shukla, appearing for the respondent has pointed out the order passed by this Court in Writ Petition No.27539 (M/S) of 2017 **(Ram Niranjan Vs. Civil Judge (Senior Division), Kunda, Pratapgarh and others**) passed on 15.11.2017 wherein this Court had been approached by the defendant Ram Niranjan (who is the respondent in this writ petition) praying that a direction be issued to the learned Trial Court to decide the Regular

Suit No.330 of 2015 expeditiously. This Court had observed that the endeavour should be made to decide the matter expeditiously, if there is no legal impediment in this regard, and keeping in mind the age of the petitioner defendant (who was 72 years old). It had observed that unnecessarily adjournments should not be granted in the Suit.

(10) It has been submitted by the learned counsel for the respondent that a copy of the order dated 15.11.2017 was filed immediately before the Trial Court and the plaintiff had full knowledge of such direction of this Court. After the same was filed issues were framed and thereafter an application for amendment was moved by the plaintiff only on 28.11.2018 with the intention to change the very nature of the Suit from one praying for permanent injunction to the defendant to not to interfere in the possession of the plaintiff to one of declaration of his right to the property in question on the basis of an unregistered and highly dubious Will allegedly made out in his favour by the maternal grand father Hari Mohan.

(11) Learned counsel for the respondent has pointed out the judgment rendered by the Hon'ble Supreme Court in **Vidyabai & Others Vs. Padmalatha & Another reported in AIR 2009 SC 1433**, where a Division Bench of the Court was considering the question as to when "a trial is supposed to commence." There was a divergence of opinion in earlier cases which was considered in detail by the Supreme Court and thereafter the Supreme Court observed that by the Civil Procedure Code (Amendment Act) 2002, a Proviso had been inserted in Order 6 Rule 17 which says that "*no application for amendment shall be allowed after trial has commenced, unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of Trial."*

(12) The Supreme Court observed that it is couched in mandatory form. *The Court's jurisdiction to allow an application for amendment is taken away unless the conditions precedent therefor are satisfied, viz., it must come to the conclusion that inspite of due diligence the parties could not have raised the matter before commencement of the Trial."*

(13) The Supreme Court thereafter framed issue to be considered by it in its judgment saying that question would be as to *"whether the Trial had commenced or not*? It thereafter held that the date on which issues are framed, is the date of first hearing. *The provisions of the Code of Civil Procedure envisaged taking of various steps at different stage of proceedings. Filing of affidavit in view of Examination-in-Chief of the witnesses, in our opinion would amount to commencement of proceedings."*

(14) In **Kailash Vs. Nankhu reported in (2005) 4 SCC 480**, the Supreme Court had observed that in a Civil Suit, trial begin when the issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as preliminary proceedings to the Trial or for making the case ready for trial.

(15) In a **Salem Advocate Bar Association Vs. Union of India reported in (2005) 6 SCC 344**, the Court noticed in Paragraphs-41, 42 & 43 that Order 6 Rule 17 of the CPC had been amended in 2002, and under the Proviso, no application for

amendment shall be allowed after trial has commenced, unless in all due diligence, the matter could not be raised before the commencement of the Trial. The ratio in **Kailash Vs. Nankhu (Supra)** was reiterated, stating that the Trial is deemed to commence when the issues are settled and the case is set down for recording of evidence. The Supreme Court observed thereafter in Paragraph-14 of its judgment in Vidyabai (Supra) thus:- "*it is Primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. The Court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint."*

(16) Learned counsel for the respondent has also pointed out the judgment rendered by the Hon'ble Supreme Court by a Constitution Bench in the case of **Municipal Corporation of Greater Bombay Vs. Lala Pancham and Others reported in (1965) 1 SCR 542**, where it was observed that an entirely a new case made out in the amendment could not be allowed to be set up by the plaintiff. The Constitution Bench judgement in Pancham (Supra) was rendered before the CPC was amended but the principles applicable to belated movement of amendment application remained the same.

(17) It has been argued by Shri Anurag Shukla on the basis of such judgments that initially the plaintiff had come up with a case that he had been in possession over the property in dispute since the time of his ancestors and it being Abadi was settled with him as per Section 9 of the Uttar Pradesh Zamindari Abolition & Land Reforms Act, whereas the amendment application made out a case that the mother of the petitioner had started living in her parental house (after becoming a widow) and his maternal grand father made out a Will in his favour in 1983, although unregistered, which had made him his heir and thus entitled to succeed to all property owned by him including the property in dispute. Learned counsel for the respondent has pointed out that mother of the petitioner was married and had gone to her matrimonial home and the ancestors of the petitioner i.e. plaintiff would be his parental grand parents and not his maternal grand parents.

(18) Learned counsel for the respondent has pointed out another judgment of the Supreme Court in **Pandit Malhari Mahale Vs. Monika Pandit Mahale and Others reported in (2020) 11 SCC 549**, where the Supreme Court had observed that the Trial Court while allowing the application under Order 6 Rule 17 after trial had begun, did not notice the condition mentioned in the Proviso. There being no finding by the Trial Court as contemplated by Order 6 Rule 17 Proviso the Trial Court ought not to have allowed the amendment.

(19) The Learned counsel for the respondent has also referred to a judgment rendered by Hon'ble the Supreme Court in the case of **Nagindas Ramdas Vs. Dalpatram Inccharam, reported in AIR 1974 SC 471**, where in Paragraph-26, the Supreme Court had observed that "*admissions if true and clear, are by far the*

best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence are by themselves, not conclusive."

(20) It has been argued by Shri Anurag Shukla that there was an admission by the plaintiff in that there was a statement in the plaint that he was in possession as far as back as when Section 9 of the U.P.Z.A. & L.R. Act became applicable, and now the case that was being set up by the plaintiff was that he had been bequeathed the property by an unregistered Will. It has been submitted that even otherwise in a Suit for injunction on the basis of possession, only possession has to be proved and not the right which may have led to such possession, which could only be decided in a Suit for declaration.

(21) This Court having heard the learned counsel for the parties has gone through the orders impugned and finds that the learned Trial Court had noticed the submissions made by the plaintiff in the plaint and compared them with the submissions now proposed to be made by way of amendment in the pleadings in the application under Order 6 Rule 17 of the CPC, and found them to be contradictory in nature. It had observed that the plaintiff by way of proposed amendments was making out a case which he should have made out in the first place while filing the plaint and that the Suit was at the stage of taking of evidence. If such application for amendment is allowed, the plaintiff's right to the property in question would be determined on absolutely differently leading to a change in the nature of the Suit.

(22) No doubt the Trial Court did not refer to any judgments to substantiate its conclusions but when the Civil Revision was filed the learned District Judge was careful enough to notice all the judgments that were cited by the counsel for the plaintiff/revisionist and also the judgment that were cited by the respondent and dealt with them individually and came to the conclusion that the issues had been framed in the Trial and the matter was at the stage of taking evidence and the amendments proposed in the application under Order 6 Rule 17 of the CPC would in fact change the nature of the Suit at a belated stage i.e. six years after filing of the said Suit.

(23) This Court finds from the orders impugned that there is a detailed consideration of the facts of the case as mentioned in the plaint and as mentioned in the application for amendment. There is a correct appreciation of the law also by the learned courts below. The Jurisdiction under Article 227 of the Constitution of India being supervisory in nature has held by Hon'ble Supreme Court in the case of **Radhey Shyam Vs. Chhavinath reported in (2015) 5 SCC 423**, it has to be exercised very sparingly and only where there is a clear and patent error in law or perversity in the appreciation of facts is made out which is not the case here.

(24) The petition stands **dismissed**. No order as to costs.

(2022)02ILR A271
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters Under Article 227 No. 20302 of 2021

Ram Kumar ...Petitioner
Versus
Gulshan Babau & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Narain, Pawan Kumar Verma

Counsel for the Respondents:
Vijay Kumar

A. Code of Civil Procedure, 1908 - Order XLI Rule 27 – The application moved under Order XLI Rule 27 CPC before the appellate court cannot be rejected by taking hyper technical view of the matter. Sangram Singh v Election Tribunal AIR 1955 SC 425 followed, wherein it was observed that CPC must be regarded as such i.e. something designed to facilitate justice and not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against provided always that justice is done to both sides' lest the very means designed for furtherance of justice be used to frustrate it.

B. Section 65 Evidence Act- Xerox copy of certificate of registration of Trade Mark, in the face of the objections raised by the defendant, could not have been marked as an exhibit.

Petition allowed. (E-12)

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

(Oral)

1. Heard learned counsel for the petitioner and learned counsel appearing on behalf of the respondent and perused the order impugned dated 09.08.2021 passed by the leaned Additional District Judge, Court No.7, Hardoi, in Civil Appeal no.11 of 2019: Ram Kumar Vs. Gulshanbabu and others.

2. It is the case of the petitioner that a suit for specific performance of contract was filed by the respondent nos.1 and 2 against the petitioner and they impleaded their brother i.e. the respondent no.3 herein as defendant no.2 in the said suit. The plaintiff's case before the learned trial court was that the defendant no.1's mother Smt. Ram Kali had entered into an agreement to sell the property in dispute for an amount of Rs.50,000/-, out of which Rs.30,000/- was given to her and agreement to sell was registered with the understanding that the remaining amount shall be given to her within three years by the plaintiffs and if it is given within time, the mother of the defendant no.1 would execute the sale agreement in their favour. However, despite several attempts being made by the plaintiffs, the mother of the defendant no.1 did not execute the sale agreement in their favour.

3. The petitioner appeared in the Suit and filed written statement before the learned trial court and specifically denied the plaint of the plaintiff stating that Smt.Ram Kali was not the wife of Shambhu Dayal and she had never inherited the property of Shambhu Dayal. The name of the mother of the petitioner was Smt. Shanti Devi and the petitioner along with Smt. Shanti Devi had jointly inherited the property of Shambhu Dayal. No agreement to sell was ever executed by Smt. Shanti Devi. In fact an agreement to

sell with regard to the property of the father of the petitioner was executed by one Smt. Ram Kali who was the mother of plaintiffs themselves. Despite such specific claim being made in written statement, no issue was framed by the learned trial court as to whether Smt. Ram Kali and Smt. Shanti Devi were one and the same person and Smt. Shanti Devi is the widow of Shambhu Dayal who has inherited the property along with the petitioner was also known by the name of Ram Kali. The Suit was decreed in favour of the plaintiffs. The petitioner filed an Appeal.

4. In the Appeal, the petitioner filed an application for bringing on record the additional evidence under Order 41 Rule 27 C.P.C. giving a proper explanation for delay caused in bringing such evidence on record. Such evidence was with regard to the khatauni. The petitioner is a resident of Sandi and he tried to find out the khatauni at Hardoi, but the documents were found at Bilgram. The Khatauni was discovered much later after the suit was decreed. A copy of the khatauni issued in 2011 is important for decision of the Appeal, as it shows that Smt. Shanti Devi as widow of Late Shambhu Dayal had inherited the agricultural property of her husband along with the petitioner and this would substantiate the version of the written statement filed by the petitioner.

5. It has been submitted that learned Appellate Court has rejected the application under Order 41 Rule 27 C.P.C. on the ground of delay without looking into the reason for such delay and without looking into clause (c) of Order 41 Rule 27 Clause 1, where it has been clearly stated that the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,the Appellate Court may allow such evidence or document to be produced, or witness to be examined. Since the entire case of the petitioner/ appellant both before the trial court and the Appellate Court is that his mother Smt. Shanti Devi w/o Shambhu Dayal has never executed agreement to sell but the plaintiffs' own mother Smt. Ram Kali has executed the agreement to sell in favour of the plaintiffs, the entire controversy before the Appellate Court rests upon such document to be filed, and the application of the petitioner for submitting additional evidence has been rejected arbitrarily.

6. Learned counsel for the respondent has read out the order of the learned trial court which had been challenged in the Appeal by the petitioner and has pointed out that no documentary evidence was filed by the petitioner to substantiate his claim i.e. mother's name was Smt. Shanti Devi and not Smt. Ram kali. He had submitted before the learned trial court that his educational certificates like his High School and Intermediate Certificates had the name of his mother Smt. Shanti Devi printed thereon, but such High School and Intermediate Certificates have been misplaced by him. Learned trial court has therefore relied upon the documentary evidence filed by the plaintiffs which showed the receipts issued by the Nagar Nigam for water tax and house tax showing the name of Smt. Ram Kali w/o Shambhu Dayal. In view of the sub-clause (a) and (b) of Clause 1 of Order 41 Rule 27, the learned Appellate Court has rightly rejected the application of the petitioner.

7. In rejoinder, learned counsel for the petitioner has placed reliance upon paragraph-16 to 18 of the judgement

rendered by Hon'ble Supreme Court in *Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineries) and others*, 2010 8 SCC 423.

8. This Court has considered the aforecited judgment. The Appellant therein was a Company and from the year 1945 it was engaged in the business of manufacture and sale of high grade coconut oil used for cooking and manufacturing of other various toilet products under distinctive trade mark "Shalimar". The trade mark "Shalimar" was being infringed by the respondents who were marketing their products by using appellant's registered trade mark. It thus filed a Suit seeking permanent injunction restraining defendants from marketing or offering for sale edible oil products under the trade mark "Shalimar". In course of the trial, the appellant produced before the court photocopies of registration certificates under the Trade and Merchandise Marks Act, 1958 along with the related documents. Such photocopies were marked by trial court as Exhibits A1 to A5 "subject to objection of proof and admissibility".

The Suit thereafter was dismissed by the trial court holding that available evidence on record did not establish the claim of the plaintiff's case because the appellant did not file the trade mark registration certificate in their original. Against the decree of the learned trial court, the appellant filed an Appeal before the Andhra Pradesh High Court, wherein it also filed an application under Order 41 Rule 27 for accepting the originals of the trade mark registration certificates and allied documents as additional documents under Order 41 Rule 7 C.P.C. Learned Single Judge of the High Court allowed the application and also the Appeal. The respondent filed an intra-court Appeal. The Division Bench took a view that there was no occasion or justification for admitting the original trade mark registration certificates at the appellate stage as additional evidence. The High Court enumerated three circumstances as given in Order 41 Rule 27 for production of additional evidence. It thereafter noted that neither of the three conditions was satisfied in the case of the appellants. The original documents were all along in possession of the plaintiff. At no stage the trial court had refused to admit them in evidence and since they were all along in the possession of the plaintiff therefore it could not fill up the lacunae in its case by producing the same in the Appellate Court. Allowing the application at the Appellate stage would cause prejudice to the defendants also.

The Supreme Court considered the arguments raised by learned counsel for the appellant and the judgements relied upon by him more so in case of Sangram Singh Vs. Election Tribunal, AIR 1955 SC 425, wherein it was observed that the Code of Civil Procedure must be regarded as such only a Code of Procedure i.e. *"something designed to facilitate justice and not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of Sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it."*

The Court considered the fact that serious mistake were committed at all stages, the trial court should not have marked as exhibits the xerox copies of the certificate of registration of trade mark in face of the objection raised by the

defendants. It should have declined to take them on record as evidence rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits "subject to objection of proof and admissibility", the appellant was lulled into complacency. Had those xerox copies been rejected by trial court, the appellant would have made all efforts to file them before the learned trial court itself. It observed that the Division Bench of the High Court erred in holding that production of additional evidence was not permissible under Order 41 Rule 27 as such additional documents were liable to be taken on record in the interest of justice.

9. Having considered the judgment rendered by Supreme Court in the matter and also the fact as pleaded in this petition including the observations made by the trial court with regard to the failure of defendants to produce any evidence to show that his mother's name was Smt. Shanti Devi and not Smt. Ram Kali at the stage of trial, but also considering the fact that khatauni in question could not be available to the petitioner because of it being deposited in a wrong Record Room and it being essential for deciding main controversy, this Court is of the opinion that the Appellate Court has taken a hyper technical view of the matter by rejecting the application of the petitioner.

10. The order dated 09.08.2021 passed on Paper No.14-Ga by the Appellate Court is set aside but the Appellate Court while deciding the application afresh shall also give opportunity to the respondent to file additional evidence/ any documentary proof in his possession to show that the name of the appellant's/ petitioner's mother was indeed Smt. Ram Kali and not Smt. Shanti Devi.

11. This petition is accordingly ***disposed of.***

(2022)02ILR A274
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.02.2022

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Matter Under Article 227 No. 27153 of 2021

Salik Ram Singh @ Salik Ram ...Petitioner
Versus
A.D.J., Court No. 3, Gonda & Ors. ...Respondents

Counsel for the Petitioner:
A.Z. Siddiqui

Counsel for the Respondents:
Ankit Pande

A. Code of Civil Procedure, 1908 - Order XXI Rule 97,98,99 & 101 – A conjoint reading of Order XXI Rules 97,98,99,101 project the following picture:

I. If a decree holder is resisted or obstructed in execution of decree for possession upon issuance of warrant for possession under Order XXI Rule 35 CPC then the decree holder has to move an application under Order XXI Rule 97 CPC for removal of obstruction and after hearing the decree holder and obstructionist then the court can pass appropriate orders after adjudicating upon the controversy as enjoined by Order XXI Rule 97(2) r/w Order XXI Rule 98 C.P.C.

II. If after such adjudication it is found that resistance or obstruction was without a just cause then such obstruction or resistance would be removed under Order XXI Rule 98(2) C.P.C. and the decree holder would be put in possession.

III. The order so passed would be treated as a decree under Order XXI Rule 101 C.P.C. and no

separate suit will lie and only remedy will be to file appeal against such deemed decree.

IV. If a stranger to the decree is already dispossessed before getting any opportunity to resist or offer obstruction then his remedy would lie in filing an application under Order XXI Rule 99 C.P.C.

V. If such application is allowed after adjudication then executing court can direct the stranger under Order XXI Rule 99 C.P.C. to be put in possession of the property. However, if his application is found to be substance less it has to be dismissed.

VI. Oder passed under XXI Rule 98(1) CPC would be deemed to be a decree as laid down in Order XXI Rule 103 C.P.C. and would be appealable but no separate suit would lie.(Para 8).

VII. Thus, it is settled law whenever an obstruction or resistance is made by any person in the execution of decree the executing court is under obligation to adjudicate the right, title or interest of the obstructionist in the manner prescribed under Rules 98-103 of Order XXI CPC which is a complete code in itself.

VIII. Not only the decree holder or a person disposed in execution of decree has right to make an application to the executing court but a person who is apprehending dispossession can also make an application to the court and when such an application is brought before the court the said court shall be obliged to make an enquiry and pass an order in respect of right, title or interest of the party.

Petition allowed. (E-12)

List of Cases cited:-

1. Brahmadev Chaudhary Vs Rishi Kesh Prasad Jaiswal (1997)3 SCC 694

2. Bhanwar Lal Vs Satya Narain (1995)1 SCC 6

3. Silverline Forum(P) Ltd. Vs Rajiv Trust (1998)3 SCC 723

4. Sameer Singh Vs Abdul Rab (2015)1 SCC 379

5. Noorduddin Vs K.L. Anand (1995)1 SCC 242

6. Ghasi Ram Vs Chet Ram Saini (1998)6 SCC 200

7. S. Rajeshwari Vs S.N. Kulasekaran (2006)4 SCC 412

8. Babulal Vs Raj Kumar (1996)3 SCC 154

9. Rahul S. Shah Vs Jinendra Kumar Gandhi (2021)6 SCC 418

10. Asan Devi Vs Phulwasi Devi (2003)12 SCC 219

11. Harbilas Vs Mahendra Nath (2011)15 SCC 377
Followed

12. Usha Jain Vs Manmohan Bajaj AIR 1980 MP 146(FB) no longer good law.

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

1. Heard learned counsel for the parties.

2. The instant petition has been preferred for the following main reliefs:-

"I. Issue order or direction setting aside the impugned Order dated 29.10.2021 passed by Executing Court in Execution Case No.1/2017 pending before the Opposite Party No.1, contained in Annexure No.1 to this petition;

II. Issue order or direction setting aside the impugned Order dated 11.11.2021 passed by Opposite Party No.1 in Execution Case No.1/2017 and every subsequent proceedings thereof contained in Annexure No.2 to this petition."

3. In brief, the petitioner, who was not a party to the SCC Suit No. 5 of 2014, claiming himself to be an owner in possession of the property in issue in the

suit, is resisting the judgment and decree dated 29.03.2017, which has become final.

4. Facts relevant for the present case, as stated, are to the effect that Vishwanath Kumar Mehrotra s/o Braj Mohan Lal, was the sole owner of the property in question i.e. Gata No. 1789M situated at Mohalla Chhedipurwa, Station Road, Gonda. The said Vishwanath Kumar Mehrotra, who was handicapped and since he was not being looked after by his wife and children, bequeathed his entire property by way of a registered Will Deed dated 01.06.1970 in favour of the petitioner and based upon the same, the petitioner, after death of Vishwanath Kumar Mehrotra, being successor, became the owner of the property under the Will Deed dated 01.06.1970 including the property in issue.

5. It is also stated that Shyama @ Shyamo Devi, widow of Vishwanath Kumar Mehrotra, filed a SCC Suit No. 5 of 2014 for eviction of the shop (property in issue) in collusion with one Masroor Ahmed, who as per the petitioner was never the tenant or lessee of Late Vishwanath Kumar Mehrotra. On coming to know about the pendency of suit, the petitioner on the basis of a Will Deed dated 01.06.1970 preferred an application dated 14.09.2016 for impleadment under Order 1 Rule 10 of Code of Civil Procedure (in short "CPC") praying therein that the petitioner be impleaded in the array of the parties in the suit. The said application was opposed by Shyamo Devi vide her objection dated 01.10.2016. The petitioner's application No. C2/64 for impleadment was rejected on 26.11.2016 for want of prosecution. Thereafter, the SCC Suit No.5 of 2014 was decreed in favour of Shyamo Devi vide order dated 29.03.2017.

6. On coming to know about the aforesaid, the petitioner assailed the orders dated 26.11.2016 as also 29.03.2017 by filing a Revision along with an application for condonation of delay registered as Miscellaneous Case No. 617 of 2017, which was rejected on 15.02.2019 by the Revisional Court.

7. Thereafter, the petitioner assailed the orders dated 15.02.2019, 26.11.2016 and 29.03.2017 before this Court by filing a petition i.e. Misc. Single No. 14839 of 2019 (Salik Ram Singh v. 3rd Additional District Judge Gonda and Ors.), which was dismissed on 24.05.2019 by this Court with an observation that the petitioner may file a suit for declaration of his claim in regard to property in dispute and thereafter, taking note of the observation made by this Court in the judgment dated 24.05.2019 passed in Petition No. 14839 of 2019, the petitioner preferred a suit for declaration i.e. Regular Suit No. 481 of 2019, which is pending before a Court of competent jurisdiction. In addition to Regular Suit for declaration of rights over the property in question, the petitioner preferred two application dated 09.08.2021 Nos. 137-C1/1 (for stay of the execution proceedings) and 140-C2/1 under Order 21 Rule 97/99/101 of CPC before the Execution Court in Execution Case No. 1 of 2017, which were rejected on 29.10.2021. Thereafter, the petitioner preferred a Review Application for reviewing the order dated 29.10.2021, which was also rejected by the Execution Court on 11.11.2021. The orders dated 29.10.2021 and 11.11.2021 are impugned in this petition.

8. The relevant portion of the order dated 29.10.2021, impugned in this petition, on reproduction reads as under:-

"पत्रावली के परिशीलन से विदित है कि पूर्व में अशोक कुमार द्वारा भी प्रश्नगत सम्पत्ति पर अपना मालिकाना अधिकार के आधार पर पक्षकार बनने हेतु प्रार्थना पत्र प्रस्तुत किया गया था जिस पर दिनांक 05.04.2021 को विस्तृत आदेश पारित करते हुए यह स्पष्ट किया गया कि लघुवाद इजराय में मालिकाना अधिकारों की उद्घोषणा नही की जा सकती है। इजराय की कार्यवाही में कोई न्यायालय डिक्री से अतिरिक्त कोई अनुतोष प्रदान नही कर सकता। लघुवाद संख्या 05/2014 में आपत्तिकर्ता द्वारा पक्षकार बनने के लिए प्रार्थनापत्र प्रस्तुत किया गया था जो कि निरस्त किया गया तथा माननीय उच्च न्यायालय द्वारा भी प्रार्थी/तृतीय पक्ष पृथक वाद संस्थित करने हेतु निर्देशित किया गया जिससे यह स्पष्ट है कि लघुवाद में लघुवाद से सम्बन्धित इजराय मे स्वामित्व का निर्धारण किये जाने का कोई क्षेत्राधिकार लघुवाद न्यायालय को प्राप्त नहीं है। माननीय उच्च न्यायालय द्वारा मि0सि0नं0 14839/2019 में पारित आदेश दिनांकित 24.05.2019 में यह आदेश पारित किया गया है कि– "*The Execution Case no.1 of 2017 for compliance of the Decree dated 29.3.2017 is pending disposal before the Executing Court. In case the petitioner claims any right over the property in question, bequeathed to him allegedly through registered Will Deed, he may file a suit for declaration for the same before the appropriate Court as the SCC Court having decided the suit in favour of the Landlady, cannot look into the question of title to the property. The SCC Suit is by way of summary proceedings and the question of title can only be decided by the competent Court in regular civil suit filed for the same."* माननीय उच्च न्यायालय द्वारा अपने आदेश में इस इजराय वाद का उल्लेख करते हुए पृथक वाद दाखिल करते हुए निर्देशित किया गया है जिससे यह स्पष्ट है कि लघुवाद इजराय मे भी प्रार्थी के स्वामित्व के निर्धारण से सम्बन्धित कोई बिन्दु विचार में नही लिया जा सकता। माननीय उच्च न्यायालय द्वारा उक्त आदेश दिनांक 24.05.2019 को पारित किया गया है। प्रार्थी द्वारा यह प्रार्थना पत्र दिनांक 09.08.2021 को प्रस्तुत किया गया। यह भी उल्लेखनीय है कि प्रार्थना पत्र 119 ग/2 कायमी वारिस के विरूद्ध निर्णीतऋणी द्वारा दाखिल की गयी आपत्ति में भी निर्णीत ऋणी तृतीय पक्ष का स्वामी होने का बिन्दु उठाया था जिस पर विस्तृत आदेश पारित किया जा चुका है। यह भी उल्लेखनीय है कि प्रार्थी ने आदेश 21 नियम 97 सी0पी0सी0 के तहत अपनी आपत्ति दाखिल की है और उसी के तहत वह अपना साक्ष्य प्रस्तुत करना चाहता है। आदेश 21 नियम 97 सी0पी0सी0 यह प्रावधानित करता है कि जहां स्थावर सम्पत्ति के कब्जे की डिक्री के धारक का या डिक्री के निष्पादन में विक्रय की गयी ऐसी किसी सम्पत्ति के क्रेता का ऐसी सम्पत्ति पर कब्जा अभिप्राप्त करने में किसी व्यक्ति द्वारा प्रतिरोध किया जाता है या उसे बाधा डाली जाती है, वहां वह ऐसे प्रतिरोध या बाधा का परिवाद करते हुए आवेदन न्यायालय से कर सकेगा तथा आदेश 21 नियम 99 सी0पी0सी0 यह प्रावधानित करता है कि ''जहां निर्णीतऋणी से भिन्न कोई व्यक्ति स्थावर सम्पत्ति पर कब्जे की डिक्री के धारक द्वारा जहां ऐसी सम्पत्ति का डिक्री के निष्पादन में विक्रय किया गया है वहां, उसके क्रेता द्वारा ऐसी सम्पत्ति पर से बेकब्जा कर दिया गया हो वहां वह ऐसे बेकब्जा किये जाने का परिवाद करते हुए न्यायालय से आवेदन कर सकेगा।'' इस वाद में अभी तक दखल के सम्बन्ध में कोई कार्यवाही नही की गयी है और न ही इस आशय की कोई आख्या पत्रावली पर उपलब्ध है कि वाद ग्रस्त सम्पत्ति पर भौतिक कब्जा किसका है और न ही आपत्तिकर्ता को उसके किसी कब्जे से बेदखल किया गया है।

माननीच उच्च न्यायालय द्वारा एस0सी0सी0 रिवीजन डिफेक्टिव नं0 64/2017 में दिनांक 24.08.2017 को निगरानी निरस्त करते हुए निगरानीकर्ता निर्णीतऋणी मशरूफ को 02 माह का समय प्रश्नगत दुकान खाली करने के लिए प्रदान किया गया था जिसकी पूर्ण जानकारी होने के बाद भी निर्णीतऋणी द्वारा अभी इस आदेश का अनुपालन नही किया गया है। अतः उपरोक्त परिस्थितियों में प्रार्थी का प्रार्थना पत्र आदेश 21 नियम 97 सी0पी0सी0 इस स्तर पर स्वीकार किये जाने योग्य नही है तथा इजराय की कार्यवाही स्थगित किये जाने का कोई आधार नही है। तदानुसार प्रार्थना पत्र 140ग/2 व 137ग/2 निरस्त किये जाने योग्य है।

आदेश

प्रार्थना पत्र–140ग/2 व प्रार्थना पत्र 137ग/2 निरस्त किये जाते है। आपत्ति तदानुसार निस्तारित।

पत्रावली वास्ते सुनवाई/निस्तारण दिनांक 03.11.2021 को पेश हो।"

9. Learned Execution Court rejected the application of the petitioner for review of order dated 29.10.2021 vide order dated 11.11.2021 on the main ground to the effect that the order dated 29.10.2021 was passed after considering all the aspects of the case

and there is no error in the order dated 29.10.2021.

10. Assailing the impugned orders, learned counsel for the petitioner submitted that the petitioner was not the party in the SCC Suit No. 5 of 2014, decreed on 29.03.2017, in relation to which Execution Case No. 1 of 2017 is pending, wherein, the application under Order 21 Rule 97/99/101 of CPC was preferred by the petitioner, which was rejected vide impugned order dated 29.10.2021, nor is a judgment debtor nor he has entered into the shoes of judgment debtor, nor he has been put in possession of property in suit by the judgment debtor and in fact the petitioner on the basis of a Will Deed dated 01.06.1970 is claiming his independent rights over the property in suit, as such, based upon the Will Deed, the petitioner preferred two applications, one for staying the execution proceedings and another under Order 21 Rule 97/99/101 CPC for rejecting the execution proceedings.

11. It is also contended that a third person claiming to be in possession of the property forming subject matter of decree in his own right can resist delivery of possession by filing an objection under Order 21 Rule 97 before the Execution Court itself and the Execution Court is under obligation to consider and decide the same on merits before proceeding further in the execution case. However, in the present case, the Execution Court erred in interpreting the relevant rules/provisions contained under Order 21 CPC and rejected the application/objection of the petitioner preferred by him under Order 21 Rule 97 being not maintainable. The prayer is to interfere in the impugned order(s) and remand the matter for adjudication on merits as per law.

12. In support of his submissions, learned counsel for the petitioner relied upon the judgments passed in the cases of ***Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal, (1997) 3 SCC 694 & Sameer Singh v. Abdul Rab*, (2015) 1 SCC 379 : (2015) 1 SCC (Civ) 509 : 2014 SCC OnLine SC 820.**

13. Opposing the petition for the reliefs sought, Sri R.S. Pandey, learned Senior Advocate assisted by Sri Ankit Pande, learned counsel for the opposite party Nos. 2 to 4 submitted that the impugned order(s) dated 29.10.2021 and 11.11.2021 are not liable to be interfered with by this Court. Elaborating his arguments, learned Senior Advocate submitted that the Execution Court rightly held that the application/objection of the petitioner is not maintainable. The submission is that the application moved by the petitioner under Order 21 Rule 97 before the Execution Court was not maintainable as no complaint was raised by the decree holder i.e. opposite party No. 2 with regard to resistance/obstruction by an stranger. The proceedings under Rule 97 can be initiated on the application of the decree holder which is evident from the language of the Order 21 Rule 97 as also from the Form No. 40 provided under Appendix 'E' of CPC, which is the proforma of summons to be issued to the person who resists/obstructs the officer charged with execution of warrant of possession.

14. It is further submitted that as per Order 21 Rule 97 of CPC on an application preferred by the decree holder informing the Execution Court about the resistance/obstruction in execution of decree of possession, the concerned court would issue summons and thereafter, the

person who resisted/obstructed the execution of decree may appear and file an objection claiming his right, title or interest in the said property and if objection is filed by the person concerned then in that event the Execution Court is bound to adjudicate the lis under Order 21 Rule 97 (2) read with Order 21 Rule 101 and not otherwise.

15. It is further submitted that the Execution Court vide order dated 29.10.2021 while rejecting the application moved by the petitioner under Order 21 Rule 97 has observed that no proceeding has been undertaken with regard to possession as yet and there is no such report with regard to the actual physical possession of person(s) on spot and it has also been observed that the applicant/petitioner has not been dispossessed as yet and therefore, provisions of Order 21 Rule 99 are not attracted and after making these observations, the Execution Court has held that the application under Order 21 Rule 97 preferred by the applicant/petitioner is not maintainable and accordingly, rejected the same. In view of the aforesaid facts and findings recorded by the Execution Court, no cause of action has accrued in favour of the petitioner for filing the present petition.

16. It is further submitted that the cause of action for stranger accrues as soon as the decree holder complains about obstruction/resistance by some stranger either by moving an application under Order 21 Rule 97 or Rule 35 of CPC and before such stage, the petitioner preferred the application in issue and being so the same was not maintainable. Thus, rightly rejected.

17. In support of submissions made and issues involved in the present case, learned Senior Advocate for the side opposite has relied upon the judgments placed before this Court by the counsel for the petitioner, indicated above, as also some other judgments, which are as under.

1. ***Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal*****, (1997) 3 SCC 694**, relevant paras of which are reproduced hereunder:-

"6. On the undisputed facts on record it has, therefore, to be held that because of the resistance or obstruction offered by the appellant, amongst others, on 28-4-1991 the application moved by the respondent decree-holder on 6-5-1991 was necessarily to be one falling within the scope and ambit of Order 21, Rule 97. It is pertinent to note that the resistance and/or obstruction to possession of immovable property as contemplated by Order 21, Rule 97 CPC could have been offered by any person. The words "any person" as contemplated by Order 21, Rule 97, sub-rule (1) are comprehensive enough to include apart from judgment-debtor or anyone claiming through him even persons claiming independently and who would, therefore, be total strangers to the decree. It is not in dispute between the parties that no decree for possession has been obtained by Respondent 1 against the appellant. He is, therefore, prima facie a stranger to the decree. When he offered obstruction or resistance to the execution of the decree he would squarely fall within the sweep of the words "any person" as found in Order 21, Rule 97, sub-rule (1). Consequently it must be held that Respondent 1's application dated 6-5-1991 though seeking only reissuance of warrant for delivery of possession with aid of armed force in substance sought to bypass the previous resistance and obstruction offered by the

appellant on the spot. Thus it was squarely covered by the sweep of Order 21, Rule 97, sub-rule (1) CPC. Once that happened the procedure laid down by sub-rule (2) thereof had to be followed by the executing court. The Court had to proceed to adjudicate upon the application in accordance with the subsequent provisions contained in the said order. We may in this connection also refer to the Schedule to the CPC, Appendix E which gives various forms for summons to be issued to parties in execution proceedings especially Form No. 40 which deals with "Summons to appear and answer charge of obstructing execution of decree (Order 21, Rule 97)". The said form reads as under:

"No. 40

Summons to Appear and Answer Charge of

Obstructing Execution of Decree (Order 21, Rule 97)

(Title)

To,

...

Whereas ..., the decree-holder in the above suit, has complained to this Court that you have resisted (or obstructed) the officer charged with the execution of the warrant for possession:

You are hereby summoned to appear in this Court on the ... day of ... 19..., at ... a.m., to answer the said complaint.

Given under my hand and the seal of the Court, this ... day of 19....

Judge."

7. It is, therefore, clear that in an application under Order 21, Rule 97 moved by a decree-holder who complains about the resistance or obstruction offered by any person to the decree-holder in his attempt at obtaining possession of property and who wants such obstruction or resistance to be removed which otherwise is an impediment in his way, a lis arises between the decree-holder applicant under Order 21, Rule 97 on the one hand and such obstructionist or resisting party on the other, to whom summons have been issued by the Court as per Form No. 40. When such a lis arises, it has to be adjudicated upon as enjoined by Order 21, Rule 97, sub-rule (2). The procedure for adjudicating such a lis has to be culled out from the remaining succeeding Rules of Order 21. This directly takes us to the consideration of Order 21, Rule 101 which reads as under:

"101. *Question to be determined*.--All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

Now it is obvious that such questions relating to the right, title and interest in the property arising between the parties to any proceedings under Order 21, Rule 97 or Rule 99 have to be adjudicated upon by following an identical gamut of procedure by the executing court. The said gamut of procedure is laid down by Order 21, Rule 98 which reads as under:

"98. *Orders after adjudication*.--(1) Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2),--

(a) make an order allowing the application and directing that the applicant

be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days."

It is now time for us to consider Order 21, Rule 99 which reads as under:

"99. *Dispossession by decree-holder or purchaser*.--(1) Where any other person than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."

8. A conjoint reading of Order 21, Rules 97, 98, 99 and 101 projects the following picture:

(1) If a decree-holder is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order 21, Rule 35 then the decree-holder has to move an application under Order 21, Rule 97 for removal of such obstruction and after hearing the decree-holder and the obstructionist the court can pass appropriate orders after adjudicating upon the controversy between the parties as enjoined by Order 21, Rule 97, sub-rule (2) read with Order 21, Rule 98. It is obvious that after such adjudication if it is found that the resistance or obstruction was occasioned without a just cause by the judgment-debtor or by some other person at his instigation or on his behalf then such obstruction or resistance would be removed as per Order 21, Rule 98, sub-rule (2) and the decree-holder would be permitted to be put in possession. Even in such an eventuality the order passed would be treated as a decree under Order 21, Rule 101 and no separate suit would lie against such order meaning thereby the only remedy would be to prefer an appeal before the appropriate appellate court against such deemed decree.

(2) If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on the spot on account of his absence from the place or for any other valid reason then his remedy would lie in filing an application under Order 21, Rule 99 CPC claiming that his dispossession was illegal and that possession deserves to be restored to him. If such an application is allowed after adjudication then as enjoined by Order 21, Rule 98, sub-rule (1) CPC the executing court can direct the stranger applicant under Order 21, Rule 99 to be put in possession of the property or if his application is found to be substanceless, it has to be dismissed. Such an order passed by the executing court disposing of the

application one way or the other under Order 21, Rule 98, sub-rule (1) would be deemed to be a decree as laid down by Order 21, Rule 103 and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order 21, Rule 101.

9. In short the aforesaid statutory provisions of Order 21 lay down a complete code for resolving all disputes pertaining to execution of the decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the executing court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order 21, Rule 97, sub-rule (1) and he cannot bypass such obstruction and insist on reissuance of warrant for possession under Order 21, Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order 21, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the executing court it is difficult to appreciate how the executing court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order 21, Rule 99 CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order 21, Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order 21, Rule 99. Order 21, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order 21, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order 21 and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order 21, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order 21, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of

natural justice as the obstructionist, who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the executing court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order 21, Rule 97 CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the executing court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21, Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievances once and for all finally resolved in execution proceedings themselves.

10. In this connection we may also profitably refer to a judgment of a Bench of three learned Judges of this Court in the case of Bhanwar Lal v. Satyanarain [(1995) 1 SCC 6] . In that case the Bench consisting of K. Ramaswamy, S.C. Agrawal and N. Venkatachala, JJ., had to consider a parallel fact-situation. One Satyanarain had obstructed to the delivery of possession of the suit immovable property which was sought to be obtained in execution by the appellant decree-holder. After such an obstruction was offered by Satyanarain the decree-holder moved an application under Order 21, Rule 35 for police assistance to remove the obstruction caused by Satyanarain. The executing court directed the decree-holder to make an application under Order 21, Rule 97. This Court took the view that the very application under Order 21, Rule 35, sub-rule (3) for police assistance for removal of obstruction caused by Satyanarain had to be treated to be an application under Order 21, Rule 97 and such an application was maintainable and could not be said to be beyond limitation. In this connection the following pertinent observations were made by this Court: (SCC pp. 8-9, paras 2-6)

"2. The crux of the question is whether the application filed on 25-5-1979 by the appellant, though purported to be under Order 21, Rule 35(3) against Satyanarain, is convertible to one under Order 21, Rule 97. Order 21, Rule 35(3) provides that:

"35. (3) Where possession of any building on enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.'

3. A reading of Order 21, Rule 35(3) postulates that the person in possession of

the immovable property to be delivered under the decree must be per force bound by the decree. Admittedly, Satyanarain was not a judgment-debtor and that therefore, he is not bound by the decree unless he claims right, title or interest through the judgment-debtor, Ram Kishan. The person resisting delivery of possession must be bound by the decree for possession. In other words the resistor must claim derivate title from the judgment-debtor. The court gets power under Order 21, Rule 97 to remove such obstruction or resistance and direct its officer to put the decree-holder in possession of the immovable property after conducting enquiry under Rule 97.

4. Order 21, Rule 97 provides thus:

"97. *Resistance or obstruction to possession of immovable property*.--(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.'

5. The procedure has been provided in Rules 98 to 103. We are not, at present, concerned with the question relating to the procedure to be followed and question to be determined under Order 21, Rules 98 to 102. A reading of Order 21, Rule 97 CPC clearly envisages that "any person' even including the judgment-debtor irrespective whether he claims derivative title from the judgment-debtor or sets up his own right, title or interest dehors the judgment-debtor and he resists execution of a decree, then the court in addition to the power under Rule 35(3) has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not. The decree-holder gets a right under Rule 97 to make an application against third parties to have his obstruction removed and an enquiry thereon could be done. Each occasion of obstruction or resistance furnishes a cause of action to the decree-holder to make an application for removal of the obstruction or resistance by such person.

6. When the appellant had made the application on 25-5-1979 against Satyanarain, in law it must be only the application made under Order 21, Rule 97(1) of CPC. The executing court, obviously, was in error in directing to make a fresh application. It is the duty of the executing court to consider the averments in the petition and consider the scope of the applicability of the relevant rule. On technical ground the executing court dismissed the second application on limitation and also the third application, on the ground of res judicata which the High Court has in the revisions now upheld. The procedure is the handmaid of substantive justice but in this case it has ruled the roost."

11. In view of the aforesaid settled legal position, therefore, and in the light of the statutory scheme discussed by us earlier it must be held that Respondent 1 decree-holder's application dated 6-5-1991 praying for issuance of warrant for delivery of possession with the aid of armed force, was in substance for removal of obstruction offered by the appellant and others under Order 21, Rule 97 CPC and had to be adjudicated upon as enjoined by Order 21, Rule 97, sub-rule (2) read with Order 21, Rule 101 and Order 21, Rule 98. In this connection the Court had also to follow the

procedure laid down by Order 21, Rule 105 which enjoins the executing court to which an application is made under any of the foregoing rules of the order to fix a date of hearing of the application. As the executing court refused to adjudicate upon the obstruction and the claim of the appellant who obstructed to the execution proceedings it had clearly failed to exercise jurisdiction vested in it by law. The High Court in revision also committed the same error by taking the view that such an application was not maintainable. It is of course true as submitted by learned counsel for the decree-holder that in para 4 of the judgment under appeal the High Court has noted that there was some discrepancy about the khasra number. But these are passing observations. On the contrary in the subsequent paragraphs of the judgment the High Court has clearly held that such an application by the objector was not maintainable and his only remedy was to move an application under Order 21, Rule 99 after handing over possession and consideration of objection to delivery of possession by a stranger to the decree at any earlier stage was premature. It must, therefore, be held that neither the executing court nor the High Court in revision had considered the objection of the appellant against execution on merits. Consequently the impugned judgment of the High Court as well as the order of the executing court in Civil Execution Case No. 25 of 1990 dated 15-2-1996 are quashed and set aside and proceedings are remanded to the Court of Munsif II, Munger to re-decide the application of Respondent 1 decree-holder dated 6-5-1991 by treating it to be one under Order 21, Rule 97 for removal of obstruction of the appellant and after hearing the decree-holder as well as the appellant to adjudicate the claim of the appellant and to pass appropriate orders under Order 21, Rule 97, sub-rule (2) CPC read with Order 21, Rule 98 CPC as indicated in the earlier part of this judgment."

2. ***Silverline Forum (P) Ltd. v. Rajiv Trust,*** **(1998) 3 SCC 723**, relevant paras of which are quoted hereunder:-

"**9**. At the outset, we may observe that it is difficult to agree with the High Court that resistance or obstructions made by a third party to the decree of execution cannot be gone into under Order 21 Rule 97 of the Code. Rules 97 to 106 in Order 21 of the Code are subsumed under the caption "Resistance to delivery of possession to decree-holder or purchaser". Those rules are intended to deal with every sort of resistance or obstructions offered by any person. Rule 97 specifically provides that when the holder of a decree for possession of immovable property is resisted or obstructed by "any person" in obtaining possession of the property such decree-holder has to make an application complaining of the resistance or obstruction. Sub-rule (2) makes it incumbent on the court to proceed to adjudicate upon such complaint in accordance with the procedure laid down.

10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the executing court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the

resistance was made by a transferee pendente lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

11. When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may be arising between the parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

14. It is clear that the executing court can decide whether the resister or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. The court can make the adjudication on admitted facts or even on the averments made by the resister. Of course the court can direct the parties to adduce evidence for such determination if the court deems it necessary.

15. In *Bhanwar Lal v. Satyanarain* [(1995) 1 SCC 6] a three-Judge Bench has stated as under: (SCC p. 9, para 5)

"A reading of Order 21 Rule 97 CPC clearly envisages that "any person' even including the judgment-debtor irrespective whether he claims derivative title from the judgment-debtor or sets up his own right, title or interest dehors the judgment-debtor and he resists execution of a decree, then the court in addition to the power under Rule 35(3) has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not. The decree-holder gets a right under Rule 97 to make an application against third parties to have his obstruction removed and an enquiry thereon could be done."

16. In *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal* [(1997) 3 SCC 694] this Court, following the aforesaid decision, made the under-quoted observation: (SCC p. 699, para 6)

"It is pertinent to note that the resistance and/or obstruction to possession of immovable property as contemplated by Order 21 Rule 97 CPC could have been offered by any person. The words "any person' as contemplated by Order 21 Rule 97, sub-rule (1) are comprehensive enough to include apart from judgment-debtor or anyone claiming through him even persons claiming independently and who would, therefore, be total strangers to the decree. ... Consequently it must be held that Respondent 1's application dated 6-5-1991 though seeking only reissuance of warrant for delivery of possession with aid of armed force in substance sought to bypass the previous resistance and obstruction offered by the appellant on the spot. Thus it was squarely covered by the sweep of Order 21 Rule 97, sub-rule (1) CPC. Once that happened the procedure laid down by sub-rule (2) thereof had to be followed by the executing court. The Court had to proceed to adjudicate upon the application in accordance with the subsequent provisions contained in the said order."

3. ***Bhavnagar Transport Company v. Valmikbhai Himatlal Patel*, 1999 SCC OnLine Guj 158 : AIR 2000 Guj 36 : (1999) 40 (3) GLR 2332 : (2000) 2 AP LJ**

(DNC) 39 : (2000) 3 ALT (DNC 6.3) 6 : (1999) 2 GLH 161 : (2000) 1 GCD 165 : (2000) 2 CCC 240 : (2000) 2 Civ LT 441 at page 40, relevant paras of which are quoted hereunder:-

*"**12**. Mr. M.B. Gandhi has also placed reliance on the decision of the Supreme Court in the case of Bhanwarlal v. Satyanarain, reported in (1995) 1 SCC 6 : (AIR 1995 SC 358). Therein also, there was an obstruction to delivery of possession in pursuance of an execution of the decree, the decree holder had made application under Rule 35(3) instead of Rule 97. The Supreme Court observed that the application made must be treated as one of under Rule 97 and the application was not time barred. In the above mentioned decision, in paras 3 and 5, the Supreme Court has observed that the decree holder gets a right under Rule 97 to make an application against a third party to have his obstruction removed and an enquiry thereon could be done. Hence, this decision also will not help the appellant.*

***13**. From the above discussion, it becomes crystal clear that when the holder of a decree for possession or the purchaser of any such property sold in execution of the decree comes with a warrant for possession, the appropriate remedy of a person other than the judgment debtor is to resist or obstruct the order of a decree for possession. The third party has to obstruct and resist the process of execution with regard to the warrant for possession. The warrant for possession is obstructed and resisted, then decree holder or the purchaser, may complain before the executing Court by filing an application. It may be remembered that Decree-holder in those circumstances may not file any application under R. 97(1) O. 21 of CPC and may proceed further with the execution because the provision is apparently permissive one. But if such an application is filed by decree-holder, executing Court thereupon may issue notice to the obstructor or third party. Third party then has right to file his objections and in these circumstances executing Court is obliged to adjudicate upon the application under sub-rule (2) of R. 97 of O. 21 of the CPC. The scheme of Order 21 nowhere by whisper even gives any right to any third party obstructor to approach the executing Court directly and even if decree holder chooses not to file an application for removal of the obstruction, insist upon the executing Court to adjudicate his (third party objector) objections regarding the warrant for possession. To give this meaning to R. 97 of Order 21 of the CPC would mean to add something in the provisions, which was never intended to be made by the legislature in their wisdom and, therefore, a third party obstructor cannot have any right to say that since he has filed an application to remove obstructions under R. 97, O. 21 and that executing Court is obliged to adjudicate upon his application."*

4. ***Sameer Singh v. Abdul Rab*, (2015) 1 SCC 379 : (2015) 1 SCC (Civ) 509 : 2014 SCC OnLine SC 820**, relevant paras of which are quoted hereunder:-

"**14**. To appreciate the submissions raised at the Bar, it is necessary to appreciate the whole gamut of provisions contained in Order 21 Rules 97 to 103 CPC and the fundamental objects behind the same.

15. Rule 97 deals with resistance or obstruction to possession by the holder of a decree for possession or the purchaser of any such property sold in execution of a decree. It empowers such a person to file an application to the court complaining of

such resistance or obstruction and requires the court under sub-rule (2) to adjudicate upon the application in accordance with the provisions provided therein.

16. Rule 99 deals with dispossession by decree-holder or purchaser. It stipulates that:

"**99. (1)** Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession."

The Court is obliged to adjudicate such an application. Thus this Rule, as is manifest, includes any person other than the judgment-debtor.

17. Rule 101 deals with the questions to be determined. It provides that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the court dealing with an application and not by a separate suit and for the said purpose, the executing court has been conferred the jurisdiction to decide the same.

18. Rule 100 deals with orders to be passed upon application complaining of dispossession. It is apt to reproduce the said Rule--

"***100. Order to be passed upon application complaining of dispossession***.--Upon the determination of the questions referred in Rule 101, the Court shall, in accordance with such determination--

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such order as, in the circumstances of the case, it may deem fit."

19. Rule 98 deals with orders after adjudication. Sub-rule (1) provides that upon the determination of questions referred to in Rule 101, the court in accordance with determination and subject to provisions of sub-rule (2) therein make an order allowing the application and directing that the applicant be put in possession of the property or dismissing the application or pass such other order, as in the circumstances of the case it may deem fit. As far as sub-rule (2) is concerned, the same is not necessary to be taken note of for the purposes of the present case. Rule 103 which is significant reads as follows:

"**103**. ***Orders to be treated as decrees***.--Where any application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree."

20. The submission of the learned counsel for the appellants is that if the scheme underlying the said Rules is appositely appreciated, it is clear as crystal that the legislature in order to avoid multiplicity of proceedings has empowered the executing court to conduct necessary enquiry and adjudicate by permitting the parties to adduce evidence, both oral and documentary, and to determine the right, title and interest of the parties and, therefore, such an order has been given the status of a decree. As has been put forth by him, a proceeding in terms of Rule 97 or Rule 99 is in the nature of a suit and the adjudication is similar to that of a suit and when in the case at hand, the court has declined to embark upon any enquiry by calling for reply, recording evidence and appropriately adjudicating the controversy, the order passed cannot be regarded under

Order 21 Rule 103 as a decree. In this context, the authorities that have been commended to us need to be carefully noticed.

21. In *Noorduddin v. K.L. Anand* [(1995) 1 SCC 242] , the executing court had rejected the application of the appellant therein on the ground that the High Court had already adjudicated the lis. Analysing the language employed in Rules 97, 98 and 100 to 104, the Court held: (SCC p. 249, para 8)

"8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding the Civil Procedure Code (Amendment) Act, 1976, right of suit under Order 21 Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution."

Elucidating further, the Court opined that adjudication before execution is an efficacious remedy to prevent fraud, oppression, abuse of the process of the court or miscarriage of justice. The object of law is to mete out justice and, therefore, adjudication under Order 21 Rules 98, 100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the immovable property under execution.

22. In *Babulal [Babulal v. Raj Kumar*, (1996) 3 SCC 154] , the appellant apprehending that it would be dispossessed in an execution proceeding had filed an application based on possessory title and obtained interim injunction. He had also filed an application stating, inter alia, that he should not be dispossessed. His objection was overruled by the executing court holding that since he had not been dispossessed, an application under Order 21 Rule 98 was not maintainable. The said view was affirmed by the High Court in civil revision petition. The Court while interpreting Order 21 Rules 98 to 102 referred to the decision in Bhanwar Lal v. Satyanarain [(1995) 1 SCC 6] and opined that it is clear that an adjudication is required to be conducted under Order 21 Rule 98 before removal of the obstruction caused by the objector or the appellant and a finding is required to be recorded in that behalf. The Court ruled that the order is treated as a decree under Order 21 Rule 103 and it is subject to an appeal. It has been observed in the said case that prior to 1976, the order was subject to suit, but under the amended Code, right of suit under Order 21 Rule 63 of old Code has been taken away, and the determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under Order 21 Rule 98 which is an order and is a decree under Order 21 Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if

it were a decree. The Court further opined that the procedure prescribed is a complete code in itself and, therefore, the executing court is required to determine the question.

23. In *Ghasi Ram [Ghasi Ram v. Chait Ram Saini*, (1998) 6 SCC 200] while making a distinction between the provisions prior to the amendment brought in 1976 in CPC and the situation after the amendment, a two-Judge Bench observed thus: (SCC p. 205, para 7)

"7. ... the position has changed after amendment of the Code of Civil Procedure by the Amendment Act of 1976. Now, under the amended provisions, all questions, including right, title, interests in the property arising between the parties to the proceedings under Rule 97, have to be adjudicated by the executing court itself and not left to be decided by way of a fresh suit."

24. In *S. Rajeswari [S. Rajeswari v. S.N. Kulasekaran*, (2006) 4 SCC 412] , the appellant was one of the persons who had obstructed the execution of a decree obtained by the first respondent therein and had filed an application under Section 151 CPC which was rejected by the executing court on the ground that it was not maintainable. Being grieved by the said order he preferred a revision petition which was allowed by the High Court. The Court treated the application preferred under Section 151 CPC to be one under Order 21 Rule 97 because the executing court proceeded to record evidence and thereupon adjudicated the matter. The evidence of the decree-holder was considered and a conclusion was arrived at that the identity of plot in question had not been established and thereby the plaintiff was disabled from executing the decree for possession of the land. A contention was raised before this Court that the High Court had erred in entertaining a revision petition under Section 115 CPC, for the order was a decree under Order 21 Rule 103 of CPC and hence, an appeal lay. The said contention was accepted by this Court.

25. At this juncture, we may refer with profit to the pronouncement in *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal* [(1997) 3 SCC 694 : AIR 1997 SC 856] , wherein a two-Judge Bench scanning the anatomy of the Rules came to hold that: (SCC pp. 702-03, para 9)

"9. ... a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order 21 Rule 99. Order 21 Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order 21 Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order 21 and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him."

26. The aforesaid authorities clearly spell out that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained code, as has been emphasised by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the executing court. Order 21 Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree. Thus, it is a deemed decree. If a court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot earn the status of a decree. If an executing court only expresses its inability to adjudicate by stating that it lacks jurisdiction, then the status of the order has to be different. In the instant case the executing court has expressed an opinion that it has become functus officio and hence, it cannot initiate or launch any enquiry. The appellants had invoked the jurisdiction of the High Court under Article 227 of the Constitution assailing the order passed by the executing court on the foundation that it had failed to exercise the jurisdiction vested in it. The appellants had approached the High Court as per the dictum laid down by this Court in Surya Dev Rai v. Ram Chander Rai [(2003) 6 SCC 675]."

5. *Rahul S. Shah v. Jinendra Kumar Gandhi,* (2021) 6 SCC 418 : (2021) 3 SCC (Civ) 569 : 2021 SCC OnLine SC 341, relevant paras of which are reproduced hereunder:-

"**42**. All courts dealing with suits and execution proceedings shall mandatorily follow the below mentioned directions:

42.1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order 10 in relation to third-party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third-party interest in such properties.

42.2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the court, the court may appoint Commissioner to assess the accurate description and status of the property.

42.3. After examination of parties under Order 10 or production of documents under Order 11 or receipt of Commission report, the court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

42.4. Under Order 40 Rule 1 CPC, a Court Receiver can be appointed to monitor the status of the property in question as custodia legis for proper adjudication of the matter.

42.5. The court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

42.6. In a money suit, the court must invariably resort to Order 21 Rule 11, ensuring immediate execution of decree for payment of money on oral application.

42.7. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

42.8. The court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

42.9. The court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

42.10. The court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to sub-rule (2) of Rule 98 of Order 21 as well as grant compensatory costs in accordance with Section 35-A.

42.11. Under Section 60 CPC the term "... in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

42.12. The executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

42.13. The executing court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the police station concerned to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the court, the same must be dealt with stringently in accordance with law.

42.14. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the executing courts.

43. *We further direct all the High Courts to reconsider and update all the Rules relating to execution of decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 CPC, within one year of the date of this order. The High Courts must ensure that the Rules are in consonance with CPC and the above directions, with an endeavour to expedite the process of execution with the use of information technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable."*

18. Considered the submissions of the counsel for the parties and perused the record.

19. Submission of learned counsel for the petitioner, in nutshell, is that the Execution Court failed to exercise the jurisdiction vested to it in not adjudicating/deciding the dispute raised by

the petitioner when it had brought to the notice of the Execution Court that the petitioner had resisted the execution of decree and therefore, it was incumbent upon the Execution Court to have proceeded to decide the dispute raised by the petitioner in accordance with the procedure prescribed under Rule 101 of Order 21 CPC which enjoins that on question including the question relating to right, title or interest to the property arising between the parties to a proceeding on an application under Rule 97 or 99 shall be determined by the Court dealing with the application and not by a separate suit.

20. In brief, the submission of learned counsel for the opposite party Nos. 2 to 4, Sri Pandey, Senior Advocate, is that a bare reading of Order 21 Rule 97 CPC clearly indicates that it is only the decree holder who is entitled to make an application to Execution Court informing the Court about the obstruction/resistance made by a person to the execution of decree of eviction or warrant for delivery of possession of the property in question and no stranger or even a person claiming through judgment debtor is entitled to make such application and therefore, the impugned orders are justified.

21. In view of the aforesaid, the issue for determination in the present case is that "whether in absence of an application of the decree holder before the Execution Court complaining/informing to the Court about the obstruction/resistance made by a person in obtaining the possession of the property in decree, the application by a person claiming himself to be in possession of the property in issue/dispute under Order 21 Rule 97 CPC would be maintainable?" In other words, as to "whether a person in possession of the property claiming independent right as an owner in possession, not a party to a decree under execution, could resist such decree by seeking adjudication of his objection under Order 21 Rule 97 CPC?"

22. The relevant judgments of the Hon'ble Supreme Court on the issue involved in the present case, to the view of this Court, are ***Brahmdeo Chaudhary*** (supra), ***Silverline Forum (P) Ltd.*** (supra), ***Sameer Singh*** (supra), ***Shreenath and another v. Rajesh and others*** reported in ***(1998) 4 SCC 543 and Ashan Devi and another v. Phulwasi Devi and others*** reported in ***(2003) 12 SCC 219 and Har Vilas v. Mahendra Nath and others*** reported in ***(2011) 15 SCC 377***.

23. It would be appropriate to refer here that similar controversy to that in the present case was before the Full Bench of the M.P. High Court in the case of ***Usha Jain v. Manmohan Bajaj, AIR 1980 MP 146 : 1980 MPLJ 623*** and Full Bench observed as under:-

"The executing court has no jurisdiction to start an enquiry suo motu or at the instance of a third party other than the decree-holder/auction-purchaser under Order 21 Rule 97. This Rule is merely permissive and not mandatory so that the decree-holder/auction-purchaser need not resort to it against his will and may even apply for a fresh warrant under Order 21 Rule 35 CPC. Executing court is not bound to stay its hands the moment a third party files an objection to the execution nor the stay would continue till an unwilling decree-holder/auction-purchaser is forced to apply for investigation into the right or title claimed by the third party and negative the claim therein. If the executing court were to stay its hands till investigation into

a third party's claim is not finally decided then it would result in depriving the decree-holder of his possession by filing repeated spurious claims.

No enquiry into the title or possession of a third party is contemplated at any rate at his instance either under Rules 35 and 36 or Rules 95 and 96 of Order 21 CPC when the decree-holder or the auction-purchaser applies for obtaining possession. Subsequently when the decree-holder or auction-purchaser is met with obstruction or resistance in obtaining possession, one of the options open to him is to apply under Rule 97 but that provision is merely permissive and not mandatory and it is open to the decree-holder/auction-purchaser to apply instead for a fresh warrant of possession. An enquiry at the instance of a third party in possession is contemplated only under Order 21 Rule 100 after he was dispossessed and not before it.

The omission by the executing court to investigate into the objection filed by a third party does not result in injustice to the third party. It cannot be said that he would have no remedy to protect his possession and have his title judicially investigated prior to his dispossession, his only remedy then being under Order 21 Rule 100 after dispossession. Another remedy available to such a third party is to institute an independent civil suit for a declaration of his title claiming therein the relief of temporary injunction to protect his possession."

24. The above quoted observations of the Full Bench of M.P. High Court were taken note of by the Hon'ble Supreme Court in the case of ***Shreenath*** (supra) and in para 18 of the judgment of the Hon'ble Supreme Court after considering the judgments passed by it including in the case of Brahmdeo Chaudhary (supra) held that:-

"In view of the aforesaid finding and the law being well settled the interpretation given by the aforesaid Full Bench of the M.P. High Court in the case of Usha Jain v. Manmohan Bajaj [AIR 1980 MP 146 : 1980 MPLJ 623] cannot be held to be good law."

25. In the case of ***Shreenath*** (supra), the Hon'ble Supreme Court considered the relevant provisions i.e. Rule(s) 35, 97, 98, 99 and 100 of Order 21 of CPC and the judgments relevant to the same and thereafter overruled the judgment of the Full Bench of M.P. High Court as would appear from the following paras:-

"**8**. In order to appreciate the controversy, Order 21 Rule 35, Order 21 Rule 36 and Order 21 Rule 97 are quoted hereunder:

"35. *Decree for immovable property*.--(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building on enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the

court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

36. *Decree for delivery for immovable property when in occupancy of tenant*.--Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

97. *Resistance or obstruction to possession of immovable property*.--(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1) the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."

9. This sub-clause (2) was substituted by the Amending Act, 1976. Earlier sub-clause (2) was:

"97. (2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same."

10. Under sub-clause (1) Order 21 Rule 35, the executing court delivers actual physical possession of the disputed property to the decree-holder and, if necessary, by removing any person bound by the decree who refuses to vacate the said property. The significant words are by removing any person bound by the decree. Order 21 Rule 36 conceives of immovable property when in occupancy of a tenant or other person not bound by the decree, the court delivers possession by fixing a copy of the warrant in some conspicuous place of the said property and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree in regard to the property. In other words, the decree-holder gets the symbolic possession. Order 21 Rule 97 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through the judgment-debtor or claiming independent right of his own including a tenant not party to the suit or even a stranger. A decree-holder, in such a case, may make an application to the executing court complaining such resistance for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the executing courts when such claim is made to proceed to adjudicate upon the applicant's claim in accordance with the provisions contained hereinafter. This refers to Order 21 Rule 101 (as amended by 1976 Act) under which all questions relating to right, title or interest in the property arising between the parties under Order 21 Rule 97 or Rule 99 shall be determined by the court and not by a separate suit. By the amendment, one has not to go for a fresh suit but all matter pertaining to that property even if obstruction by a stranger is adjudicated and finally given even in the executing

proceedings. We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the executing court could adjudicate the claim made in any such application under Order 21 Rule 97. Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger.

11. So, under Order 21 Rule 101 all disputes between the decree-holder and any such person is to be adjudicated by the executing court. A party is not thrown out to relegate itself to the long-drawn-out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and the other person claiming title on their own right to get it adjudicated in the very execution proceedings. We find that Order 21 Rule 35 deals with cases of delivery of possession of an immovable property to the decree-holder by delivery of actual physical possession and by removing any person in possession who is bound by a decree, while under Order 21 Rule 36 only symbolic possession is given where the tenant is in actual possession. Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to the decree-holder or purchaser is resisted by any person. "Any person", as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including a stranger.

12. Prior to the 1976 Amending Act, provisions under Order 21 Rules 97 to 101 and 103 were different which are quoted hereunder:

"97. (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

98. Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation to be detained in the civil prison for a term which may extend to thirty days.

99. Where the court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court shall make an order dismissing the application.

100. (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.(2) The court shall fix a day investigating the matter and shall summon the party against

whom the application is made to appear and answer the same.

101. Where the court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

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103. Any party not being a judgment-debtor against whom an order is made under Rule 98 or Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property but, subject to the result of such suit (if any), the order shall be conclusive."

13. So far sub-clause (1) of Rule 97 the provision is the same but after the 1976 Amendment all disputes relating to the property made under Rules 97 and 99 are to be adjudicated under Rule 101, while under unamended provision under sub-clause (2) of Rule 97, the executing court issues summons to any such person obstructing possession over the decretal property. After investigation under Rule 98 the court puts back a decree-holder in possession where the court finds obstruction was occasioned without any just cause, while under Rule 99 where obstruction was by a person claiming in good faith to be in possession of the property on his own right, the court has to dismiss the decree-holder's application. Thus even prior to 1976, right of any person claiming right on his own or as a tenant, not party to the suit, such person's right has to be adjudicated under Rule 99 and he need not fall back to file a separate suit. By this, he is saved from a long litigation. So a tenant or any person claiming a right in the property on the own, if resists delivery of possession to the decree-holder, the dispute and his claim has to be decided after the 1976 Amendment under Rule 97 read with Rule 101 and prior to the amendment under Rule 97 read with Rule 99. However, under the old law, in case order is passed against the person resisting possession under Rule 97 read with Rule 99 then by virtue of Rule 103, as it then was, he was to file a suit to establish his right. But now after the amendment one need not file suit even in such cases as all disputes are to be settled by the executing court itself finally under Rule 101.

14. We find that both either under the old law or the present law, the right of a tenant or any person claiming right on his own of the property in case he resists, his objection under Order 21 Rule 97 has to be decided by the executing court itself.

15. Rule 100 of the old law, as referred in the aforesaid Full Bench decision of the Madhya Pradesh High Court is a situation different from what is covered by Rule 97. Under Rule 100 (old law) and Order 99, the new law covers cases where persons other than the judgment-debtor is dispossessed of immovable property by the decree-holder, of course, such cases are also covered to be decided by the executing court. But this will not defeat the right of such a person to get his objection decided under Rule 97 which is a stage prior to his dispossession or a case where he is in possession. In other words, when such person is in possession the adjudication to be under Rule 97 and in case dispossessed adjudication to be under Rule 100 (old law) and Rule 99 under the new law. Thus a person holding possession of an immovable property on his own right can object in the execution proceeding under Order 21 Rule 97. One has not to wait for his dispossession to enable him to participate in the execution proceedings. This shows that such a person can object and get adjudication when he is sought to be dispossessed by the decree-holder. For all the aforesaid reasons, we do not find the

Full Bench in *Usha Jain* [AIR 1980 MP 146 : 1980 MPLJ 623] correctly decided the law.

16. In *Noorduddin v. Dr K.L. Anand* [(1995) 1 SCC 242] it is held : (SCC p. 249, para 8)

"8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21 Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21 Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution."

17. In *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal* [(1997) 3 SCC 694] the question raised was whether a stranger occupying the premises on his own right when offered resistance to the execution of the decree obtained by the decree-holder can or cannot request the executing court to adjudicate his claim without being insisted upon that first he must hand over the possession and then move an application under Order 21 Rule 97. It is held in para 9 : (SCC p. 702)

"9. In short the aforesaid statutory provisions of Order 21 lay down a complete code for resolving all disputes pertaining to execution of the decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the executing court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order 21 Rule 97 sub-rule (1) and he cannot bypass such obstruction and insist on reissuance of warrant for possession under Order 21 Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order 21 Rule 97...."

26. In the case of ***Ashan Devi*** (supra), the Hon'ble Supreme Court observed as under:-

"**16**. It is necessary at this stage to take into account the objects of drastic amendments introduced to the Code of Civil Procedure by Act 104 of 1976. This Court in the case of *Shreenath* [(1998) 4 SCC 543] has compared the unamended provisions of the Code in Order 21 and the provisions introduced after amendment. It is noticed that earlier under the Code, the third party "dispossessed" in the execution of the decree was required to institute an independent suit for adjudication of its right and claims. In order to shorten the litigations concerning same properties between same and third parties, claims of third parties to the property in execution are now required to be determined by the

executing court itself in accordance with provisions under Order 21 Rule 101 with right of appeal to the higher court against such adjudication treating it to be a "decree" under Order 21 Rule 103 of the Code. On the amendments introduced to the Code by the Amendment Act of 1976, this Court observed thus: (SCC p. 545, para 3)

"3. In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding justice is to be adopted. The procedural law is always subservient to and is in aid of justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed."

17. In case of *Brahmdeo Chaudhary* [(1997) 3 SCC 694] the provisions of Order 21 Rule 97 of the Code, as amended, came up for construction. They read thus:

"97. *Resistance or obstruction to possession of immovable property*.--(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."

18. The question raised in that case was whether the objector cannot claim adjudication of his claim being third party to the decree under execution until he is "actually dispossessed". The argument advanced was that application under Order 21 Rule 97 at the instance of the objector is not maintainable to the executing court because such application complaining "resistance and obstruction" by the third party could be filed ***only by the decree-holder*** under Order 21 Rule 97 of the Code. It was argued that the remedy of the third party to the executing court is only after he suffers dispossession in execution of the decree. Thereafter, he has to complain under Order 21 Rule 99 and seek adjudication of his claims and rights. This Court negatived that contention and observed thus: (SCC p. 703, para 9)

"On the contrary the statutory scheme envisaged by Order 21 Rule 97 CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both ***to the decree-holder*** as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the executing court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21 Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievance once and for all finally resolved in execution proceedings themselves."

(emphasis supplied)

19. The case of *Brahmdeo Chaudhary* [(1997) 3 SCC 694] was relied on by this Court in the case of *Silverline Forum* (P) Ltd. [(1998) 3 SCC 723 : AIR 1998 SC 1754] It was held that the remedy under Order 21 Rule 99 in execution is available to a party only on his dispossession but a third party who is resisting or obstructing the execution of decree can also seek adjudication of his claims and rights by making application under Order 21 Rule 97 of the Code.

20. In the case of *Tanzeem-E-Sufia* [(2002) 7 SCC 50] the third party who was in possession of a part of premises had filed a separate suit for declaration of its right and title. In execution proceedings, the decree-holder in respect of the entire decretal property, complained of obstruction and resistance to the execution by the third party. Even on these facts, this Court held that the application of the decree-holder required adjudication under Order 21 Rule 97 of the Code and the application of the third party also necessitated adjudication of its rights under Order 21 Rule 99 of the Code irrespective of the fact that for part of the property, the third party had filed an independent suit for declaration of its title to the suit property.

21. The abovementioned decided cases of this Court clearly indicate that the provisions of Order 21 Rules 97 and 99 have been widely and liberally construed to enable the executing court to adjudicate the inter se claims of the decree-holder and the third parties in the execution proceedings themselves to avoid prolongation of litigation by driving parties to file independent suits.

22. The word "dispossessed" as used in Order 21 Rule 99 of the Code has been narrowly construed to be an ouster from actual and physical possession of the property by several High Courts. See *Pera Naidu v. Soundaravalli Ammal* [AIR 1954 Mad 516 : (1954) 1 MLJ 179] AIR at p. 519; *Rajendra N. Das v. Minatunnisa Bibi* [(1966) 32 Cut LT 972 : ILR 1966 Cut 611] and *Emerciano Leonardo Dias (Dr.) v. Ganexama B. Naique Vaingancar* [AIR 1978 Goa 48] .

23.*Salmond on Jurisprudence explains* that the word "possession" is a word of "open texture". Its legal meaning has to be ascertained from the context. The property involved in the present case is open vacant land. Such property is possessed by a person who has control over the same. This "control" over the property means "power to exclude all others". The test then for determining whether a man is in possession of anything is whether he is in "general control" of it -- maybe, that he is not in actual and physical possession or using the same.

24. The objectors have laid evidence before the executing court to show that after obtaining by recitals in the sale deeds delivery of possession of the property, the names of purchasers were also mutated in the municipal records. Merely because at the time of execution of the decree through Court Nazir, the objectors were not physically present on the property, it cannot be said that the delivery of possession to the decree-holder by the court does not amount to the objectors' legal ouster or "dispossession". The word "possession", therefore, has to be given contextual meaning on facts of a particular case and the nature of the property involved.

25. In interpreting the provisions of Order 21 Rule 97 of the Code and the other provisions in the said order, the aims and objects for introducing amendment to the Code cannot be lost sight of. Under the unamended Code, third parties adversely affected or dispossessed from the property involved, were required to file independent suits for claiming title and possession. The legislature purposely amended provisions in Order 21 to enable the third parties to seek adjudication of their rights in execution proceedings themselves with a view to curtail the prolongation of litigation and arrest delay caused in execution of decrees. See *Bhag Mal v. Ch. Parbhu Ram* [(1985) 1 SCC 61] .

26. The High Court in the impugned judgment dated 23-4-2001 has construed the word "dispossessed" under Order 21

Rule 99 of the Code to mean actual and physical dispossession. The reasoning adopted is that if the expression "dispossessed" is thus not narrowly construed,

"anybody apprehensive of dispossession or anybody claiming right although not actually dispossessed can come within the purview of Rule 99 and there would be floodgate and a decree-holder who obtained a decree by due process of law would be frustrated in not getting the fruit of the decree".

27. There is fallacy in the above reasoning. As has been held by this Court in the case of *Brahmdeo Chaudhary* [(1997) 3 SCC 694] a third party resisting or obstructing the execution of the decree can also seek adjudication of his rights under Order 21 Rule 97 in the same way as the decree-holder. If that be so, it seems illogical that the third party which complains of actual dispossession because of the delivery of possession in execution to the decree-holder should not be allowed to claim adjudication of his rights through the executing court. An interpretation of the provision which promotes or fulfils the object of the amended provisions of the Code of curtailing litigation, has to be preferred to the one which frustrates it. The High Court also lost sight of the fact that the property involved was a vacant land and it could have been possessed only by having ownership and control over it. Mere physical absence of the third party at the time of execution of the decree was not a relevant fact to reject application under Order 21 Rule 99 of the Code. From the trend and ratio of decisions of this Court surveyed above, if the objectors would have been present at or near the vacant land at the time of execution of a decree and had offered obstruction or resistance to the execution, they would have been entitled to seek adjudication of their rights and claims through the executing court under Order 21 Rule 97. On the same legal position and reasoning even though the objectors were not in actual and physical possession of the vacant land, but as a result of delivery of possession of the land through Nazir to the decree-holder, lost their right and control over the land to put it to their use, they will have to be treated to have been "dispossessed" within the meaning of Order 21 Rule 99 of the Code. Such interpretation would fulfil aim and object of the amended provisions of the Code by allowing adjudication of disputes of title between the decree-holder and the third party in the executing court itself without relegating them to an independent litigation.

28. In view of the discussion aforesaid, in our opinion, the executing court was well within law in recording evidence and adjudicating the claim of the third party. The executing court rightly rejected the preliminary objection to the maintainability of application of the objectors under Order 21 Rule 99 of the Code and decided the other issues on merits of their claims arising between the decree-holder and the objectors.

27. In the case of ***Har Vilas*** (supra), the Hon'ble Supreme Court has observed as under:-

"**4**. The Full Bench decision of the Madhya Pradesh High Court in *Usha Jain case* [AIR 1980 MP 146 : 1980 MPLJ 429 (FB)] has been overruled by this Court in Shreenath v. Rajesh [(1998) 4 SCC 543] . It has been held that a third person claiming to be in possession of the property forming the subject-matter of decree in his own right can resist delivery of possession even by filing an objection under Order 21 Rule 97 of the Code of Civil Procedure in the

executing court itself and if that is done, the objection shall have to be determined by the executing court itself. The provisions of Rule 100 (of the old CPC, the equivalent provision whereof is Rule 99 in the new CPC) will not defeat the right of such person to get his objection decided under Rule 97 which is a stage prior to his dispossession. In view of the decision of this Court in the case of *Shreenath* [(1998) 4 SCC 543] the impugned view of the High Court based on the Full Bench decision of the High Court of Madhya Pradesh in the case of *Usha Jain* [AIR 1980 MP 146 : 1980 MPLJ 429 (FB)] cannot be sustained."

28. In view of the law declared by the Apex Court it is settled that whenever an obstruction or resistance is made by any person whomsoever in the execution of decree by the decree-holder, the Execution Court is under obligation to adjudicate the right, title or interest of the obstructionist/resister in the manner prescribed under Rules 98 to 103 of Order 21 CPC which is a complete Code in itself and it provides for the concerned parties to have their grievances once and for all finally resolved in the execution proceedings.

29. It would not be out of place to refer the relevant portion of the judgment passed by the High Court of Andhra Pradesh in the case of ***Tahera Sayeed v. M. Shanmugam, AIR 1987 AP 206***:-

"The faith of the people is the saviour and succour for the sustenance of the rule of law and any weakening link in this regard would rip apart the edifice of justice and cause disillusionment to the people in the efficacy of law. The acts of the Court should not injure a party. When the stains on the purity of fountain of justice is apparent, it is but the duty of the Court to erase the stains at the earliest. It is well settled that right to an adjudication is a procedural right. The procedure has been devised as handmaid to advance justice and not to retard the same. The primary object for which the Court exists is to do justice between the parties. The approach of the Court would be pragmatic but not pedantic or rigmarole."

"When the third party not bound by the decree approaches the Court to protect his independent right, title or interest before he is actually dispossessed from immovable property and files an application under Order 21, Rule 97, it must be treated to be an intimation to the Court as Caveat to the decree-holder or purchaser or a person claiming through him that "look here, your fraud would be exposed and collusion uncovered; I am not a pretender for judgment-debtor. I have my own just right, title or interest in the immovable property in my possession and I am not bound by your decree", and the Court is to treat it as a complaint or a counter in opposition as an application for the purpose of Order 21, Rule 97 and to adjudicate it under Rule 98 or Rule 101 which shall be final and conclusive between the parties and it shall be treated to be a decree for the purpose of Rule 103 and it is subject to appeal and further subject to the result in the prior pending suit under Rule 104. This approach is consistent with ubi jus ebi remedium, shortens the litigation, prevents needless protraction and expenditure and affords expeditious quietus to execution apart from assuaging fair justice. Accordingly I hold that the application under Order 21, Rule 97 of the petitioner or the counter of respondent 1, Narasimha, be treated as an application under Order 21, Rule 97 and it is maintainable.

Even otherwise, the inherent power under Section 151 of the Code also successfully be invoked by the petitioner. The inherent power is in addition to the power which the Court is already possessed of. Procedure is not a vested right. It is to be tailored (to?) attune to the ends of justice. Inherent power is intended to be exercised to prevent miscarriage of justice, or abuse of the process of the Court. Order 21, Rule 97, if interpreted strictly, could be available only when the decree-holder or purchaser chooses to make avail of. Instead, if he persists in execution under Order 21, Rule 35 against a third party not bound by the decree, on issue of Warrant in Form XI of Appendix E of the Schedule to the Code, the bailiff is bound to execute the decree and deliver physical possession under relevant clauses (1) to (3) thereof; if necessary by assault or by use of criminal force. Thereby the procedure aids abuse of the process enabling the decree-holder or the purchaser to over-reach his object to saddle himself in possession of the immovable property depriving the person in possession but not bound by the decree of his valuable right to property.

Procedure is but the machinery of law-- the channel and means whereby law is administered and justice reached. All procedure, therefore, is an armour to effectuate the right to property. Procedural safeguard is an ingrained facet of fair play in action to subserve the legal right and not to extinguish it. The highest duty of a Court is to take care that its act does not injure a suitor. Thus, in a given situation, as stated earlier, if inherent power is not exercised by the Court to modulate its procedure, it would facilitate heaping injustice upon a rightful person."

30. In view of the decision in ***Tahera's case (supra***) it is evident that the petitioner was fully justified in apprising the Court and the decree-holder that the petitioner is not bound by the decree and the decree in question cannot be executed against him and once this was done, there was no other option before the Execution Court except to decide/adjudicate the question(s) related to right, title or interest in regard to the property in issue as per Order 21 Rule 101.

31. From the above referred judgments, it is evident that not only the decree-holder or a person dispossessed in the execution of the decree has a right to make an application to the Execution Court but a person who is apprehending dispossession can also make an application to the Court and when such an application is brought before the Court, the said Court shall be obliged to make an enquiry into the allegations and pass an order after making the enquiry into the right, title or interest of the party.

32. This Court, in the judgment passed in the case of ***Jahid Khan and another v. Suresh Chandra Jain and others*** reported in ***(2013) SCC Online All 13354***, after considering the judgments passed in the case of ***Brahmadev Chaudhary (supra)*** and ***Shreenath*** (supra), also took the view similar to the view taken above, as appears from the following observations:-

"**14**. In view of the above decisions of the Supreme Court the law appears to be settled that once a complaint resisting or obstructing a decree execution of a decree of possession of immovable property is made by a person claiming to be in possession, his rights thereof are liable to be adjudicated first before he is dis-possessed and he should not wait for

loosing possession to the decree holder and then to make an application under Rule 99 of Order XXI, C.P.C."

33. Thus, in view of the above, this Court is of the considered opinion that the application filed by the resistor/obstructor under Order 21 Rule 97 claiming himself to be in possession of the property in issue/dispute, would be maintainable and for this very reason, the same should be decreed on merits even if no application is filed by the decree holder to the Court complaining/informing regarding resistance/obstruction in obtaining the possession of the property in decree.

34. The question(s) framed above are answered accordingly.

35. In view of the above, it was incumbent upon the Execution Court to decide/adjudicate the application/objection of the petitioner preferred under Order 21 Rule 97/99/101 CPC to find out the nature of the rights of the petitioner over the disputed property. Thus, the Execution Court committed error in rejecting the application/objection of the petitioner under Rule 97/99/101 of Order 21 CPC as not maintainable.

36. For the all reasons aforesaid, the present petition is allowed and the impugned orders dated 29.10.2021 and 11.11.2021 passed by the Execution Court in Execution Case No. 1 of 2017 are set-aside and the matter is remanded back to Execution Court for afresh decision of the application/objection of the petitioner under Order 21 Rule 97/99/101 CPC in accordance with law as expeditiously as possible preferably within a period of six months from the date of production of certified copy of this order, if possible and if there is no other legal impediment in this regard. In concluding the proceedings, the court concerned shall avoid unnecessary adjournments to the parties.

37. In above terms, the petition is ***allowed***.

(2022)02ILR A304
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.02.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Crl. Misc. Bail Appl. No. 862 of 2022

Sri Krishna Rathor ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Suyesh Pradhan

Counsel for the Respondents:
G.A.

A. Bail - The Court granted him bail on the ground that the witnesses are from inside the family and amongst the native villagers and therefore there is no possibility of the applicant of fleeing away from the process of the Court. (Para 18)

Bail Application Allowed. (E-10)

List of Cases cited:

1. Bhagwan Singh Vs The St. f Uttarakhand (2020) 14 SCC 184

2. Sanjay Chandra Vs Central Bureau of Investigation (2012) 1SCC 40 Spectrum Scam Case

3. Prahlad Singh Bhati Vs NCT, Delhi & anr. 2001 4 SCC 280

4. Dataram Singh Vs St.of U.P. & ors. (2018) 3 SCC 22

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Learned counsel for the bail applicant, Sri Vaibhav Srivastava, Advocate assisted by Sri Suyesh Pradhan, Advocate and learned A.G.A. for the State, Sri Ajay Kumar Singh Tomar, Advocate are physically present in the Court.

3. The present bail application is moved on behalf of accused-applicant Sri Krishna Rathor, involved in Case Crime No.511 of 2021, under Section 304 of the I.P.C., registered at Police Station Sandana, District Sitapur.

4. The occasion of present bail application has arisen on rejection of bail plea of the accused-applicant by learned Special Judge, Sitapur vide order dated 11.01.2022.

5. Counter affidavit and rejoinder affidavit have duly been exchanged between the contesting parties to the case, as such, the case is ripe for hearing.

6. Opening the argument, learned counsel for the bail applicant addresses the case as a case of harsh (celebratory) firing but peculiarly enough the firing is done by one inmate of the house in a tilak ceremony of another family member in enthusiasm of the ceremonial spirit. Daringly enough he opened the fire by reason of which a woman of the concerned family got seriously injured and ultimately died on spot. Another peculiarity of the fact lies in the first information report of the incident is not lodged by any of the family members but it was noticed by local police itself entered in G.D. of 07.12.2021. It is reported by the police officer that at about 07:30 P.M. when the tilak ceremony was going on the fire was made open in enthusiasm by accused-applicant causing hurt and fatal injuries to the woman i.e. the deceased victim namely Anju D/o Ramnath and wife of one Pradeep.

7. Learned counsel submitted that there was neither the intention to kill the deceased nor the pistol was aimed to fire on her, therefore, act of the accused-applicant was atmost of rash and negligence. He further added that not only the present accused-applicant but there were so many others also present in the ceremonial crowd who opened harsh (celebratory) firing in the same enthusiasm as shown by the present accused-applicant. Learned counsel further submitted that it is not established by the prosecution that only the present accused-applicant's act was responsible for causing death of the deceased "Anju".

8. Learned A.G.A. on the other hand protested the bail application quoting the statement of witnesses who are relatives and were gathered at the ceremonial place at the relevant time of incident particularly the statement of Smt. Shanti Devi i.e. mother of the deceased, impressing on the fact that she has confined the role of fatal firing causing the death of the deceased immediately on the spot to the present accused-applicant only.

9. Learned A.G.A. further quoted the first information report which was investigated and ultimately charge sheet was submitted wherein number of witnesses are named who were present on spot at the relevant time of incident and

have unequivocally stated about the firing, however, some of them have not stated to have seen any particular person firing by whom, the fatal injuries occurred to the deceased "Anju".

10. On the ground of aforesaid materials available on the case diary, learned A.G.A. submitted that offence is not only rash, negligent and irresponsible but also unmindful act with brutality in nature. However, any kind of previous enmity on the part of present accused-applicant with the family members of the deceased is not stated in the counter affidavit even criminal antecedent is not stated.

11. Learned counsel for the bail applicant submitted that the present accused-applicant is a government servant and his employment is the only means of livelihood for his entire family, as such, there is a question at this stage whether he should be given an opportunity to defend himself in the course of trial.

12. Hearing the learned counsel for the bail applicant, learned A.G.A. for the State and after perusing materials available on record, it would be relevant to quote Section 299 of the Indian Penal Code, 1860, which runs 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 there by 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 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."

13. In the present case which emerges out from the first information report and the statement of the witnesses that the firing was done though without any intention on the occasion of ceremony of tilak in the

house of incident where numerous relatives and villagers were gathered not only on the ground but also on the roof of the house of incident, using fire arm in such a crowded gathering is rash and negligent which caused an irreparable loss to the family of the deceased not able to be compensated in terms of money, but since every accused, howsoever graver may be the offence, should be given an opportunity to defend himself by putting evidences in his favour, if any, in the course of trial.

14. In ***Bhagwan Singh vs The State Of Uttarakhand, Criminal Appeal No.407 of 2020 decided on 18.03.2020*** reported in ***(2020) 14 SCC 184,*** Hon'ble the Apex Court has observed as under:-

"*Incidents of celebratory firing are regretfully rising, for they are seen as a status symbol. A gun licensed for self-protection or safety and security of crops and cattle cannot be fired in celebratory events, it being a potential cause of fatal accidents."*

15. In the present case also, it appears prima facie from the evidence on record that the appellant aimed the gun towards the roof and then fired. It was an unfortunate case of misfiring. The applicant ofcourse cannot absolve himself of the conclusion that he carried a loaded gun at a crowded place where his own guests had gathered to attend the marriage ceremony. He did not take any reasonable safety measure like to fire the shot in the air or towards the sky, rather he invited full risk and aimed the gun towards the roof and fired the shot. He was expected to know that pellets could cause multiple gunshot injuries to the nearby persons even if a single shot was fired. As such by his act the applicant has himself brought his case under the purview of offence under Section 299 of the Indian Penal Code, 1860 punishable under Section 304 of the Indian Penal Code, 1860.

16. Hon'ble the Supreme Court in para 21, 22 and 23 of the judgment given in the case of ***Sanjay Chandra Vs. Central Bureau of Investigation*** reported in ***[(2012 1 SCC 40)-(Spectrum Scam Case)]***, has laid down certain objects of bail under Section 437 & 439 of the Cr.P.C. which are as follows:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the

witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

17. In ***Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280***), Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

18. In the present case as the record shows charge sheet has already been submitted by the Investigating Officer before the Court concerned, trial is to be continued, the witnesses are more so inside the family and amongst the native villagers, therefore, there is no possibility of fleeing away from the process of the Court.

19. Keeping into mind the valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence, as it is held in the judgment of Hon'ble the Supreme Court in ***Dataram Singh Vs. State of U.P. and ors. reported in (2018) 3 SCC 22***, I find force in the submission of learned counsel for the bail-applicant to enlarge him on bail.

20. Keeping into mind the grief and bereaveness of the family who have lost their daughter, though the accused-applicant in the present case may be granted order to be released on bail but some conditions also need to be encumbered on him in a bid to compensate to the bereaved family to an insignificant extent.

21. Let the accused-applicant ***(Sri Krishna Rathor***) involved in Case Crime No.511 of 2021, under Section 304 of the I.P.C., registered at Police Station Sandana, District Sitapur be released on ***bail only on paying of Rs.5,00,000/- through a bank***

draft in the name of mother of the deceased namely Smt. Shanti Devi W/o Ramnath and on his furnishing a personal bond of Rs.1,00,000/- and two reliable sureties of the like amount to the satisfaction of the court concerned subject to following additional conditions, which are being imposed in the interest of justice:-

(i) If proceeding for cancellation of armed license is not done, the District Magistrate, Sitapur is required to initiate proceeding in accordance with law for the purpose to cancel the arm license of the accused-applicant in circumstances of the case.

(ii) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iv) In case, the applicant misuse the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and if the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(v) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(2022)02ILR A309
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.02.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 595 of 1982

Babu Pasi alias Babu Lal Pasi & Anr. **...Appellants**

Versus

State of U.P. **...Respondent**

Counsel for the Appellants:
J.N. Chaudhary, H B Singh, Harendra Pratap Singh, Ram Chandra Dwivedi, Saket Tiwari, Shilendra Kumar, Sumit K. Srivastava

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code,1860 - Sections 300, 302 r/w 34 , 114, 396, 307, 323, 325 & 404 - Code of Criminal Procedure, 1973 – Sections 313, 374 (2), 378 (1) & 437 A, Evidence Act, 1872 - Section 3 - Offence of Murder – Attempt to Murder – Dacoity with Murder – Evidence of Eye witnesses – Credibility & Reliability - all three eye witnesses – Alleged to be self contradictory and their presence on the spot is doubtful.

Criminal Law - Indian Penal Code,1860 - Sections 300, 302 r/w 34 , 114, 396, 307, 323, 325 & 404 - Code of Criminal Procedure, 1973 – Sections 313, 374 (2), 378 (1) & 437 A - Evidence Act, 1872 - Section -3 - offence of Murder – Testimony of Eye witnesses – Credibility & Reliability - Eye witnesses implicated also Nine other co-accused

persons whom were clearly acquitted by the Trial Court being not appreciating the evidence of these eye witnesses against them and their acquittal has not been challenged by the state or by the informant.

Criminal Law -Indian Penal Code,1860 - Sections 300, 302 r/w 34 , 114, 396, 307, 323, 325 & 404 - Code of Criminal Procedure, 1973 – Sections 313, 374 (2), 378 (1) & 437 A - Evidence Act, 1872 - Section 3 - Offence of murder - Testimony of Eye witnesses – Credibility & Reliability – Mistakes made in identification parade the eye witnesses – the eye witnesses, informant and other are makes statements before the Special Exe. Magistrate that they saw and identified those accused persons are committing dacoity and murdered – but prosecution case was not relates with robbery with murder – though Eye witnesses and the informant are seating in bus nearby but why they are not take efforts to save deceased persons rather they peacefully watching, got down from the bus and take shelter behind the tree with their luggage – they did not see whom were make fire upon the deceased - they were heard names of accused persons on saying of other passengers.

Criminal Law - Indian Penal Code,1860 - Sections 300, 302 r/w 34 , 114, 396, 307, 323, 325 & 404 - Code of Criminal Procedure, 1973 – Sections 313, 374 (2), 378 (1) & 437 A - Evidence Act, 1872 - Section 3 - Offence of murder - Testimony of Eye witnesses – Credibility & Reliability – eye witnesses deposed that accused persons were armed with Katta, rifle and gun – admission of eye witness that third person who were seating nearby the deceased with empty handed had not received any injury and despite being relationship with deceased they were not reacted on the incident – testimony of eye witnesses is not trustworthy.

Criminal Law - Indian Penal Code, 1860 - Sections 300, 302 r/w 34 , 114, 396, 307, 323, 325 & 404 - Code of Criminal Procedure, 1973 – Sections 313, 374 (2), 378 (1) - 437 A - Evidence Act, 1872 - Section 3 - Offence of murder - Testimony of Eye witnesses – Credibility & Reliability – in Medical evidence - injury no. 1 is attributable by sharp edged weapon which more fatal and with possibility of death due to alone in comparing to injury no. 4 of fire arm – contrary this - both eye witnesses did not stated about other mode of assault upon the deceased persons – Furthermore – prosecution fails to explain how multiple incised wound came on the body of the deceased persons and also there is no any recovery of Katta or fire arms - accused entitled to be benefit of doubt.

Criminal Law - Indian Penal Code,1860 - Sections 300, 302 r/w 34 , 114, 396, 307, 323, 325 & 404 - Code of Criminal Procedure, 1973 – Section 313, 374 (2), 378 (1), 437 A - Evidence Act, 1872 - Section 3 - Offence of murder – Non-Examination of Material & Natural Witnesses – neither the informant nor injured nor deriver and conductor of the bus has been examined by the prosecution – no explanation given for their non-examination - hence adverse inference against the prosecution deserves to be drawn and accused person has entitled to be benefit of doubt.

Criminal Law - Indian Penal Code,1860 - Sections 300, 302 r/w 34 , 114, 396, 307, 323, 325 & 404 - Code of Criminal Procedure, 1973 – Section 313, 374 (2), 378 (1) & 437 A - Evidence Act, 1872 - Section 3 - Offence of murder –Standard of proof – duty of prosecution - case of triple murder is going to unpunished - it might be the case of prosecution is true - it was necessary to examine such other witnesses - findings of the Court - Distance between 'may be true' and 'must be true' has not been covered by prosecution by adducing legal, reliable and unimpeachable evidence - Court are squarely satisfied that instant case is a fit case in respect of the Appellant no. 2 - deserves benefit of doubt - Court propose giving him benefit of that doubt.(Para – 37, 38, 39, 42, 44, 45, 46, 47, 48, 49, 50, 55, 56, 57, 58, 59, 60)

Criminal appeal is allowed judgment and order of session Trial court is set aside. (E-11)

List of Cases cited:

1. Surinder Kumar Vs St. of Har. (2011 Vol. 10 SCC 173)

2. St. of H.P. Vs Gian Chand (2001 Vol. 6 SCC 7)

3. Takhaji Hiraji Vs Thakore Kubersing Chamansingh & ors. (2001 Vol. 6 SCC 145)

4. Dahari Vs St. of UP (2012 vol. 10 SCC 256)

5. Sarwan Singh Vs St. of Punj. (1957 AIR 637)

(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.)

(Per Ramesh Sinha, J. for the Bench)

(A) INTRODUCTION

(1) Eleven accused persons, namely, **Babu Pasi alias Babu Lal Pasi, Ringu Pasi, Ramesh, Madan Lal, Ram Swaroop, Ganga Sewak, Neta alias Kunni, Chandra Kishore, Lalaunoo, Ram Rup, Ram Chandra,** were tried by the VI Additional Sessions Judge, Unnao in Sessions Trial No. 210 of 1981 : *State Vs. Babu Lal and others*.

(2) It is pertinent to mention here that during the trial, accused Babu Lal Master died, whereas accused Vinod Kumar and Babu Lal Dom were absconding, hence their trial was separated from aforesaid eleven accused persons and the trial Court had charged accused Ringu Pasi and Babu Lal Pasi under Sections 302 read with Section 34 I.P.C. for committing murder of Shiv Balak and Ram Balak and under Section 404 I.P.C. for having taken arms from the deceased persons; and accused Ramesh, Madan Lal, Ram Swaroop, Ganga Sewak, Neta alias Kunni, Chandra Kishore, Lalaunoo, Ram Roop and Ram Chandra were charged under Sections 201, 148, 302 read with Section 34 I.P.C. and Section 302 I.P.C. read with Section 114 I.P.C.

(3) Vide judgment and order dated 17.07.1982, the VI Additional Sessions Judge, Unnao, acquitted nine accused persons, namely, Ramesh, Madan Lal, Ram Swaroop, Ganga Sewak, Neta alias Kunni, Chandra Kishor, Lalaunoo, Ram Roop, Ram Chandra and convicted two accused persons, namely, **Babu Pasi alias Babu Lal Pasi (appellant no.1 herein),** Ringu Pasi (appellant no.2 herein) under Section 302 read with Section 34 I.P.C. and Section 404 I.P.C. and sentenced them in the manner as stated hereinafter :-

"(i) Under section 302 read with Section 34 I.P.C. to undergo imprisonment for life; and

(ii) Under Section 404 I.P.C. to undergo one year's R.I."

Both the sentences were directed to run concurrently.

(4) Feeling aggrieved by their conviction and sentence above vide judgment and order dated 17.07.1982, **Babu Pasi alias Babu Lal Pasi (appellant no.1 herein)** and **Ringu Pasi (appellant no.2 herein**) have preferred the instant criminal appeal under Section 374 (2) of the Code of Criminal Procedure.

(5) It is pertinent to mention here that no appeal against the acquittal of nine accused persons, namely, Ramesh, Madan

Lal, Ram Swaroop, Ganga Sewak, Neta alias Kunni, Chandra Kishor, Lalaunoo, Ram Roop, Ram Chandra, has been filed either by the State or by the complainant's side.

(6) It transpires from the record that during pendency of the instant appeal, appellant no.1-Babu Pasi alias Babu Lal Pasi died on 12.07.2015, hence the instant criminal appeal filed on his behalf stands abated vide order dated 07.02.2019. Now the instant criminal appeal survives only in respect of **appellant no.2-Ringu Pasi**.

(B) FACTS

(7) Shorn off unnecessary details, the case of the prosecution is as under :-

Gaya Prasad Singh (informant), son of Sheo Darshan Singh Kachi, who is the resident of village Hamirpur, Police Station Bihar, District Unnao, has lodged an F.I.R., alleging therein that in the year 1979, Chandrika Pasi of his village was murdered, in which his son Ram Balak (deceased), his nephew Raj Narayan son of Suryawali Kachi, Dinesh Chandra (injured) and Harish Chandra alias Kunne, sons of Udai Shanker Shukla, resident of village Bhagwant Nagar, Police Station Bihar, were challaned and in this case, on 30.09.1980, they were required to be present in Court. On that date i.e. on 30.09.1980, his another civil case was listed in Civil Court.

On 30.09.1980, his son Ram Balak (deceased), Shiv Balak (deceased) and his brother Vishnu Dutt came to kachahari (Court) for doing pairvi in both the cases. On the said date, the relatives of Chandrika Pasi and his companions, namely, Babu Lal Pasi Master, Ringu Pasi, Babu Pasi (accused), residents of Village Osiya, Police Station Bighapur, were also gone along with other 2-3 friends to *kachahari* (court) for doing *pairvi* of the case of Chandrika.

In the Court, some hot talk took place between his sons and Babu Lal Master etc. Thereafter, Babu Lal said that "खुन का बदला खुन से चुकाया जायेगा" (blood would be avenged for blood), which was also heard by Ram Narayan Kadi, who had gone there for pairvi of his brother Raj Narayan. On the said date, the case was posted for 06.10.1980.

On 06.10.1980, he (informant Gaya Prasad Singh), his sons Ram Balak (deceased), Shiv Balak (deceased), his nephew Raj Narayan and Shivdhar Singh sons of Ganga Singh, resident of village Bhunau Kheda, Ram Balak Yadav son of Kali Prasad resident of village Pitua Kheda, Ramdas Lohar son of Bhalu, Ram Balak son of Satya Narayan Pasi resident of Village Hamirpur, Police Station Bihar, District Unnao, were gone to *kachahari* (Court) but the case was posted for 07.10.1980, then, they were coming from Kanpur to Buxer through a bus, bearing registration No. U.T.T. 7367, upon which his grand-child Upendra Singh (P.W.1) son of Shiv Balak (deceased) was also returning from Kanpur. Babu Pasi, Ringu Pasi (appellants) of Usiya also boarded on the said bus from Unnao.

When the bus was started to go from Bighapur to Buxer, then, 3-4 men from Bighapur also boarded the said bus and when the bus moved ahead from frjkgk (a place where three road met with each other) of Usiya village at around 05:30 p.m., loud sound jksdks jksdks (stop stop) came inside the bus from its behind and 3-4 fire also

happened in the bus. Thereafter, the bus, after running about 150 yard, stopped and then, they saw that Ram Balak (deceased) and Shiv Balak (deceased) got shot and fell on their seats and near to them, Babu Pasi, Ringu (appellants) and 24 year old wheatish colour boy wearing a red bushirt were holding a katta (pistol) in their hands and while abusing the passengers, asked them that bastard get out from the bus and ran away and if someone spoke, he too would be shot. Thereafter, while snatching the rifle of his son Ram Balak (deceased) and a single bore gun of Shiv Balak (deceased) by Babu Pasi and Ringu Pasi (appellants), respectively, they took it in their hands.

Thereafter, Dinesh Chandra Shukla (injured), who was sitting in front of the seat of the next gate with his rifle facing his face towards back, was caught holding his rifle by a wheatish man wearing Khakhi paint and bushirt and appeared to be a young age. Thereafter, Dinesh tried to escape from the grip of a wheatish man but he was jerked by him and then, while pulling over from bus with rifle, the said wheatish man snatched his rifle. Thereafter, all the passengers got out of the bus and hid under the trees here and there. They (informant Gaya Prasad Singh and Upendra Singh (P.W.1) also ran away and hid here and there under the cover.

As soon as the bus stopped the side of the road, Babu Lal Pasi Master (accused), who was armed with one bore gun and along with him 10-12 persons, who armed with Katta (pistol) and shotguns (अद्धी बंदूके), started firing. When the passengers got down, Babu Lal Master (accused) had said that dead body of the bastard be taken out from the bus, thereupon 3-4 persons entered into the bus and took out the dead body of his two sons, who died on account of shot inside the bus and thereafter, took away the dead bodies of his two sons to the south of the road towards the field. Thereafter, on saying of Babu Lal Master (accused), one of his companion, after soaking his *angaucha* (towel) in water, entered into the bus and cleaned the blood that had fallen in it.

A passenger, who was running towards the east and fell into the water about seven yards east of the road, was too shot by the miscreants. Two miscreants picked up his body and took him towards south of the road towards agriculture. The miscreants fired 15-16 shots and all the miscreants went south through the fields.

Hearing the fire sound, the men working in the nearby fields came on the road and saw the incident and recognized the miscreants. After the miscreants ran away, the said people came near the bus. The passenger, who had boarded the bus from Bighapur, told his name as Lallu Yadav of Mardan Khera, Kishan Mohan of Usiya, Jagmohan Singh of Akwabad, Police Station Bighapur. The men, who had gathered on the spot and who had seen and recognized the miscreants, told that the red bushirt miscreant was Vinod Kumar Chamar; the name of the person wearing Khakhi paint and bushirt was Babal Lal Dom of village Usiya and the name of the other miscreants was Kunni alias Neta, Ram Chandra Ahir, Madan Pasi, Ramesh Pasi, Ram Swaroop Ahir, Ganga Sewak Ahir of Usiya, Lalaunu Pasi of village Bhagrar, Chandra Kishore Lohar of village Aram police station Bighapur Unnao. The name of 3-4 miscreants could not tell by them but they said they would recognize by seeing them.

It has further been stated by the informant Gaya Prasad Singh that his son Shiv Balak was wearing half black tericoat

bushirt, in which big white check was made, one rainy shoe, one rose colour aunguacha having its corner green, H.M.T. Automatic white dial white Kesh and a watch connected with chain amounting to Rs.400/-; and Ram Balak was wearing tericot bellbottom and tericot bushirt, rainy shoe, Omax automatic of catechu color and a watch connected with chain amounting to Rs. 400/-. They were also having license of rifle and gun and cartridge. The window of the bus where his sons were sitting got broken on the shot of miscreants and the seat where his sons were sitting in the bus, were having entry of gun shot and blood stained. On account of the shot of the miscreants, Dinesh Shukla and 2-3 persons were also sustained injuries. The name of the miscreants told by the persons came there after the incident, has not been known by him prior to the incident. He, Upendra Singh, Shivdhar Singh, Ram Balak Yadav, Ram Balak Pasi, Ram Das Lohar had seen the miscreants and recognized them and when they came in front of them, he can recognized them. He and his family members can identify the belongings of his sons when they come in front of them.

(8) Thereafter, informant Gaya Prasad Singh Kachi got the FIR scribed at Bighapur Bus Station through Upendra Singh (P.W.1), who after scribing it read it over to him and thereafter got his signature on it and subsequently handed it over to informant Gaya Prasad, who, then, proceeded to Police Station Bighapur and lodged it.

(9) The evidence of Syed Ibtida Husain Rizvi (P.W. 8) shows that on 06.10.1980, he was posted as Constable Clerk at Police Station Bighapur and on the said date, at 07:15 p.m., informant Gaya Prasad came and filed his written FIR (Ext. Ka.1), on the basis of which he prepared the chik FIR (Ext. Ka.33).

(10) A perusal of the chik FIR shows that the distance between the place of incident and Police Station Bighapur was 3 miles. It is significant to mention that a perusal of the chik FIR also shows that on its basis, Case Crime No. 144 of 1980, under Sections 396, 201 I.P.C. was registered against appellants and 3-4 unknown persons.

(11) The evidence of SI Hari Shanker Singh (P.W. 7), in short, shows as under :-

In October, 1980, he was posted as Station Officer at police station Bighapur. On 06.10.1980, this case was registered in his presence at the police station. He commenced the investigation and proceeded to the place of incident along with the informant (Gaya Prasad Singh) and other witnesses from police station, where Station Officer of police station Bihar and S.I. R.P. Shukla along with Constables were met at the place of the occurrence. He, thereafter, instructed them to search the dead bodies of the deceased and also to search the accused persons. Thereafter, he recorded the statements of Krishna Mohan and Lalloo etc.

On 07.10.1980, at 02:00 a.m., he again commenced the investigation and at the place of occurrence, he recorded the statement of witness Upendra Singh (P.W.1) etc. Subsequently, he inspected the place of occurrence and on the pointing out of the informant and other witnesses, he prepared the site plan (Ext. Ka.5). From the place of incident, he seized two empty catridges, blood stained earth lying on the road on the side of the bus and plain earth near it in two containers under a recovery

memo. He also seized four pellets, fVdyh dkjrwl, and a ticket of roadways bus in two containers under a recovery memo. He also seized the blood stained earth and plain earth from the places "N' and "Q' shown in the site map in two separate containers under a recovery memo. He also seized blood stained ' in the site plan in two separate containers under the recovery memo. Their recovery memo is Ext. Ka. 6 to Ext. Ka. 9.

On the date itself, the dead body of the deceased Shiv Balak was recovered on excavating the field of Devideen and he then prepared a recovery memo (Ext. Ka. 10). Thereafter, the dead body of another person was recovered from that field on excavating it but due to darkness, the Panchayatnama of any corpse could not be done. The dead body of Shiv Balak was identified by Upendra Singh (P.W.1). The accused persons were searched but they were not found at their home. He and other people remained on the spot for the supervision of the dead bodies.

On 08.10.1980, at about 07:00 a.m., he prepared panchayatnama of the dead body of the deceased Shiv Balak (Ext. Ka. 12), photo lash (Ext. Ka. 13), challan lash (Ext. Ka. 14) and a letter to C.M.O. (Ext. Ka. 15) and handed over the dead body of the deceased Shiv Balak in a sealed condition for post-mortem to Constable Ram Vilash etc. To identify the dead body of the unknown person, it was brought from the field of Devideen to Urmiya Tiraha and got identified from the people who were coming and going there. But after not being identified, Ramdas Photographer was called from Janta Studio Bighapur and photo of the dead body of the unknown person was taken in his presence. Thereafter, photographer had handed over the positive photograph of the unknown person to him (Ext. Ka. 14 and Ext. Ka. 15). Thereafter, he prepared the panchayatnama of the dead body of the unknown person (Ext. Ka. 16), photo lash (Ext. Ka. 17), challan lash (Ext. Ka. 18) and a letter to C.M.O. (Ext. Ka. 19) and handed it over to aforesaid Constable Ram Bilas etc. in a sealed condition.

Thereafter, he came at Bighapur Bus Stand, where the bus was standing. From inside the bus, he seized one briefcase (Ext. Ka.16) and articles found inside of it under recovery momo (Ext. Ka. 20). The address was known from the letter found in the briefcase. He also recovered six pellets and 2 vnn fVdyh from inside the bus, which was taken in possession and prepared its recovery memo. He seized the pieces of mirror of broken window inside the bus in a container under recovery memo (Ext. Ka. 23). He found blood on the rexine on the seat of the bus and therefore he cut the blood stained rexine and seized it under recovery memo (Ext. Ka. 24). He also prepared the site plan of the bus (Ext. Ka. 22). The injury report of Dinesh Chandra was received at the police station, which was copied and after that he came at police station, Bihar.

On 09.10.1980, he went to the house of Shiv Kumar Trivedi of village Babu Kheda along with recovered items Ext. Ka. 16 wherein his son Rama Shanker met and he identified the briefcase and clothes inside it and said it was his brother-in-law. Smt. Shail Kumari has said that the briefcase and its article were of his husband.

On 11.10.1980, he handed over the custody of the bus to Sri R.P.Singh, Station Officer, Unnao and got receipt thereof (Ext.

Ka. 24). On the date itself, another dead body was found in the field of aforesaid Devideen on excavating (Ext. Ka. 26) but it could not be identified at that time, therefore, informant Gaya Prasad was called. He prepared the site map of that place (Ext. Ka.25). He, thereafter, left the unknown dead body under the supervision of S.I. R. P. Shukla and came to Unnao and informed the S.P.

On 12.10.1980, informant Gaya Prasad came there, identified the dead body and told that it was his son Ram Balak. He, thereafter, prepared panchayatnama of the dead body of Ram Balak (Ext. Ka. 27), photo lash (Ext. Ka. 28), challan lash (Ext. Ka 29) and a letter to C.M.O. (Ext. Ka. 30). He thereafter sealed the dead body of Ram Balak and handed it over to Constable Ram Pal etc. for post-mortem.

On 14.10.1980, he recorded the statements of Head Moharrir Ram Asre Tiwari, Constable Ram Bilas Yadav and Ram Pal. On 15.10.1980, he came to Unnao and under the order of the Court, Kunni alias Neta was taken in police custody for 48 hours and brought him to police, where he recorded his statement. On 20.10.1980, at about 03:30 a.m., he arrested Madan Pal Cheddi from the Tiraha of Unnao-Raibareli road and Maiku Teli road at the east of village Sikandarpur. On the search of accused Chhedi, he recovered a country-made pistol, four live cartridges and a wrist watch and prepared two separate recovery memo. On the pointing out of accused Madan and Cheddi, he recovered a bag (Ext. Ka. 26), which was buried in the ground under the water in the field of Ludhai Pasi, in which one angaucha (towel) was found (Ext. Ka. 31).

On 23.10.1980, he went to Kanpur and searched other accused persons but he could not find them. On 24.10.1980, photographer Ram Baran had given him five photograph.

On 24.10.1980, he came to know that accused Babu Lal Master, Babu Lal, Ringu, Ramesh, Vinod Kumar and Chandra Kishore (accused) were surrendered themselves in the Court of Chief Judicial Magistrate, Lucknow. On 28.10.1980, he received information from the Court of J.M.-8, Unnao that aforesaid accused persons came to Unnao Jail from the Lucknow Jail on 26.10.1980. On 31.10.1980, he learnt that accused Ramroop, Ram Swaroop and Gram Sewak surrendered themselves in the Court of Unnao on 28.10.1980 and accused Babu Lal Dom surrendered himself in Court on 29.10.1980. On 02.11.1980, the property of the accused Lalaunoo and Chandra Kumar was attached and handed it over to Munni Lal. On 06.11.1980, he came to know that accused Ram Chandra surrendered himself on 03.11.1980. On 10.11.1980, he conducted the proceedings for reporting the identification of aungaucha and watch and on 12.11.1980, he conducted the proceedings for reporting the identification of accused persons. Thereafter, he was transferred to Kotwali and further investigation was done by Jora Singh (P.W.15).

(12) The evidence of H.C. Ram Asre (P.W.9) shows that in the month of October, 1980, he was posted as Head Moharrir at Police Station Bighapur. On 09.10.1980, Devideen, son of Lalloo, resident of Ibrahimpur, P.S. Saraini, District Raibareli, came at the police station. He stated that Devideen was sent for medical examination along with Constable Sriram with *chithi majroobi* (letter for medical examination) at Primary Health Centre, Bighapur. On

20.10.1980, he took accused Madan Lal and Chhedi Lal from police station Bighapur at 11:10 a.m. and detained them at District Jail, Unnao.

In cross-examination, P.W.9 H.C. Ram Asrey had deposed before the trial Court that accused Madan and Cheddi were arrested on 20.10.1980 and at 10:15 a.m., they were brought at police station. The injuries of Devideen, which he had seen, were mentioned in the G.D.

(13) The evidence of Sri Janardan Singh (P.W.10) shows that on 29.12.1980 and also on 03.01.1980, he was posted as Executive Magistrate at District Unnao. On 03.01.1981, he conducted the identification parade of accused Vinod Kumar, Babulal son of Dhannu Dom and Ramesh and Ram Chandra, Ram Swaroop, Ramroop, Ganga Sewak, Madan Lal, Lalaunu alias Chandra Kumar and Chandra Kishore at District Jail, Unnao. A separate parade consisting of 10-10 undertrial prisoners with each accused was prepared and the witnesses were called one by one. During identification, they were made to sit in such a place where they would not have a conversation with the coming witnesses nor made any indication. The result of the identification parade was that the accused Babu Lal was correctly recognized by the witness Gaya Prasad Singh; accused Chandra Kishore was correctly recognized by the witness Upendra Singh; accused Vinod Kumar and Madan Lal were corrected recognized by the witness Ramdas. He prepared the proceedings of identification directly, which is in his handwriting and signed (Ext. Ka.38)

Similarly, on 29.12.1980, he conducted the identification parade of blood stained aungaucha (Ext.1) at his office. The result of such identification was that witnesses Gaya Prasad Singh, Upendra Singh, Gajendra Singh and Devendra Singh had correctly identified the said aungaucha. He had prepared the proceedings in respect of the identification, which is in his handwritten and signature (Ext. 39)

In cross-examination, P.W.10 has stated that at the time of identification of goods, they did not get information who is the accused in this case and who is his lawyer, hence the accused was not informed about the identification proceedings. Witness Gaya Prasad had made one mistake in identifying the other accused; witness Upendra Singh also made nine mistakes in identifying other accused; witness Dinesh Chandra made ten mistakes in identifying ten accused. The statements given by the witness to him were "डकैती व कत्ल करते वक्त मौके पर देखा था". Witness Upendra was also given the same statement to him.

(14) The evidence of Constable Shiv Charan Mishra (P.W.11) shows that on 29.12.1980, he was posted as Court Moharrir in the Court of Special Executive Magistrate. On that date, he brought out a sealed bundle good from Sadar Malkhana, Unnao to the Court and after completion of identification proceedings, he brought the sealed bundle good from the Court and lodged it to Sadar Malkhana. The goods belonged to this case.

(15) The evidence of Head Constable Annirudh Prasad (P.W.13) shows that on 21.10.1980, he was posted as Moharrir at Sadar Malkhana. On the said date, two sealed bundle of this case was deposited by Constable CP 31 Jagdish Prasad in Sadar Malkhana. He also stated that on 29.12.1980, one sealed and stamped

bundle, in which bag and angaucha were there, was brought by Constable Shiv Charan Mishra (P.W.11) to the Court for identification and after identification of the aforesaid goods, Constable Shiv Charan Mishra (P.W.11) deposited it in a sealed condition in Sadar Malkhana.

(16) The evidence of Ram Baran Verma (P.W.14) shows that in the year 1977, he was doing the work of photography at Bighapur, where he has a studio. On 08.10.1980, he took the negative of Ext. 14, 15. 17, 18 and 19 and he also brought it. He further stated that the same has been filed by him in the Court, in which Ext. 27, 28, 29, 30 and 31 were mentioned. He further stated that for this negative, he prepared the positive photograph print (Ext. 14, 15, 17, 18 and 19) and gave it to the Inspector.

In cross-examination, P.W.14 has stated that the bazar (market) of Bighapur is closing once in a week i.e. on Monday. On that day when he prepared the photo, bazar (market) was also closing on Monday. He clicked the photo of the dead body at the *tiraha* of Usiya and also clicked the photo of the bus at Bus Stand Bighapur.

(17) The evidence of P.W.15 Jora Singh shows that on 29.11.1980, he was posted as Station Officer at Police Station Bighapur. He took the investigation of the case himself after transfer of the Investigating Officer Sri Hari Shanker (P.W.7. After completion of the investigation, the appellants and the acquitted accused were charge-sheeted vide charge-sheet dated 11.01.1981 (Ext. Ka. 43).

In cross-examination, P.W.15 has stated before the trial Court that he did not send the blood stained items to Chemical Examiner for examination. On asking the reasons thereof, he stated that he was not paying attention.

(18) Going backward, the injuries of Dinesh Chandra Shukla and Devi Deen were examined on 07.10.1980 and 09.10.1980, at 1:30 p.m. and 03:30 p.m. at District Hospital, Unnao and Primary Health Centre, Bighapur by Dr. Vrij Narayan Saxena (P.W.3) and Dr. Keshav Gupta (P.W.12), respectively, who found injuries on their person as enumerated hereinafter :-

"Injuries of Dinesh Chandra Shukla

1. Incised wound 2 cm x 0.25 cm x .15 cm on the 1st past aspect of left forearm 5 cm above the medial epicondyle tailing present on the above side, margins clear cut.

2. Abrasion 2 cm x 2 cm on the lateral aspect of Rt. knee joint.

Injuries of Devi Deen

1. Rounded firearm wound 8 cm below Lt. tibia bone. 1 cm in diameter muscle deep (probed). Feeling of Hard Mass like a pallet 3 cm medial to wound area all around the wound in swollen and tender.

2. Rounded fire arm wound 11 cm down and out from Lt. tibial tubercli measuring 1 cm in diameter. Muscle deep (probed). Blackening is present at the mouth and wound while pressing the wound slight pus and blood has come out."

(19) It is significant to mention here that Dr. Vrij Narayan Saxena (P.W.3), who examined the injured Dinesh Chandra Shukla, has deposed before the trial Court

that on 07.10.1980, he was posted as Emergency Medical Officer, District Hospital, Unnao and on the said date, he conducted the medical examination of injured Dinesh Chandra Shukla. On examination of injured Dinesh Chandra Shukla, he found two injuries on his person. As per his opinion, injuries were one day old; injury no.1 could be attributable by sharp edged weapon and injury no.2 by scrubbing; these injuries could be attributable on 06.10.1980 at 05:30 p.m.; and the injury of knee could be caused by falling rough paved road.

In cross-examination, P.W.3- Dr. Vrij Narayan Saxena has deposed that none of the these two injuries could be caused by fire arm; and both the injuries are superficial and could be self-inflicted.

(20) As stated hereinabove, the injuries of Devi Deen was examined by Dr. Keshav Gupta (P.W.12), who deposed before the trial Court that on 09.10.1980, he was posted as Medical Officer in Primary Health Centre, Bighapur. On the said date, at 03:30 p.m., he examined the injured Devideen, who was brought by Constable Sri Ram of Bighapur Police Station. On the examination of injured Devi Deen, he found two injuries on his person. As per his opinion, injuries could be attributable by any fire arm weapon; duration of the injuries at the time of examination was about three days old; he advised x-ray for both the injuries; he prepared the injury report (Ext. Ka. 42); and all the injuries on his person could be attributable on 06.10.1980 at 05:30 p.m.

In cross-examination, he had deposed before the trial Court that on 06.10.1980, he went to Bighapur. The hospital of Bighapur is at a distance of 2 kms from the police station.

(21) The autopsies on the dead bodies of deceased persons, namely, (1) unknown person, (2) Shiv Balak and (3) Ram Balak, were conducted on 09.10.1980, 08.10.1980 and 13.10.1980 at 01:30 p.m., 04.00 p.m. and 1:30 p.m., by Dr. Adarsh Sanghi (P.W. 4), Dr. J.N. Bajpai (P.W.5) and Dr. R.R. Aacharya (P.W.16), who found on their person ante-mortem injuries, enumerated hereinafter :-

"Ante-mortem injuries of unknown person

1. Gun shot wound of entry circular in shape 11/2" x 11/2" x chest cavity deep. On the upper part of the chest 11/2" below left sterno clavicular joint margins inverted and contused. Blackening and tattoing not present.

2. Incised wound 2" x 1/2" x bone deep on the right cheek, 1/2" away from right alae of nose. The under lying maxillary bone is cut.

3. Incised wound 3" x 1/2" x bone deep over right cheek 1/2" interior to injury no.2.

4. Circular lacerated wound 1/2" x 1/3" x muscle deep just above right elbow joint.

5. Lacerated wound 1/2" x 1/3" x muscle deep on right fore-arm back 2" below elbow joint.

6. Gun shot wound of entry 11/2" x 11/4" x muscle deep on the anterior part of left buttock 3" is below iliac crest. Margins inverted and contused. No blackening or tattoing.

7. Four gun shot wounds 1/2" x 1/3" each into muscle deep on the anterior part of the right buttock in an area of 31/2" x 2".

Margins inverted and contused. No blackening or tattoing. "

"**Ante-mortem injuries of Shiv Balak, son of Gaya Prasad Singh (informant)**

1. Multiple incised wounds in an area of 6" x 6" x bone deep carsury lev on left side of face, left side of nose, left side of cheek and left side of chin. Margins (illigble) clear cut.

2. Gun shot wounds of entry 1" x 1" x chest cavity deep on the right side of chest lower parts. 2" above part of stomach.

3. 4 Gun shot wounds of entry 1/2" x 1/3" x chest cavity deep on the right side of the chest in an area of 3" x 11/2 ". 4" outer of the injury no.2 and 11/2" from the right nipple.

4. Gun shot wounds of entry 1" x 1" into abdominal cavity deep on the left side abdomen upper part. 9th below left arm pit 7th outer to unsclicus."

"Ante-mortem injuries of Ram Balak, son of Gaya Prasad Singh (informant)

1. Incised wound 12.0 cm x 4.0 cm x bone deep on (L) face from (L) ear to lower jaw. Maxillary bones (L) mandible bone of (L) skull cut.

2. Incised wound on (L) neck 3.0 x 1.0 cm x bone deep middle.

3. Incised injury 8.0 x 0.5 cm x muscle deep on mid, upper abdomen.

4. Firearm wound of entry on (L) shoulder region scapular region, oblique 2.0 x 1.5 cm direction from (L) to (R). Scapular bone (L), back of IV & V rib (L) broken found at (R) lung."

The cause of death spelt out in the autopsy reports of the deceased persons was shock and haemorrhage as a result of ante-mortem injuries which they had suffered.

(22) It is signification to mention here that in their depositions in the trial Court, Dr. Adarsh Sanghai (P.W.4), Dr. J.N. Bajpai (P.W.5) and Dr. R.R. Aacharya (P.W.16) have reiterated the said cause of death of the deceased (1) unknown person, (2) Shiv Balak and (3) Ram Balak, respectively.

(23) P.W.4-Adarsh Sanghai has deposed before the trial Court that on 09.10.1980, he was posted for post-mortem duty and on that date, at about 01:30 p.m., he conducted the post-mortem of the dead body of an unknown person, which was sent by S.O. Bighapur and brought it by C.P.282 Ram Bilash Yadav in a sealed condition and identified it by him. On examination, he initially found that the age of the deceased was about 30 years; it had been almost three days old since he died; the body physique was average; the stiffness of the body after death had ended; the decomposition of the body had begun; the body was covered with mud; the insects were crawling on the body; and blisters were present on the whole body.

He further stated that on internal examination, it was found that the brain was decomposed; in the bone of pleura, one bending, two pellete, about half litre blood and fluid were found; both right and left lungs were torn; heart was torn and empty; the upper part of the sternum bone was broken; about 50 grams of semi-digested food was present in the stomach; small intestine was empty; and faces were present in the large intestine. He has further deposed that he found five big pellet and one piece of bending from the body of the deceased, which was sealed and sent to S.P.

Unnao. The report of post-mortem is in his handwriting and signature (Ext. Ka.3). The death of the deceased could be attributable on 06.10.1980 at 05:30 p.m. Injuries no. 4 and 5 could not be caused by fire arm. He further stated that it is difficult to distinguish between the injuries caused soon before the death and within half an hour immediately after the death.

In his cross-examination, P.W.4-Dr. Adarsh Sanghai has deposed that the clotting of the blood starts immediately after death. When the blood starts clotting, the dripping of the blood decreases. After the death, skin and subcutaneous tissue etc. starts getting hard. It is difficult to say that within 10-15 minutes, it becomes hard. After hardening, the inflicted injuries could be distinguishable from earlier injuries of death. He had minutely observed the injuries found during the post-mortem. Injuries No. 2, 3, 4, and 5 were ante-mortem. He further stated that at this moment, it is difficult to say where there was blood in these injuries as it is not mentioned in the report. He is not the ballistic expert. As per his opinion, bending could go into the body on firing from three feet with a pistol. The blackening and tattooing will not come in the condition of wearing clothes. One injury i.e. No.1 appears to have been inflicted within three feet. The death is also possible on 06.10.1980 at around 7-8 pm. The name and address of the deceased was unknown at the time of post-mortem. In the winter season, the blood coagulates quickly.

(24) P.W.5-Dr. J.N. Bajpai, in his examination-in-chief, has deposed that on 08.10.1980, he was posted as Radiologist at District Hospital, Unnao and on that date, at 04:00 p.m., he conducted the post-mortem examination of the deceased Shiv Balak Singh, which was brought by Constable 354 C.P. Ram Pal Singh, Police Station Bighapur in a sealed condition and identified it by him. On examination, initially he found that the age of the deceased was about 40 years and it had been almost 2 days since he died. The physical appearance of the deceased was normal. There was mud on the body of the deceased. The post-death stiffness was not present and no sign of rot was found. He further deposed that on internal examination, he found that right side bone of the chest and seventh rib bone were broken; eighth and ninth rib on the left side of the chest were broken; the pleura on the right side had ruptured; about half a liter of blood was present in the pleural cavity; the right lung was torn; the membrane above the heart was also torn and was empty; the peritoneum was also torn; one liter of fluid was present in abdominal cavity; stomach and small intestine were empty and stool was present in large intestine; liver was ruptured on the right side; the spleen was also torn. He further stated that he prepared the post-mortem report (Ext. Ka. 4). The death could be possible on 06.10.1980 at 05:30 p.m. He also stated that gun shot injury would come from firing from close range because blackening was present. If injury no. 1 is caused immediately after death, it is difficult to distinguish it as ante-mortem and post-mortem. He stated that in his opinion, injuries no. 3 and 4 of the fire arm cannot be done after the death.

In his cross-examination, P.W.5 has deposed that he cannot say from how many shots, injuries no. 2, 3 and 4 would have come. He cannot say whether injuries no. 2, 3 and 4 came from one shot or from three shots. These injuries could be possible on 06.10.1980, at 7-8 p.m.

(25) The evidence of P.W.16- Dr. R.R. Acharya shows that on 13.10.1980, he was posted as Orthopedic Surgeon in District Hospital, Unnao. On the said date, at 1:30 p.m., he conducted the post-mortem of the deceased Ram Balak, son of Gaya Prasad, which was brought by C.P. 359 Ram Nath Singh of police station Bighapur in a sealed condition and identified by him. On examination of the body of the deceased Ram Balak, he opined that the deceased was about 40 years old and it had been almost 7 days since he died. On internal examination, he found that the left side skull bone was chopped off; the stomach and small intestine were empty; gas and faces were present somewhere in the large intestine. He further stated that injuries no. 1, 2 and 3 was inflicted with a sharp edged weapon and injury number 4 was inflicted by a fire arm. He had prepared the post-mortem report (Ext. Ka. 45) at the time of inspection, which was in his handwriting and signature. The death of the deceaed could be possible on 06.10.1980 at 05:30 pm.

In cross-examination, he has stated that the death of the deceased could be more possible on account of injury no.1. The injury no.1 was more fatal than injury no.4. He further stated that it could not be possible for a man to survive after injury no.1. Injury no.1 could also be possible after death. He also stated that advance sign of decomposition in the dead body was present. The maggots flies were present in the dead body of the deceased. The skin was shriveled and the skin was also come out somewhere from the dead body. He could not find the mud on the dead body of the deceased.

(26) The case was committed to the Court of Session in the usual manner where the convicts/appellants Ringu Pasi and Babu Pasi were charged under Sections 302 read with Section 34 I.P.C. for committing the murder of Sheo Balak and Ram Balak and under Section 404 I.P.C. for having taken arms from the deceased persons; and the acquitted accused, namely, Ramesh, Madan Lal, Ram Swaroop, Ganga Sewak, Neta alias Kunni, Chandra Kishor, Lalaunoo, Ram Roop and Ram Chandra, were charged under Sections 201, 148, 302/34, 302/114 I.P.C. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(27) During the trial, in all, the prosecution examined 16 (sixteen) witnesses, namely, P.W.1 Upendra Singh, P.W.2 Lallu, P.W.3 Dr. Vrij Narayan Saxena, P.W.4 Dr. Adarsh Sanghi, P.W.5 Dr. J.N. Bajpai, P.W.6-Krishna Mohan, P.W.7-Hari Shanker Singh, P.W.8 Syed Ibtida Husain Rizvi, P.W.9 Ram Asrey, P.W.10 Janardan Singh, P.W.11 Shiv Charan Mishra, P.W.12 Dr. Keshav Gupta, P.W.13 Anirudh Prasad, P.W.14 Ram Baran Verma, P.W.15 Jora Singh and P.W.16 Dr. R. R. Aacharya. Out of sixteen witnesses, three of them, namely, Upendra Singh (P.W.1), Lallu (P.W. 2) and Krishna Mohan (P.W.6) were examined as eye-witnesses.

(28) P.W.1-Upendra Singh, in his examination-in-chief, has deposed before the trial Court that he is the resident of village Hamirpur, police station Bihar. Village Usiya police station Bighapur is about 25 km away from his village. The deceased Shiv Balak and Ram Balak was his father and uncle, respectively. The name of his grand-father is Sri Gaya Prasad Singh. His uncle Ram Balak lived separately from his father. He was studying in Kanpur at the time of incident. Chandrika Pasi of his village was murdered

about 7-8 months before this incident, in which his uncle Ram Balak and Raj Narayan etc. were challaned. Raj Narayan happens to be his uncle in a distant relationship. Dinesh Chandra and Harish Chandra, who were accused in the murder of Chandrika Pasi, is a resident of village Bhagwant Nagar.

The hearing in Chandrika's murder case was fixed on 06.10.1980 at Unnao. On 06.10.1980, he was coming from Kanpur to his village by bus. This bus goes from Kanpur to Buxar. Buxar lies ahead of Bhagwant Nagar. The bus starts from Kanpur at 3 or 3.30 pm in the evening. The number of that bus was U.T.T. 7367. For going from Kanpur to Buxar, the bus goes via Unnao. When the bus arrived at Unnao Bus Station, his father (deceased Shiv Balak) and uncle Ram Balak (deceased), grand-father Gaya Prasad (informant), Harish Chandra and injured Dinesh Chandra, Ram Balak Yadav resident of Pituakheda, Shivadhar Singh resident of Munaukheda, Ram Das Lohar resident of Hamirpur, Ram Balak Pasi resident of Hamirpur met him. At that time, his father (deceased Shiv Balak) was armed with 12 bore licensee gun; his uncle Ram Balak (deceased) was armed with rifle; and Dinesh Chandra (injured) was armed with rifle. They all were sitting on that bus. He was sitting on a two seater with his grand-father. His father (deceased Shiv Balak), uncle (deceased Ram Balak) and Harishchandra were seated behind him on the bus. Shivdhar, Ram Das, Ram Balak Yadav and Ram Balak Pasi were sitting on the rear seat of the bus. Babu Lal Pasi and Ringu Pasi (convicts/appellants) were also sitting from Unnao Bus Station on this bus. He knew both of them from earlier. Both of them used to come at Chandrika's house of his village with Babu Lal Pasi Master. After this incident, Babu Lal Pasi Master was killed in encounter.

After crossing Unnao, the bus reached at Bighapur Bus Station, where some passenger got off and some passengers boarded on the bus. The *tiraha* (an intersection of three roads) of Usiya is about 4-5 kms from Bighapur Bus Stand. For going from Bighapur to Bhagwant Nagar, the bus goes through Usiya *tiraha* (an intersection of three roads). After running from Bighapur, the bus stopped at the *tiraha* (an intersection of three roads) of Usiya. When the bus went 50-60 yards from the *tiraha* of Usiya, a loud sound of "रोको रोको (stop stop)" inside the bus came behind it and 3-4 fires also happened in the bus. When he looked back, he saw that his father (deceased Shiv Balak) and his uncle (deceased Ram Balak) got shot and they rolled on the seat. The bus stopped after running about 100-125 yards from the place where the bullet was fired. He saw that Babu Lal Pasi, Ringu Pasi and a 22-24 year's old boy wearing red bushirt were standing near the seat of his father and uncle and all of them were armed with Katta (gun). Later on he came to know that the name of the boy wearing a red bushirt was Vinod Kumar. The rifle of his uncle was snatched by accused Babu Lal Pasi and his father's gun was snatched by accused Ringu. All three people abused the passengers and asked them to get off the bus and they had said that "नही उतरोगे तो गोली मार देंगे". One boy wearing khakhi paint and bushirt was standing near Dinesh Chandra and that boy started to snatch the rifle of Dinesh and dragged Dinesh down from the next door of the bus and snatched his rifle. On this, the people sitting inside the bus got out and hid here and there. They (P.W.1 and his grand-father Gaya Prasad) also got down and got under cover.

P.W.1 has further deposed that after getting down from the bus, he saw Babu Lal Master standing on the side of the road with a single bore gun in his hand and along with him, 10-12 men were standing by carrying अद्धी (half) guns and Katta (gun) and they also started firing.

When the passengers went to the north, Babu Lal Master said that "सालो की लाश बाहर निकाल लो" (take out the dead body of the bastard). On this, 3-4 men entered the bus and brought out the dead bodies of his father and uncle and carried them towards the fields on the south side of the road. On the saying of Babu Lal Master, one of his companions wiped blood inside the bus with a towel. When an unknown passenger of a bus was running towards east, then, two men chased him and shot him 100-125 yards away from the bus, from which he died. Two miscreants also hanged his dead body and took it towards the south.

P.W.1 has further stated that about 15-16 fires took place there. The people around were coming on listening to the sound of fire and had seen the incident. The people came near them (P.W.1, his grand-father and other passengers) after the accused fled. His grand-father had a conversation with those people and his grand-father asked the names of the accused. A passenger, who had landed on the Usiya Tiraha, had also come there and he told his name as Krishna Mohan. Krishna Mohan and other villagers had told the name of the assailant, who was wearing the Khakhi paint and bushirt, as Babu Lal Dom and also told the names of other accused as Madan Pasi, Ramesh Pasi, Ramchandra, Ramswaroop, Ramroop, Ganga Sevak, Kunni alias Neta, Chandrakishore Luhar, Babulal Pasi, Master Babu Pasi, Ringu Pasi, Laloni Pasi, Magraya. Out of these, he already knew Babu Pasi, Ringu Pasi and Kunni. Apart from these, there were also 3-4 assailants, whose names were not given by the villagers nor known to them. This incident is around 5:30 pm in the evening.

The passengers had already gone but he (P.W.1), his grand-father, Harishchandra, Dinesh Chandra, Shivadhar, Ram Balak Yadav, Ram Das Lohar, driver & conductor of the Bus went to Bihar Police Station by bus and when reached at Takia Bus Stand, his grand-father had talked to someone, then, that person told that the place of incident comes under police station Bighapur. Thereafter, they returned from that bus for Bighapur. After coming to Bighapur, the bus was parked at the bus station. The police station Bighapur is inside the *basti* from Bighapur Bus Station, where bus could not go. He further stated that he scribed the report on the dictation of his grand-father and whatever his grand-father told him, he wrote the same in the report and handed it over to his grand-father. He has proved the report (Ext.Ka.1). Thereafter, he, Shiv Adhar Singh, Ram Balak Yadav, Ram Balak Pasi, Ramdas Lohar went to village Hamirpur for giving information.

P.W.1 had further deposed that his father and uncle had weared the wrist watch. His father had also taken towel (*angaucha*). The miscreants had taken away the towel (*angaucha*) and wrist watch. His father and uncle had a lisence, which the miscreants also brought. At the time of incident, Dinesh Chandra sustained injuries on his hand while taking away his rifle by the miscreants. At that time, 2-3 passengers had also sustained injuries.

P.W.1 has also stated that he had gone to the District Jail, Uanno to identify the miscreants, wherein he identified Chandra Kishore Luhar. He further stated that he

had seen Chandra Kishore Luhar for the first time at the time of the incident and thereafter, at the time of identification proceedings and in between, he had not seen to him (Chandra Kishore Luhar). He did not even know him (Chandra Kishore Luhar) before it.

P.W.1 has stated that his father Gaya Prasad is 75 years old and now he did not see and hear properly. Jageshwar is his younger uncle, who lived separately from him. He had told the number of gun, bicycle and license to the Inspector after looking at the documents of the house. On 07.10.1980, the body of his father Shiv Balak was found in the field and he identified it.

(29) P.W.2-Lallu, in his examination-in-chief, has deposed that he lives in village Mardan Kheda, Usiya. He knows Babu Lal Master, who has been killed. Babul Lal Master was the resident of village Usiya and was a teacher in Katra Diwan Kheda. He knew Chandrika resident of Hamirpur. The maternal house of Chandrika was at village Katra, Diwankheda. Babu Lal was the master and Chandrika was the passi (पासी). Before this incident, Chandrika was killed. He had seen the mother of Chandika coming and going to the house of Babu Lal Master after the killing of Chandrika.

It was about 16-17 months ago from today (27.02.1982). He went to Bighapur market. It was 05:00 or 05:15 in the evening. He came to bus stand from Bighapur market, where he met Jagmohan and Krishnamohan. He had to leave for his home by bus. When the bus came from Unnao going towards Buxer, Jagmohan and Krishna Mohan boarded the same bus. He also stated that मै जिस सीट पर बैठा था उसके आगे एक सीट छोडकर तीन सीटर वाली सीट पर एक आदमी रायफल लिए व एक बन्दूक लिए व तीसरा आदमी खाली हाथ बैठे थे। (leaving one seat in front of his seat where he was sitting, on the three seater seat, a man with a rifle, another man with a gun, a man with empty handed were sitting). The man, who was empty handed, was sitting on the side of the window and the man, who was armed with rifle, was sitting in the middle of them. He had seen Babu Lal Pasi and Ringu Pasi (accused) sitting on the two-seater seat next to these three people. He knew both of them before. A man was also sitting behind the driver's seat facing them. When the bus was about to leave, Vinod Pasi resident of Kusia had boarded inside the bus from the back door of the bus. He (Vinod Pasi) was wearing a red shirt. He (Vinod Pasi) came and stood near Ringu (accused). Babu Lal Dom (accused) resident of Usiya had also boarded inside the bus from the front door, who was wearing khakhi paint and bushirt. He (Babu Lal Dom) was standing next to the man armed with the rifle sitting behind the driver's seat. He knew Vinod and Babu Lal Dom (accused) prior to it.

P.W.2 had further stated that the bus had reached the tiraha (intersection road) of Usiya from Bighapur at around 5.30 pm, where Krishna Mohan got down from the bus. He (P.W.2) had to get down at Akwabad, which was ahead of Usiya *Tiraha*. He further stated that when the bus would have reached about 50 yards from Usiya *tiraha*, then, Babu Lal Pasi and Ringu Pasi (accused) stood up; made the sound of रोको रोको (stop stop); got up from their seats; and came to the gallery of the bus and from there, they (Babu Lal Pasi and Ringu Pasi) fired shot from their two *kattas* upon the men, who were armed with rifle and gun. Vinod had also fired with a *katta*. The gunman and rifleman had rolled on their seats as soon as shot. Thereafter,

the bus stopped west of the culvert after covering a distance of about 100 yards. Babu Lal Pasi (accused) said that सालो निकल कर भाग जाओ अगर कोई बोलेगा तो उसे भी गोली मार देगे (bastard go out and run away, if anyone speaks, then they will shoot him too).

Thereafter, the gun and rifle were snatched from the deceased by Ringu and Babu Lal Pasi, respectively. Babu Lal Dom (accused) also tried to get rid of the rifle from the second man but when that second man did not relieve the rifle, then, Babu Lal Dom jolted him and dragged him out of the bus and snatched the rifle outside. Thereafter, all the passengers got out of the bus and started running away. He (P.W.2) also got out of the bus and covered himself behind a tree on the side of the road. When he came out of the bus, he saw Babulal Master, Madan Pasi, Ramesh Pasi, Lalaunu Pasi, Chandra Kishore Kumhar, Ram Swaroop, Ram Roop, Ganga Sevak, Ram Chandra, Kunni and four more men to whom he did not recognize, were also standing north of the bus. Babu Lal Master had a gun in his hand and the rest of the people hadअद्धी (half) guns and Katta (gun). Babu Lal Master and his associates had fired 10-12 shots. Babu Lal Master said that इन सालो की लाशे खीच लो (drag the dead bodies of these bastard). On this, Ramesh, Madan, Chandra Kishore and Lalaunu went inside the bus. Chandra Kishore and Lalaunu were armed with Katta. Ramesh and Madan were empty handed. These four men took two dead bodies from the bus, hung them and went south. Thereafter, Babu Lal Master said that बस का खून पोंछ डालो (wipe the blood of the bus), on which Ramroop Pasi went inside the bus after soaking a towel.

P.W.2 had also stated that a man, who ran towards north, was chased by Ram Chandra and Kunni and both of them fired at him, thereupon he had fallen and thereafter, his dead body was taken away by Ram Chandra and Kunni towards South direction. Later on all the accused were gone. After the accused left, he went near the bus. Jagmohan and Krishna Mohan also came near the bus and many more people from the village had come. A man had asked them the names of the miscreants, then, they had told the names of the miscreants. After asking the names of the miscreants, that person also asked them the names and addresses of the people. He stated that apart from these three deceased persons, he saw blood coming out from the injuries of 2-3 persons. Thereafter, 6-7 men of the same bus sat down and went towards Takia. He stated that Takia Patan is the same place. He (P.W.2) was staying there. Later on, a lot of people had gathered there. After about half an hour of departure, the same bus came from the side of the Takia and went towards Bighapur. He already knew all the accused.

(30) P.W.6-Krishna Mohan, in his examination-in-chief, has deposed that his grocery shop is in village Usiya. It is a matter of about a year ago. He had gone to the market of Bighapur to get the items of his shop. Around 5 o'clock in the evening, he came to Bighapur Bus Stand with his luggage to go to his village. At Bighapur bus stand, he met Lallu Yadav resident of Mardan Kheda and Jagmohan Singh resident of Akbabad. Then, he sat on the bus going towards Buxer at bus stand. All three of them (P.W.6, Lallu Yadav and Jagmohan Singh) sat on the bus. Inside the bus, he saw Ringu, Babu also sat in the bus. These people (Ringu and Babu) were sitting on a two-seater seat in the bus and next to them, he saw three men sitting on the three-seater seat, out of which, one had a rifle and the other had a double barrel

gun. The man armed with the rifle was sitting in the middle and the empty-handed man was sitting at the window. A man was sitting behind the seat of the driver with a rifle and his face was towards them (P.W.6 and others). When the bus was about to run, his acquaintances Vinod Pasi and Babu Lal Dom also boarded. Babu Lal Dom was then wearing a khaki paint bushirt and Vinod Kumar was wearing a red shirt. Babu Lal was standing near the rifle man who was sitting behind the driver of the bus and Vinod stood near Ringu Pasi. He was sitting in the back seat of the bus on which 4-5 other people were sitting besides him (P.W.6). The conductor sat in the front seat near the window.

After moving from Bighapur, the bus reached Usiya Tiraha around 5:30 pm. He got off the bus at the Tiraha. The bus had moved forward thereafter. When the bus had moved forward about 50 yards, then, he heard the sound of gunfire from inside the bus. Afterwards, the bus stopped in front of the culvert about 40-50 kms towards the *Tiraha*. He saw the passengers of the bus getting out of the bus. Some of the passengers were standing here and there and some had fled. He saw 10-12 men standing near the bus, among them Babu Lal Master armed with single bore gun and Coolie alias Neta, Madan Lalaunu, Chandra Kishore, Ramesh, Ram Chandra, Ramroop, Ganga Sevak, Ram Swaroop and 3-4 other men whom he did not recognize, armed with अद्धी (half) guns and Katta (gun), were there. When the bus stopped, these people started firing. Babu Lal Master had asked to take out the dead body and at his behest, Ramesh, Chandra Kishore, Madan and Lalaunu had entered the bus and brought out the bodies of two men. These four people had gone towards south with the corpse. Outside the bus, a passenger had run towards the east, then, he was told by Kunni and Ramroop and later on P.W.6 said that Coolie and Madan had run. Both of them had killed him. Thereafter, P.W.6 has said that Coolie and Ram Chandra had shot him and had gone towards south with his dead body. When the bus stopped, Ringu armed with gun and Babu Pasi armed with a rifle came out from the bus. Babu Lal Dom had dragged the person outside the bus, who was armed with rifle and sat behind the seat of driver. Babu Lal Master had asked to wipe the blood of the bus, on which Ramroop went inside after soaking the towel. He had heard about 15-16 fires in total. He saw this incident from where he had landed after moving a little further. Apart from him, Nanku Yadav, Lallu Jagmohan, Laxmi Shankar, Santram Yadav, Harish Chandra, Ram Kumar and many other villagers had seen this incident. After the accused had fled, they went near to the bus. On being asked, the names and addresses of the accused were given. Accused went towards the boaring of Babu Lal Master in south side. He also stated that to go from Bighapur to Usiya, one has to take a ticket for Akbabad and ticket of Usiya Tiraha is not being given. On that day, he had taken the ticket of Akbabad in the bus from the conductor itself. Babulal Master had been murdered.

(31) After completion of prosecution evidence, statements of accused persons were recorded under Section 313 Cr.P.C., who denied the alleged incident and stated before the trial Court that they have been falsely implicated due to enmity.

(32) The trial Court has not placed reliance upon the testimony of P.W.6-Krishna Mohan as his testimony is self-contradictory on material points. However, the trial Court believed the evidence of

Upendra Singh (P.W. 1) and Lallu (P.W. 2) and convicted and sentenced the appellants, **Babu Pasi alias Babu Lal Pasi** and **Ringu Pasi** in the manner stated in paragraph-3. It, however, acquitted the remaining accused, namely, Ramesh, Madal Lal, Ram Swaroop, Ganga Sewak, Neta alias Kunni, Chandra Kishore, Lalaunoo, Ram Rup, Ram Chandra. It is pertinent to mention that the State of U.P. has not challenged their acquittal by preferring an appeal under Section 378 (1) Cr. P.C.

(33) As mentioned earlier, aggrieved by their convictions and sentences, the convicts/appellants **Babu Pasi alias Babu Lal Pasi and Ringu Pasi** preferred the instant criminal appeal and during pendency of the instant appeal, appellant no.1-Babu Pasi alias Babu Lal Pasi died and the instant appeal filed on his behalf stood abated vide order dated 07.02.2019. Now, the instant appeal survives only in respect of appellant no.2-**Ringu Pasi**.

(C) ARGUMENT ON BEHALF OF APPELLANT NO.2- RINGU PASI

(34) Sri H.B. Singh, learned Counsel for the appellant no.2-Ringu Pasi, has submitted that

I. The alleged incident took place on 06.10.1980 at 05:30 p.m., whereas the FIR of the said incident was lodged on 06.10.1980 at 07:50 p.m. at police station Bighapur, District Unnao, which is situated at a distance of 3 miles i.e. 04.83 kms, from the place of the incident, hence the F.I.R. has not been lodged promptly. Furthermore, the F.I.R. runs about four pages, which is voluminous and casts doubt that it has been lodged by much consultation and deliberation.

II. The informant Gaya Prasad, injured Dinesh Chandra Shukla, injured Devi Deen, driver and conductor of the bus, were not examined by the prosecution though they are material witnesses, which casts doubt on the reason for the purported presence of P.W.1 and P.W.2 at the place of the incident and also non-examination of them is fatal to the prosecution case.

III. The trial Court has failed to take cognizance of the fact that no motive has been attributed to the appellant no.2-Ringu Pasi for commission of the offence, therefore, the appellant no.2-Ringu Pasi could not have been found guilty of the charge levelled against him.

IV. P.W.1 is the son of the deceased Shiv Balak and nephew of the deceased Ram Balak, whereas P.W.2 was having previous enmity with co-accused Ramchandra. Furthermore, father of appellant no.2-Ringu Pasi, namely, Baijnath, was the surety of the accused in the cross case filed by P.W.2-Lallu against Ramchandra, Palangi and others. On account of the enmity, P.W.2 had disclosed the names of the accused/appellants to the informant Gaya Prasad and P.W.1-Upendra Singh and on that basis, appellants were falsely implicated in the case. Hence, these two eye-witnesses i.e. P.W.1 and P.W.2 are interested and partitioned witnesses and as such, their testimony have to be scrutinized with caution but the trial Court committed a serious error in not appreciating the evidence of these eye-witnesses with great care and caution.

V. Though there were gunshot injuries inflicted upon the deceased Shiv Balak and Ram Balak but no recovery of the weapon of assault was made.

VI. The evidence of P.W.1 and P.W.2 indicates that there was prior enmity between the deceased and family members of the accused persons and their companions because of which false implication cannot be ruled out.

VII. Thus, according to the learned counsel, the prosecution has failed to establish the charge of murder against the appellant no.2-Ringu Pasi beyond reasonable doubt.

(D) ARGUMENT OF STATE/RESPONDENTS

(35) Ms. Smiti Sahai, learned Additional Government Advocate appearing on behalf of the State, on the other hand, supported the impugned judgment of the trial Court and argued that :-

I. The incident took place at 5.30 pm, while the FIR was lodged at 07:50 pm on the basis of the written report filed by the informant Gaya Prasad. The police station was admittedly situated at a distance of 4.82 Kms (3 miles) from the place of occurrence. There is no delay in lodging the FIR. Furthermore, the FIR contains a detailed account of the nature of the incident and spells out the role is attributed to the appellants.

II. The evidence of the eye-witnesses supported by other ocular and documentary evidence has been rightly examined and appreciated by the trial court.

III. No adverse inference can be drawn against the prosecution for non-examination of the informant Gaya Prasad Singh and other witnesses because the prosecution has fully established the charge against the appellants beyond reasonable doubt by leading reliable and convincing evidence.

IV. In the presence of direct evidence, motive recedes to the background. Therefore, the prosecution does not need to prove the motive of the appellant no.2-Ringu Pasi to murder the deceased.

V. On these grounds, it has been urged on behalf of the State that the finding of guilt which was arrived at by the trial Court, is not liable to warrant any interference in appeal.

(E) ANALYSIS / DISCUSSION

(36) We have heard the learned counsel for the respective parties at length and have carefully gone through the impugned judgment and order of conviction and sentence passed by the learned trial Court. We have also re-appreciated the entire evidence on record, particularly the depositions of P.W.1 Upendra Singh and P.W.2-Lallu. We have also considered the injuries found on the three dead bodies of the deceased persons and injuries found on the body of the two injured persons.

(37) The crucial question in this appeal is whether the evidence of the three eye witnesses viz. Upendra Singh P.W. 1, Lallu P.W. 2 and Krishna Mohan P.W.6 inspires confidence or not. Our considered answer to the said question is in the negative. We may straightway mention that these witnesses had also implicated 09 other co-accused persons and all of them have been clearly acquitted by the learned trial Court on all counts. As stated earlier, the State of Uttar Pradesh has not challenged the acquittal of these nine acquitted persons.

(38) The trial Court, after analyzing the evidence of P.W.6-Krishna Mohan, formed the opinion that he gave self-contradictory version on most material points viz. as to who chased the unknown person and shot dead and took his body, therefore, his presence on the spot is doubtful. In this backdrop, the trial Court has rightly not placed reliance upon the testimony of P.W.6-Krishna Mohan.

(39) Now, out of two eye witnesses i.e. P.W.1 and P.W.2, the evidence of Upendra Singh P.W. 1 can be straight way rejected by us on the ground that although the deceased had been done to death at about 05:30 p.m., on 06.10.1980, Upendra Singh (P.W.1) could not identify the acquitted accused/convicts-appellants. He could only identify Chandra Kishore (acquitted accused) at the test identification parade held on 03.01.1981, by Sri Janardan Singh, the Special Executive Magistrate, Unnao (P.W. 10). In our view, if P.W.1 (Upendra Singh) could not identify the appellants after about three months after the incident what is the sanctity to be attached to his nominating the appellants in his statement in the trial Court. More so, P.W.10-Sri Janardan Singh, the Special Executive Magistrate, Unnao, in his cross-examination, had deposed before the trial Court that informant Gaya Prasad made one mistake in identifying the other accused persons; Upendra Singh (P.W.1) also made nine mistakes in identifying the other accused persons and none of them were identified by him; witness Dinesh Chandra (injured) made ten mistakes in identifying the ten accused persons. P.W.10, in his cross-examination, had also deposed before the trial Court that "गवाहान ने जो बयान मेरे सामने दिए थे "डकैती व कत्ल करते वक्त मौके पर देखा था।" (The statement, which was given by the witnesses, before him that "while committing robbery and murder, saw on the spot"). It means that the witnesses i.e. P.W.1-Upendra Singh, informant Gaya Prasad, injured Dinesh Chandra, stated before P.W.10-Sri Janardan Singh that they saw the identified accused persons while committing robbery and murder on the spot. But the prosecution case is not that the accused/appellants had committed robbery and also murdered the deceased. This is all the more so because in his cross-examination, P.W.1-Upendra Singh has deposed that the names of the accused/appellants were stated to him after the incident by Krishna Mohan, Lallu Mohan (P.W.2), Jagmohan Singh and other nearby villages and on that basis, he knew the names of the accused persons after the incident.

(40) Apart from the aforesaid, P.W.1-Upendra Singh, in his cross-examination, had deposed before the trial Court that at the time of the incident, there were about 60-70 passengers in the bus, out of which, six man were armed with fire arms, however, out of these six man, he didn't see anyone firing. He also deposed in the cross-examination that he could not see how many people fired inside the bus. P.W.1-Upendra Singh had further deposed that at the time of the incident, he (P.W.1) and his grand-father Gaya Prasad (informant) were sitting in two seater seat and behind 2-3 seat of them, his father Shiv Balak (deceased), his uncle Ram Balak (deceased) and Harishchandra were sitting in three seater seat. Shivadhar, Ram Das, Ram Balak Yadav and Ram Balak Pasi were sitting in the rear seat of the bus. Injured Dinesh Chandra was sitting behind the seat of driver with his rifle. He also stated that he knew Babulal Pasi and Ringu Pasi (appellants) prior to the incident as they used to come to Chandrika Pasi's house and Babu Lal Pasi Master before the incident. However, this statement of P.W.1-Upendra Singh was denied by the accused Ringu Pasi and Babu Lal Pasi in their statement under Section 313 Cr.P.C. He said that he did not know Chandrika Pasi.

(41) It also comes out from the depositions of P.W.1-Upendra Singh that both appellants Babulal Pasi and Ringu Pasi boarded the bus from Unnao Bus

Stand. P.W.1, in his cross-examination, has stated that "जहॉ मै बैठा था वही से बैठे–बैठे मेरी बातचीत मेरे पिता व चाचा से हुई थी" (from where he sat, he had a conversation with his father and uncle while sitting). Meaning thereby, from Unnao Bus Station to the place of occurrence, he (P.W.1) had a conversation with his father and his uncle, who sat behind 2-3 seats in three seater seat. At that relevant time, both accused/ appellants Babu Lal Pasi and Ringu Pasi were sitting just near to the seat of his father, his uncle and Harishchandra. In such circumstances, Babu Lal Pasi and Ringu Pasi (appellants) were very well aware that P.W.1-Upendra Singh and his grand-father Gaya Prasad (informant) are the family members of Ram Balak and Shiv Balak (deceased) and Harish Chandra who sat with Ram Balak and Shiv Balak (deceased) in the window seat of three seater seat of the bus, was also known to the deceased. P.W.1-Upendra Singh, in his cross-examination, has deposed that "किसी बदमाश ने मेरे उपर फायर नही किया न मुझे मारा पीटा न मेरे पास आया।" (none of the miscreants had fired upon him nor assaulted him nor came near to him). He has also stated that "किसी बदमाश ने मुझसे रूपये पैसो के होने के बावत नही पूछा था।" (none of the miscreants had asked him about the money). P.W.1-Upendra Singh had stated before the trial Court that when the bus went 50-60 yards from the tiraha (an intersection of three roads) of Usiya, a loud sound "रोको रोको" (stop stop) inside the bus came behind him and 3-4 fires also happened in the bus and then at this moment, he turned back and saw that his father Shiv Balak and his uncle Ram Balak got shot; they rolled on the seat; Babu Lal Pasi, Ringu Pasi and a 22-24 year's old boy wearing red bushirt were standing near the seat of his father and uncle with Katta (pistol); and snatched the gun of his father and rifle of his uncle. P.W.1, in his cross-examination, has categorically admitted the fact that "फायर होने पर मै अपने पिता व चाचा की ओर दौडा नही था। किसी फायर करने वाले को पकडने की कोशिश मैने नही की थी।" (after firing, he did not run towards his father and uncle. He did not try to catch any person who fired).

(42) Considering the aforesaid circumstances, it is quite strange/improbable that Ram Balak, Shiv Balak (deceased) and Harish Chandra were sitting together in three seater seat in the bus; after shot to Shiv Balak and Ram Balak with Katta, accused/appellants had neither made any injury to Harishchandra who sat in the window seat with Shiv Balak and Ram Balak nor the accused/appellants had made any effort to cause injuries to P.W.1 and his grand-father Gaya Prasad even knowing very well that deceased Shiv Balak was the father of P.W.1 and deceased Ram Balak was the uncle of P.W.1. It is also quite surprising that P.W.1-Upendra Singh and informant Gaya Prasad did not try to save the deceased persons, who were their family members, from grip the accused/appellants nor raised any alarm or made hue and cry at that moment. But surprisingly, they (P.W.1, informant Gaya Prasad, Harischandra and other passengers) all peacefully took their items from the bus; got down from the bus; hid behind the tree; and from there all three persons and other passengers saw the accused/appellants bring out the dead bodies of the deceased (Ram Balak, Shiv Balak). P.W.1 had also admitted the fact that he did not see any one to fire upon his father Shiv Balak and his uncle Ram Balak, however, he knew the name of these accused persons on the saying of Krishna Mohan, Lallu Yadav (P.W.2), Jagmohan and other villagers, who were said to be travelling with the said bus. But surprisingly, Krishna Mohan, Jagmohan and other villagers were not

examined by the prosecution. All the circumstances as discussed hereinabove shows that the testimony of P.W.1-Upendra Singh is not credible and creates doubt upon the prosecution story and it appears that P.W.1-Upendra Singh and his grand-father Gaya Prasad were not present at the place of the incident

(43) We are also not inclined to place any reliance on the testimony of Lallu P.W. 2. We have our grave doubts about his claim of having seen the incident. In his examination-in-chief, he stated that on the date of the incident, he went to the Bighapur Market and at about 05:00-05:15 p.m., he went from Bighapur Market to Bighapur Bus Stand, where he met Jagmohan and Krishnamohan. All of them boarded on a bus coming from Unnao and going towards Buxer. After boarding on the bus, he saw that leaving one seat in front of his seat where he was sitting in the bus, on the three seater seat, a man with a rifle, another man with a gun, a man with empty handed were sitting, whereas Babu Lal Pasi and Ringu Pasi (accused) were sitting on the two-seater seat next to these three peoples. He also saw that a man was also sitting behind the driver's seat by facing face towards them. When the bus was about to leave, Vinod Pasi resident of Kusia wearing a red shirt had boarded inside the bus from the back door of the bus and stood near Ringu (accused). Babu Lal Dom (accused) resident of Usiya had also boarded inside the bus from the front door, who was wearing khakhi paint and bushirt and stood next to the man armed with the rifle sitting behind the driver's seat. He knew Babu Lal, Ringu Pasi, Vinod and Babu Lal Dom (accused) before. P.W.2 has further deposed that Krishna Mohan got down from the bus at *tiraha* (intersection road) of Usiya at around 5.30 pm but he (P.W.2) had to get down at Akwabad, which was ahead of Usiya Tiraha. He further stated that when the bus would have reached about 50 yards from Usiya tiraha, then, Babu Lal Pasi and Ringu Pasi (accused) stood up; made the sound of रोको रोको (stop stop); got up from their seats; and came to the gallery of the bus and from there, they (Babu Lal Pasi and Ringu Pasi) fired shot from their two *kattas* upon the men, who were armed with rifle and gun. Vinod had also fired with a katta. Thereafter, the gunman and rifleman had rolled on their seats as soon as shot.

(44) As per the aforesaid depositions of P.W.2, it transpires that accused Babu Lal Pasi, Ringu Pasi and Vinod armed with Katta fired upon the men armed with rifle and gun sat in the three seater seat. It is admitted by P.W.2 also that the man, who was empty handed and sitting with rifleman and gunman in a window seat of three seater seat, did not receive any injury. P.W.1, in his cross-examination, had stated that the names of the accused persons were stated to him and his grand-father Gaya Prasad (informant) by Krishna Mohan, Lallu (P.W.2). From the depositions of P.W.1, it transpires that accused/appellants were very well aware of the relationship of the deceased with P.W.1, informant and Harishchandra, still the accused/appellants did nothing to them and all of them were allowed by the accused/appellants to keep their articles from the bus, got down the bus and hid behind the tree. P.W.2 had also supported the statement of the P.W.1. Thus, it appears that the testimony of P.W.2 is not trustworthy.

(45) P.W.16-Dr. R.R. Acharya, who conducted the post-mortem report of deceased Ram Balak, has stated before the trial Court that injuries no. 1, 2 and 3

(incised wounds) could be attributable by the sharp edged weapon, whereas injury no.4 could be attributable by fire arm. In his cross-examination, P.W.16-Dr. R.R. Acharya has deposed that "मृतक की मृत्यु चोट नं0 1 से ही होना अधिक संभव है" (the death of the deceased is mostly possible by injury no.1). He further stated that "चोट नं0 1 नं0 4 की अपेक्षा अधिक प्राणघातक थी।" (injury no.1 was more fatal than injury no.4). He also deposed that "चोट नं0 1 भी मरने के बाद की संभव नही है।" (injury no.1 is also not possible after death). From this statement of P.W.16-Dr. R.R. Acharya, it transpires that injury no.1 i.e. "*incised wound 12.0 cm x 4.0 cm x bone-deep on the face from (L) ear to lower jaw. Maxillary bones (L) mandible bone of (L) skull cut.*" is more fatal than injury no.4 i.e. firearm wound and further injury no.1 is also not possible after death meaning thereby it was caused before death.

(46) It is pertinent to mention that both P.W.1-Upendra Singh and P.W.2-Lallu had deposed before the trial Court that appellants Babu Lal Pasi and Ringu Pasi had fired upon Ram Balak and Shiv Balak with Kattas (pistol), due to which, they died on the spot. Except the allegation of firing with Kattas upon the deceased, both the eye-witnesses had not stated other mode of assault upon the deceased persons. That being the position, as to how the injury no.1 i.e. incised wound, on the dead body of the deceased Ram Balak came, has not been explained by the prosecution by giving any evidence in this regard. Furthermore, the prosecution has also not explained how one multiple incised wound came on the body of the deceased Sheo Balak and two other incised wound in addition to incised wound (injury no.1) came on the body of the deceased Ram Balak. In these backgrounds, it appears that both eye-witnesses i.e. P.W.1-Upendra Singh and P.W.2-Lallu were not seen the incident.

(47) It is also relevant to add that both P.W.1 and P.W.2 have made depositions to the effect that prior enmity existed between the members of the P.W.1 and P.W.2 one side and the members of the accused/appellants on the other side. P.W.1, in his cross-examination, has deposed that in the year 1973, Chandrika (since deceased) had lodged a case under Section 307 I.P.C. against his father and uncle. He further deposed that in the murder of Chandrika, his uncle Ram Balak, another uncle Ram Narayan, witness Dinesh Chandra (injured herein) and Harishchandra (who was sitting along with the deceased Ram Balak and Shiv Balak at the time of the incident in a window seat of three seater seat of the bus) were accused. P.W.2, in his cross-examination, has stated that he had enmity with Ramroop, Ram Swaroop, Ganga Sewak and Ramchandra (acquitted accused) and he had a criminal case against them and the second case are going on. He further stated that the second case, which was filed, is a cross case under Sections 323 and 325 I.P.C.. He stated that along with him 12 peoples were accused and from the side of Ram Roop etc., 16 peoples were accused. In the cross case, bail was granted to them. P.W.2 has further stated that at the time of the incident, the said cross criminal case under Sections 323, 325 I.P.C. was going on. He further stated that रामस्वरूप से 1977 में झगडा हुआ था उसके बाद रामरूप बगैरह से झगडा हुआ। हम लोगो का झगडा रामस्वरूप आदि से 1977 से शुरू हुआ है। क्रास केस की पेशियो पर रामस्वरूप वगैरह आते है तथा हम सब लोग भी आते हैं। P.W.2 has further deposed in cross-examination that in his cross case, accused Ramchandra, Smt. Batasa and his father Palangi are also the accused. He also stated that he knew the father of appellant Ringu, namely, Baijnath.

According to the appellants, in the cross-case, Baijnath, who is the father of appellant Ringu, was the surety of Palangi.

Thus, it appears that there was long enmity between the parties, hence involving the accused/appellants falsely in a criminal case such as the instant case by P.W.1 and P.W.2 cannot be ruled out.

(48) Learned Additional Government Advocate strenuously urged that the circumstance that the FIR of the incident was lodged promptly i.e. about 1 hour 50 minutes of the incident taking place and in the same, the act of causing injuries to the deceased with a fire arms has been attributed to the appellants speaks volumes in favour about the participation of the appellants in the murder of the deceased. We have reflected over the said submission of learned AGA. On the first blush, it was certainly very attractive. However, on a deeper scrutiny, we realised that all that glitters is not gold. It is well-settled that the FIR can only be used to contradict or corroborate the maker and is not substantive evidence. The substantive evidence are the statements of the witnesses in Court. The substantive evidence in the instant case was in the form of the evidence of the three eye witnesses viz. Upendra Singh P.W. 1, Lallu P.W. 2 and Krishna Mohan P.W.6 and that we have rejected for the reasons stated by us above. Hence this submission of learned AGA fails.

(49) As it is manifest, neither the informant Gaya Prasad nor injured Dinesh Shukla and Devideen nor driver and conductor of the bus has been examined by the prosecution. Submission of appellants is that they are natural witnesses and no explanation has been given for their non-examination and hence, adverse inference against the prosecution deserves to be drawn.

(50) In the case of **Surinder Kumar v. State of Haryana** : (2011) 10 SCC 173, the Apex Court has held that though in a different context, that a failure on the part of the prosecution in non-examining the two children, aged about six and four years, respectively, when both of them were present at the site of the crime, amounted to failure on the part of the prosecution.

(51) In **State of H.P. v. Gian Chand** : (2001) 6 SCC 71, the Apex Court, while dealing with non-examination of material witnesses has expressed that:-

"14 ... Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution. The Court has first to assess the trustworthiness of the evidence adduced and available on record. If the Court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence which tough available has been withheld from the Court then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise. "

(52) In **Takhaji Hiraji v. Thakore Kubersing Chamansing and others** : (2001) 6 SCC 145, the Apex Court has held that it is true that if a material witness, who 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 a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The Court should pose the question whether in the facts and circumstances of the case, it was necessary to examine such other witness. If so, whether such witness was available to be examined and yet was being withheld from the court. If the answer is positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable, the Court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses.

(53) In **Dahari v. State of U.P.** : (2012) 10 SCC 256 while discussing the non-examination of a material witness, the Apex Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly. The prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution.

(54) From the aforesaid authorities, it is quite vivid that non-examination of material witnesses would not always create a dent in the prosecution's case. However, as has been held in the case of **State of H.P. v. Gian Chand (supra),** the charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of facts and circumstances of each case to find out whether the witnesses were available for being examined in the Court and were yet withheld by the prosecution. That apart, the Court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on. There may be other witnesses available who could also have been examined but were not examined. Another aspect which is required to be seen whether such witness or witnesses are the only competent witnesses who could have been fully capable of explaining correctly the factual situation.

(55) In the instant case, we have already noticed that informant-Gaya Prasad, who was sitting along with P.W.1 in the bus; Harishchandra, who was sitting along with the deceased in the window seat of three seater seat of the bus; injured Dinesh Chandra Shukla and Devideen; and conduct and driver of the bus, were the eye-witness. They are the most natural and

competent witnesses. They really could have thrown immense light on the factual score, but for the reasons best known to the prosecution, they have not been examined. It is also not the case of the prosecution that they had not been cited as their evidence would have been duplication or repetition of evidence or there was an apprehension that they would have not supported the case of the prosecution. In the absence of any explanation whatsoever, we are of the considered opinion that it has affected the case of the prosecution.

(56) P.W.1-Upendra Singh, in his cross-examination, had stated that on account of extra old age and loss of vision, informant-Gaya Prasad was not produced before the trial Court. This explanation seems to be true. However, as stated hereinabove, there were other material eye-witnesses i.e. Harishchandra, injured Dinesh Chandra Shukla and Devi Deen, and conducter and driver of the bus still, no exaplantion has been produced by the prosecution for their non-examination in the trial Court. Therefore, we are of the considered view that the conviction recorded by the trial Court on the testimony of P.W.1 and P.W.2 without any corroboration is unsustainable.

(57) At this juncture, we feel distressed by the thought that the triple murderer is going unpunished but we cannot and should not be swayed by our emotions. What we have to see is whether the prosecution has led cogent, truthful and credible evidence to establish the guilt of the appellants beyond reasonable doubt. Such evidence in our judgement is wanting in the instant case. It might be that the prosecution case may be true. But before a conviction can be recorded/sustained a Court has to be satisfied that the prosecution case must be true. Emphasising this, the Apex Court in the case of **Sarwan Singh v. State of Punjab :** 1957 AIR 637, in paragraph 11 observed thus :-

"(11) ....

It may be as Mr. Gopal Singh strenuously urged before us that there is an element of truth in the prosecution story against both the appellants Mr. Gopal Singh contended that, considered as a whole the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence."

(58) In the instant case, the distance between 'may be true' and 'must be true' has not been covered by the prosecution by adducing legal, reliable and unimpeachable evidence.

(59) Pursuant to the above discussion, we are squarely satisfied that the instant is a fit case in which the appellant no.2-Ringu Pasi deserves the benefit of doubt. We propose giving him the benefit of that doubt.

(F) CONCLUSION

(60) In the result, the instant criminal appeal is **allowed**. The judgment and order dated 17.07.1982 passed in Sessions Trial No. 210 of 1981 so far as it relates to the **appellant no.2-Ringu Pasi** is hereby set aside. The appellant no.2-Ringu Pasi is acquitted from the charges levelled against him. He is in jail. He shall be set at liberty forthwith if no longer required in any other criminal case.

(61) **Appellant no.2-Ringu Pasi** is directed to file personal bond and two sureties each in the like amount to the

satisfaction of the Court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

(62) Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

(2022)02ILR A337
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 119 of 2018

Smt. Sushila & Ors. ...Appellants
Versus
Amar Pal & Ors. ...Respondents

Counsel for the Appellants:
Sri Mirza Ali Zulfqar, Sri Sandeep Kumar Tripathi, Sri Santosh Kumar Tripathi

Counsel for the Respondents:
Sri Arun Prakash

(A) Civil Law - Motor Vehicles Act, 1988 - Section 174 - Recovery of money from insurer as arrear of land revenue - principle of "*res ipsa loquitur*" - "the things speak for itself" - principle of contributory negligence - difference between contributory and composite negligence - A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.(Para - 8)

Motor accident claims petition - filed by the appellants for compensation in connection with the death of the deceased - award a sum of Rs. 8,54,800 @ 7% - Tribunal not awarded any sum towards future loss of income - Deceased in transport business - income tax payee - wife of the deceased getting her share of income from the transport business - Tribunal held that deceased was liable for 20% contributory negligence.

HELD:-Tribunal justified in holding contributory negligence of the deceased , which is to the tune of 20% . Total compensation payable to the appellants is 17,45,600/- . Appellants entitled to have compensation for future loss of income . Rate of interest fixed at 7.5% instead of 7% per annum . Findings of the tribunal set aside and direction issued to pay the interest to the appellants from the date of filing of the claim petition . Judgment and award passed by the Tribunal modified. (Para - 12,13,15,16,17)

Appeal partly allowed. (E-7)

List of Cases cited:-

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

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

3. T.O. Anthony Vs Karvarnan & ors. 2008 (3) SCC 748

4. New India Assurance Co.Ltd. Vs Urmila Shukla ,2021 ACJ 2081

5. National Insurance Co.Ltd. Vs Pranay Sethi & ors. ,2014 (4) TAC 637 (SC)

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

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

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

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

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellants (legal heirs of the deceased) have challenged the judgment and order dated 10.10.2017, passed by Motor Accident Claims Tribunal/District Judge, Rampur (*herein after referred to as 'the Tribunal'*) in Motor Accident Claim Petition No.129 of 2016 (*Smt.Sushila and others vs. Amar Pal and others*), whereby the Tribunal awarded a sum of Rs.8,54,800/- with a default clause that for 21.5.2016 till the amount is deposited, 7% interest would approve as per Section 174 of the Motor Vehicles Act, 1988.

2. Heard Shri Santosh Kumar Tripathi, learned brief-holder appearing for Shri Sandeep Kumar Tripathi, learned counsel for the appellants-claimants, learned counsel for the Insurance Company and perused the record.

3. Motor accident claims petition was filed by the appellants for compensation in connection with the death of the deceased Motilal Yadav with the averments that on 7.2.2016, deceased Motilal Yadav was going with his relative Teerth Raj Yadav by driving Car No. UK06AG-3903 from Rampur to Rudrapur, District-Udhamsingh Nagar. At about 8:00 a.m., when he reached near Ishanagar Chauki, a Bolero No.UP22U-3651 came from the side of Rudrapur, which was being driven very rashly and negligently by its driver hit the car. Due to this accident, the car of the deceased fell into a ditch. In this accident, Motilal Yadav and Teerth Raj Yadav sustained injuries and Motilal Yadav succumbed to injuries on the way to hospital. It is also stated that deceased Motilal Yadav was in the business of transport. He was having 12 trucks and his income was Rs.40,000/- per month. He was also income tax payee. The respondents filed their respective written statements.

4. It is submitted by learned counsel for the appellant that the deceased was income tax payee and he was in the business of transport. His monthly income was Rs.40,000/-, but the Tribunal has assessed his monthly income at Rs.12,000/-, which is on a lower-side. It is also submitted that learned Tribunal has not awarded any sum towards future loss of income. The Tribunal has recorded the findings, wherein the appellant No.1 has stated that the business of transport is being looked after by the brothers of the deceased and she is getting the income of her share. On the basis of this evidence, Tribunal has held that there is no loss of income from business, but business could grow in future, if the deceased was alive. It is next submitted by learned counsel for the appellants that in the heads of non-pecuniary damages, Tribunal has awarded Rs.5,000/- for loss of consortium, Rs.2,500/- for loss of estate and Rs.5,000/- for funeral expenses, which are also on lower-side whereas rate of interest is allowed only 7%, which should also be enhanced. No other point regarding the quantum of compensation is pressed. On the point of negligence, learned counsel for the appellants submitted that deceased was not negligent while driving the car at the time of accident and the driver of the Bolero car was solely negligent. Therefore, the Tribunal has wrongly assessed 20% contributory negligence of the deceased and the finding pertaining to contributory negligence may be set aside and entire compensation should be paid to the appellants.

5. Learned counsel for the Insurance Company has submitted that as per the evidence of wife of the deceased, she is

getting her share of income, which is generated from the transport business, therefore, learned Tribunal has rightly held that there was no loss of future income due to death of the deceased. With regard to the contributory negligence, he has submitted that evidence on record clearly transpires that the deceased was himself negligent in driving the car and the Tribunal has rightly fixed 20% contributory negligence of the deceased.

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

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

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

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

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

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-

6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

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

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

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

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

(Emphasis added)

10. The Apex Court in ***Khenyei Vs. New India Assurance Company Limited & Others***, 2015 LawSuit (SC) 469 has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a

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

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

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

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory

negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

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

What emerges from the aforesaid discussion is as follows :

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

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

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

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

(Emphasis added)

12. We threadbare perused the evidence on record. As far as finding of contributory negligence is concerned, Tribunal has held that deceased was liable for 20% contributory negligence. The latest decision of the Hon'ble Apex Court in ***Khenyei*** (supra) has laid down one further aspect about considering the negligence, more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident or the impact of accident upon the victim could have been minimized if he has taken care. In this case, Teerth Raj Yadav (PW2) was sitting in the car of the deceased at the time of accident. Being the best eye-witness of the accident, he has stated before the Tribunal that at the time of accident, he and the deceased had seen the Bolero car from at the distance of 150-200 mtrs. and he had told the deceased to save the accident. Hence, it is crystal clear from the evidence of eye-witness (PW2) that deceased was also negligent in driving the car and certainly he was also responsible for the accident. In our opinion, Tribunal was justified in holding contributory negligence of the deceased also, which is to the tune of 20% and this finding of Tribunal is maintained as it is just and proper in the given circumstances of the case.

13. Now, this takes this Court to the issue of compensation. The income of the deceased is assessed at Rs.12,000/- per month by the Tribunal. It is not disputed that the deceased was in transport business and he was income tax payee. No doubt, the wife of the deceased had deposed that she is getting her share of income from the transport business, which is being looked after by the brothers of the deceased, but the assessment of Tribunal is not justified and we fix the income of the deceased at Rs.20,000/- per month. It cannot be ruled out that deceased could give the growth to his business, if he was alive. Hence, appellants are entitled to have compensation for future loss of income also. The deceased was self-employed. At the time of death, his age was 53 years. Therefore, as per the decision of Hon'ble Apex Court in ***New India Assurance Co.Ltd. vs. Urmila Shukla*** [2021 ACJ 2081], 20% shall be added in the income of the deceased towards future prospects. There is no dispute between the parties regarding the deduction of 1/3 for personal expenses of the deceased and multiplier of 11, but in our opinion, the non-pecuniary damages, awarded by the Tribunal, are on the lower side. As per the decision of Hon'ble Apex Court, in ***National Insurance Co.Ltd. vs. Pranay Sethi and others*** [2014 (4) TAC 637 (SC)], appellants shall be entitled for Rs.15,000/- each, towards funeral expenses and loss of estate. Appellant No.1-wife of the deceased shall also be entitled to Rs.40,000/- towards loss of consortium. Hence, the total compensation payable to the appellants is re-computed herein below:

i. Income Rs.20,000/-

ii. Percentage towards future prospects : 20% namely Rs.4000/-

iii. Total income : Rs. 20,000/- + Rs.4000/- = Rs.24,000/-

iv. Income after deduction of 1/3 : Rs.16,000/- (rounded up)

v. Annual income : Rs.16,000 x 12 = Rs.1,92,000/-

vi. Multiplier applicable : 11

vii. Loss of dependency: Rs.1,92,000 x 11 = Rs.21,12,000/-

viii. Amount under non-pecuniary head : Rs.15,000/- + Rs.15,000/- + Rs.40,000/- = Rs.70,000/-

ix. Total compensation : Rs.21,12,000/- + Rs.70,000/- = Rs.21,82,000/-

x. Compensation after deduction of 20% towards contributory negligence : Rs. 21,82,000-Rs.4,36,400/- = **Rs.17,45,600/-**

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

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

15. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

16. Tribunal has committed grave error while awarding the interest from the date of filing the written statement by the Insurance Company-respondent No.2. This is an absurd finding, which cannot be appreciated at all. We set aside this finding and direct to pay the interest to the appellants from the date of filing of the claim petition.

17. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 8 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

18. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.***, [2007(2) GLH 291] and this High Court in total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (***Smt. Sudesna and others Vs. Hari Singh and another***) and in First Appeal From Order No.2871 of 2016 (***Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.***) decided on 19.3.2021 while disbursing the amount.

(2022)02ILR A344
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 265 of 2011

Smt. Pratima Singh & Ors. ...Appellants
Versus
Rajendra Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Satyendra Narayan Singh, Sri Chandra Prakash Mishra, Sri Gyanendra Bahadur Rai, Sri Hari Bhawan Pandey, Sri Vivek Saran, Sri S.D. Ojha

Counsel for the Respondents:
Sri Arun Kumar Mishra

(A) Civil Law - Motor Vehicles Act, 1988 - difference between law relating to contributory negligence and composite negligence - composite negligence - legal representatives of the deceased or injured, as the case may be, are at liberty to seek total compensation from the owner of either of the vehicles or from the owners of the both the vehicles because liability is joint and several - extent of negligence of joint tortfeasors is immaterial for the satisfaction of the claim of the claimants.(Para - 11,12,)

Claim petition filed before Tribunal - awarding sum of Rs.29,98,950/- as compensation to the claimants - interest @ 6% per annum - Tribunal fixed 50% contributory negligence of driver of car - 50% contributory negligence of driver of truck - Tribunal held respondents jointly and severely liable for making the payments of compensation - no amount towards 'future loss of income' - no amount granted under 'non - pecuniary heads'.

HELD:-It is a case of composite negligence. Tribunal rightly considered salary of the deceased. Multiplier of 15 applied to arrive at 'loss of dependency'. Appellants shall get Rs.15,000/- for 'loss of estate' and Rs.15,000/- for 'funeral expenses'. Apart from it, wife of deceased shall get Rs.40,000/- towards 'loss of consortium' and mother of the deceased and both the daughters shall get Rs.40,000/- each, as 'filial consortium'. Rate of interest to be 7.5% instead of 7%. Total compensation payable to appellants and daughters of deceased Rs.85,74,000/- Judgment and award passed by Tribunal modified.(Para - 17,20,21)

Appeal partly allowed. (E-7)

List of Cases cited:-

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

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

3. A.V. Padma & ors. Vs R. Venugopal & ors., 2012 (1) GLH (SC) 442

4. National Insurance Co.Ltd. Vs Pranay Sethi, 2014 (4) TAC 637 (SC)

5. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 ACJ 1298

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

7. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Coo Ltd., [2007(2) GLH 291]

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

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

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the claimants have challenged the judgment and award dated 02.11.2010 passed by Motor Accident Claims Tribunal/ Additional District Judge, Varanasi (*herein after referred to as "Tribunal"*) in M.A.C.P. No.110 of 2008 awarding sum of Rs.29,98,950/- as compensation to the claimants with interest at the rate of 6% per annum.

2. The brief facts of the case are that aforesaid claim petition was filed before learned Tribunal with the averments that the deceased Bharat Singh was husband of appellant/claimant No.1, namely, Pratima Singh, who died in road-accident at the age of 38 years. The deceased was well-

educated Software Engineer and he had served Indian Navy also. After retirement from Navy, he was working in Pune (Maharashtra) Based Geometry Software as operational head. Regarding the factum of accident, it is averred in the petition that on 28.4.2008, he was going from Varanasi to his place of service in Pune by his Indica Car bearing No.MH-12-CR-3962. At about 9:00 p.m., 4 km. away from Rewa (MP), the Truck No.MBJ 2099 dashed the aforesaid car, when the truck was being reversed by its driver at a very high speed without blinking the indicator-light and horn. In this accident, deceased-Bharat Singh sustained serious injuries due to which he died during the treatment in Sanjay Gandhi Hospital at Rewa (MP).

3. Heard Shri S.D.Ojha, learned counsel for the appellants-claimants and Shri Arun Kumar Mishra, learned counsel for the respondent No.3-United India Insurance Co.Ltd. Perused the record.

4. Before us, the accident is not in dispute. In this case, learned Tribunal has fixed 50% contributory negligence of the driver of the car and 50% contributory negligence of the driver of the truck. Tribunal has made apportionment of the claim between tortfeasors and only 50% amount of the compensation to be paid by the Insurance Company of the offending truck, which is respondent No.3 and awarded the same is vehemently objected by the appellants and argued this point along with quantum fixed by the Tribunal.

5. The driver and the owner of the offending truck did not appear before the learned Tribunal. The Insurance Company-respondent No.3 filed its written statement.

6. On the point of negligence, learned counsel for the appellants submitted that learned Tribunal has fixed 50% contributory negligence of the driver of the car and 50% contributory negligence of the driver of the truck, but the deceased was travelling in the car. He was not driving the car at the time of accident. Therefore, as far as the deceased is concerned, it is a case of composite negligence and appellants are entitled to recover the entire amount of compensation from any of the tortfeasor, but the learned Tribunal has allowed only 50% amount of compensation to be paid by the Insurance Company of the Truck, which is illegal.

7. *Per contra*, Shri Mishra, learned counsel appearing on behalf of Insurance Company, has submitted that since the driver of the truck was only negligent to the extent of 50%, therefore, the Insurance Co. of the truck is liable to pay 50% of the quantum and learned Tribunal has committed no error in this regard and there is no illegality or infirmity in the impugned judgment. Hence, it does not call for any interference by this Court.

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

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

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

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

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

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The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

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

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

10. The Apex Court in ***Khenyei Vs. New India Assurance Company Limited & Others***, 2015 LawSuit (SC) 469 has held as under:

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11. Perusal of the impugned judgment shows that learned Tribunal has held that respondents shall be liable jointly and severely for making the payments of compensation, but contributory negligence of drivers of car and truck is fixed to the extent of 50-50% and the Insurance Company of the car is not made party in the petition, hence Insurance Company of the truck would be liable to pay only 50% amount of compensation. This finding of learned Tribunal is erroneous. Learned Tribunal has not understood the law relating to composite negligence. As far as the compensation regarding the death of the deceased is concerned, it is not a case of contributory negligence, but it is a case of composite negligence. There is difference

between the law relating to contributory negligence and composite negligence.

12. In case of composite negligence, legal representatives of the deceased or injured, as the case may be, are at liberty to seek total compensation from the owner of either of the vehicles or from the owners of the both the vehicles because liability is joint and several. As held by Hon'ble Apex Court in ***Khenyei*** (supra), the extent of negligence of joint tortfeasors is immaterial for the satisfaction of the claim of the claimants. However, in case, the joint tortfeasors are before the Court, it may determine the extent of their liability for the purpose of adjusting inter se equities between them. But, in the case in hand, the owner and the Insurance Company of the car involved in accident were not before the Tribunal, hence it was not open for the Tribunal to make apportionment of the compensation between the tortfeasors.

13. It is not necessary to join both the tortfeasors in the petition because claimants absolute right in asking for the compensation from any of the joint tortfeasors and if it is so, the total amount of compensation shall be paid by the joint tortfeasor, who has made party to the petition. Claimants have the right to recover entire amount from one tortfeasor, hence learned Tribunal has committed grave error by making apportionment of compensation between the tortfeasors and limiting the liability of Insurance Company of the truck to the extent of 50% only. Hence, total amount of compensation shall be paid to the claimants/appellants by respondent No.3-Insurance Company of the offending truck, but since the owner and the Insurance Company of the car are not before us, respondent No.3 may recover 50% of the amount of compensation from the owner/Insurance Company of the car.

14. There is one more important aspect in this appeal, which is neither pointed out nor argued by any of the parties, but we threadbare analyzed the evidence on record and by perusing the record as well, we find that the deceased-Bharat Singh is survived by two daughters also, namely, Kumari Akshita Singh and Kumari Ayushi aged about 11 years and 7 years respectively as shown in column No.7 of the petition. However, they are not shown in the array of the parties, but even then when it was on record before the Tribunal that the deceased is survived by two daughters also, the Tribunal was duty-bound to settle the share of daughters' compensation also, but the Tribunal overlooked this legal and factual position. Hence, since the daughters of the deceased are on record, we direct that the daughters of the deceased, as shown in column No.7 of the petition, should be paid reasonable amount out of total amount awarded as compensation, which may be required for their higher education or marriage etc. because they would have become major by now. Therefore, as per the law laid down by Hon'ble Apex Court in ***A.V. Padma and others vs. R. Venugopal and others, 2012 (1) GLH (SC) 442***, the order of investment is not passed as the claimants are neither illiterate nor rustic villagers and moreover more than 13 years have been elapsed when the accident in question had taken place. Now the only issue to be decided is the quantum of compensation awarded by the Tribunal.

15. Learned counsel for the appellant has submitted that the deceased was in service and his salary was Rs.1,10,000/- per month, but the Tribunal has assessed the salary as only Rs.46,800/-. It is also submitted that no amount towards 'future loss of income' is considered by the learned

Tribunal and the amount granted under 'non-pecuniary heads' is also at a lower-side.

16. *Per contra*, learned counsel appearing on behalf of Insurance Company objected and submitted that learned Tribunal has rightly assessed the monthly income of the deceased as Rs.46,800/- because amount under heads of basic-pay and HRA are not admissible.

17. Perusal of records shows that the appellants have filed the appointment letter of the deceased, which is annexed with the salary break-up to be paid. This letter is dated 19.4.2007, which shows that basic-pay of the deceased was Rs.31,200/- and HRA was Rs.15,600/-. Apart from these, special allowances, transport allowances are mentioned, which are not payable. Therefore, we are of the opinion that learned Tribunal has rightly considered the salary of the deceased at Rs.31,200/- + Rs.15,600/- = Rs.46,800/-, which we do not disturb. Learned Tribunal has not awarded any sum towards 'loss of future income'. The deceased was salaried person and admittedly his age was below 40 years, therefore, as per the judgment of ***National Insurance Co.Ltd. vs. Pranay Sethi***, 2014 (4) TAC 637 (SC), 50% of the income shall be added towards 'future prospects. Wife, mother and two daughters of the deceased were dependent on the deceased. Both the daughters were minor at the time of accident, therefore, they shall be treated as one unit. Hence, keeping in view the number of dependents, 1/3 of the income shall be deducted for personal expenses of the deceased. It is admitted in the petition that the age of the deceased was 38 years, therefore, as per the judgment of the Hon'ble Apex Court in ***Sarla Verma and others vs. Delhi Transport Corporation and another***, 2009 ACJ 1298, multiplier of 15 shall be applied to arrive at 'loss of dependency'. Appellants shall get Rs.15,000/- for 'loss of estate' and Rs.15,000/- for 'funeral expenses'. Apart from it, the wife of deceased shall get Rs.40,000/- towards 'loss of consortium' and mother of the deceased and both the daughters (Kumari Akshita Singh and Kumari Ayushi) shall get Rs.40,000/- each, as 'filial consortium'.

18. Hence, the total compensation payable to the appellants and daughters of the deceased as per the discussion above is recomputed herein below:

i. Monthly Income : Rs.46,800/-

ii. Percentage towards future prospects : 50%, namely, Rs.23,400/-

iii. Total income : Rs.46,800/- + Rs.23,400/- = Rs.70,200/-

iv. Income after deduction of 1/3 : Rs.70,200/- - Rs.23,400/- = Rs.46,800/-

v. Annual income : Rs.46,800 x 12 = Rs.5,61,600/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.5,61,600 x 15 = Rs.84,24,000/-

viii. Amount under non-pecuniary heads : Rs.15,000/- + Rs.15,000/- + Rs.40,000/- + Rs.40,000/- + Rs.40,000/- =Rs. 1,50,000/-

ix. Total compensation : Rs. 84,24,000/- + Rs.1,50,000/- = Rs. 85,74,000/-

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

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

20. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

21. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal is modified to the aforesaid extent. United India Insurance Company Limited-respondent No.3 shall deposit the entire amount within a period of **12 weeks** from today with interest @ 7.5% per annum from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

22. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd., [2007(2) GLH 291] and this High Court in t***otal amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (***Smt. Sudesna and others Vs. Hari Singh and another***) and in First Appeal From Order No.2871 of 2016 (***Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.***) decided on 19.3.2021 while disbursing the amount.

(2022)02ILR A351
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1401 of 2009
&
First Appeal From Order No. 1559 of 2009

Smt. Geeta Vishnoi & Ors. ...Appellants
Versus
M/s Kanpur Shifter Private Ltd. & Anr. ...Respondents

Counsel for the Appellants:
Sri Mohd. Naushad Siddiqui, Sri Shreesh Srivastava

Counsel for the Respondents:
Sri Rahul Sahai

(A) Civil Law - Motor Vehicles Act, 1988 - Principles of res ipsa loquiter - contributory negligence - Negligence is not always a question of direct evidence -

It is an inferen to be drawn from proved facts - Negligence is not an absolute term, but is a relative one - at intersection where two roads cross each other - it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection - but continued to proceed at a high speed without caring to notice that another vehicle was crossing - then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently. (Para - 6)

Two appeals against same judgement - Claimants filed for enhancement of award - Insurance Company of offending truck filed mainly on the ground of contributory negligence of the deceased - deceased driving scooter on the wrong side of the road - driving negligently - truck was on correct side of the road but was on high speed - Had the speed of the truck been reasonable and slow, the accident could have been avoided.

HELD:- Deceased and Truck driver both negligent in driving vehicle to the tune of 50% each . Multiplier of 14 applied, keeping in view of 42 years of age of the deceased . Under the head of non-pecuniary damages, claimants entitled to get Rs.1,90,000/- in all . Compensation payable to the claimants after deduction of 50% towards contributory negligence of the deceased : Rs.17,64,416. The rate of interest fixed at 7.5% instead of 7% per annum awarded by tribunal. Judgment and award passed by the Tribunal shall stand modified. (Para - 11,14,15,18)

Appeals partly allowed. (E-7)

List of Cases cited:-

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

2. Bimala Devi Vs Himachal Pradesh Rct (2009) 13 SCC 530

3. Sunita Vs Rajasthan St. Road Transporation Corp. (2019) 0 SCC 195

4. Vimal Kanwar & ors. Vs Kishore Dan & ors., AIR 2013 SC 3830

5. National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2014 (4) TAC 657 (SC)

6. Sarla Verma Vs Delhi Transport Corporation 2009 (2) TAC 677 (SC)

7. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr., 2021(4) TAC (SC)

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

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

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

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

(Delivered by Hon'ble Ajai Tyagi, J.)

1. These two appeals have been preferred by the parties against the same judgement and award passed by Motor Accident Claims Tribunal/Additional District Sessions Judge, court No.17, Kanpur Nagar on 31.01.2009. FAFO No.1401 of 2009 (Smt. Geeta Vishnoi and others Vs. M/s Kanpur Shifter Pvt. Ltd. and others) is filed by claimants for enhancement of the impugned award while FAFO No.1559 of 2009 (The New India Assurance Company Limited Vs. Smt. Geeta Vishnoi and others) is filed by the Insurance Company of offending truck mainly on the ground of contributory negligence of the deceased. These two appeals are against the same judgement. Hence, these are heard and being decided together.

2. Brief facts of the case are that claimants of FAFO 1401 of 2009 filed a

claim petition before learned Tribunal on account of the death of Chandra Kumar Vishnoi with the averments that on 16.03.2007, the deceased Chandra Kumar Vishnoi was going by scooter bearing No.U.P. 78 V 9207 on by pass road within the jurisdiction of Police Station- Barra, District- Kanpur Nagar. He was driving the the scooter with slow speed on its left side. Between 10:00 pm and 11:00 pm (night) when he reached near Ruchi Guest House, a tanker bearing No. U.P. 78 N 2323 hit the scooter of the deceased from behind while being driven rashly and negligently by its driver. In this accident, Chandra Kumar Vishnoi sustained fatal injuries and died on the spot. It is also averred that the age of the deceased was 40 years and he was Professor in DAV Degree College in Kanpur.

3. Heard learned counsel for both the parties and perused the record.

4. Learned counsel for the Insurance Company vehemently argued that it is a crystal clear case of contributory negligence on the part of the deceased but learned Tribunal inspite of discussing the issue, did not arrive at right conclusion and it was alleged that truck driver was solely negligent.

5. The principle for deciding whether driver of a vehicle is negligent or not was discussed in below mentioned judgments.

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

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

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down

vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as comear 1992. "The burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."
emphasis added

7. The Supreme Court in **Bimala Devi Vs. Himachal Pradesh Rct (2009)** 13 SCC 530 and **Sunita Vs. Rajasthan State Road Transporation Corporation** (2019) 0 SCC 195 has held that the evidence Act 1872, cast a duty on the respondents to adduce the evidence, so it is to show that the vehicles were being driven so as to avoid any accident being taken place.

8. The principles of res ipsa loquiter would apply on the facts of this case to demonstrate that the deceased was at the wrong side of the road and driving other side of the divider. If he would not have gone on the incorrect side, the accident would not have taken place but even though the accident could have been avoided if the truck would have been at moderate speed.

9. Learned counsel for Insurance Company attracted our attention towards the site-plan of the place of occurrence also, which is prepared by the Investigating Officer during investigation of connected criminal case against the driver of the truck. It is contended by the insurance company that the road, on which accident took place, was one way road having divider. The truck was being driven on the correct side of the road but the deceased was coming from the opposite side on the same road on which the truck was coming, meaning thereby the deceased was on the left side of the divider but on the right side road which was meant for coming the traffic from opposite side of the scooter of the deceased. Learned counsel submitted that the Tribunal has overlooked this aspect of the accident and held no contributory negligence. Learned counsel also submitted that the truck driver was on its correct side and plying the vehicle at normal speed. Hence, the deceased was solely negligent and responsible for the accident.

10. Per contra, learned counsel for the claimants submitted that the deceased was on left side of the road and the truck was in the middle of the road. Learned Tribunal has rightly held that as per site-plan, the deceased was just five feet on the road from its edge while the truck was 15 feet from the other side of the edge of the road, hence, in this way, the truck driver was solely negligent and responsible for the accident. There is no illegality or infirmity in the judgement of learned Tribunal and it does not call for any interference by this Court.

11. We threadbare perused the copy of the site-plan but before discussing the site-plan we taken up issue whether in the accident in question, both the vehicles were coming from opposite direction or scooter was hit by the truck from behind. As per averment of petition, the truck driver hit the scooter from behind but it is not the case because the copy of the site-plan clearly shows that it was highway and one way road where accident took place. There was divider between the road and both the vehicles are on one side of the road where the truck driver was going from east to west on its correct side but the deceased was going from west to east on the same side of the divider and the accident took place when both the vehicles were coming from opposite direction. This fact is also corroborated by the evidence of eye-witness PW2, who has deposed that the road at the site of the accident is one way. There is divider in between. Deceased was going on left side of the road and tanker was coming in the middle of the road. If this statement of PW2 is seen in the light of the site-plan, it is clear that both the vehicles were on the same side of the road and coming from opposite direction. Learned Tribunal discussed this point in its judgement but failed to appreciate the point and situation of divider. Learned Tribunal held that the deceased was at the left side of the divider but he overlooked the situation that he was on the same side of the road on which the truck was coming from opposite direction and this side was the wrong side for the deceased to ply his vehicle. Other side of the road from divider was the correct side for the deceased to drive the scooter. Hence, it is proved on the basis of evidence that the deceased was driving the scooter on the wrong side of the road and he was driving negligently. Although, the truck was on correct side of the road but he was on high speed. Had the speed of the truck been reasonable and slow, the accident could have been avoided. After discussing the point of the negligence, we hold the deceased to be 50% negligent. In this way, we hold the deceased and the truck driver both were negligent in driving the vehicle to the tune of 50% each.

12. Now we come to the issue of quantum of compensation. Learned counsel for the claimants submitted that learned Tribunal has awarded less amount of compensation because the income of the deceased was not assessed in right perspective. It is submitted that the deceased was Professor in DAV Degree College Kanpur and he was getting salary of Rs.28,391/- per month but the Tribunal has assessed only Rs.22,931/- as salary per month. Learned counsel for the claimants argued that apart from basic salary, D.A. H.R.A. also shall be taken into account and no deduction in the salary shall be considered.

13. Per contra, learned counsel for the Insurance Company argued that only that portion of salary will be taken into account as is left after deduction of income tax. We are fully convinced with the argument of learned counsel for the Insurance Company. Perusal of the impugned judgement shows that learned Tribunal has opined that Rs.2,000/- was income tax which was liable to be deducted from the salary. Basic-pay of the deceased was Rs.13,680/- and he was getting DA at Rs.6840/- and additional D.A. at Rs.5951/- as well as house rent allowance of Rs.1980/-. Certain deductions could not have been made by the Tribunal in view of the judgement of **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830**. The Tribunal has concluded

that income tax returns of the deceased are filed but no return is filed pertaining to the year of the death. Hence, finally the Tribunal has assessed salary of the deceased at Rs.22,931/- after making the deduction towards income tax only, which we do not disturb.

14. Learned Tribunal has not granted any amount towards future loss of income. It is admitted fact that the deceased was a salaried person and his age was 42 years at the time of accident. Hence, as per the judgement of **National Insurance Company Limited Vs. Pranay Sethi and Others 2014 (4) TAC 657 (SC)** 30% of the income shall be added towards future prospects. Keeping in view the number of the dependents on the deceased, the Tribunal has rightly deducted 1/3 of the income towards personal expenses of the deceased. Learned Tribunal has applied multiplier of 15 in accordance with the second Schedule of Motor Vehicle Act but multiplier of 14 shall be applied, keeping in view of 42 years of age of the deceased, in view of the judgement of Hon'ble The Apex Court in **Sarla Verma Vs. Delhi Transport Corporation 2009 (2) TAC 677 (SC)**. As far as non-pecuniary damages are concerned, Tribunal has provided Rs.5,000/- for loss of consortium, Rs.2,500/- for loss of estate and Rs.2,000/- for funeral expenses, but as per the judgement of Pranay Sethi (surpa) Rs.15,000/- shall be granted for loss of estate and Rs.15,000/- shall be granted for funeral expenses. The wife of the deceased shall be entitled to get Rs.40,000/- for loss of consortium. Deceased is survived by two children and parents. Hence, in view of the judgement of **Kurvan Ansari @ Kurvan Ali and another Vs. Shyam Kishore Murmu and another, 2021(4) TAC (SC)**, both the children of the deceased shall get filial consortium Rs.40,000/- each and mother of the deceased shall also get filial consortium of Rs.40,000/-. Hence, under the head of non-pecuniary damages, the claimants shall be entitled to get Rs.1,90,000/- in all.

15. Hence the total amount of compensation, in view of the above discussions, payable to the claimants is being computed herein below:

(i) Monthly income of the deceased : Rs.22,931

(ii) Addition towards future prospects (30%) : Rs.6879/-

(iii) Total income 22931+6879= Rs.29,810/-

(vi) Income after deduction of 1/3 : 29810-9936= Rs.19,874/-

(v) Annual income : 19874 x 12 = Rs.2,38,488/-

(vi) Multiplier applicable : 14

(vii) Loss of dependency : 2,38,488 x 14 = Rs.33,38,832/-

(vii) Loss of estate : Rs.15,000/-

(ix) Funeral expenses : Rs.15,000/-

(x) Loss of consortium and filial consortium:
40,000+40,000+40,000+40,000= Rs.1,60,000/-

(xi) total compensation : Rs.33,38,832 + 1,90,000= Rs.35,28,832/-

Compensation payable to the claimants after deduction of 50% towards contributory negligence of the deceased : Rs.17,64,416.

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

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

17. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

18. In view of the above, both the appeals are partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

19. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd**., [2007(2) GLH 291] and this High Court in total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) and in First Appeal From Order No.2871 of 2016 (**Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd**.) decided on 19.3.2021 while disbursing the amount.

(2022)02ILR A357
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1491 of 2021

Smt. Kamla & Ors. ...Appellants
Versus
Shri Gurdeep Singh Kukreja & Anr. ...Respondents

Counsel for the Appellants:
Sri S.C. Kesarwani

Counsel for the Respondents:
Sri Dharmendra Kumar, Sri Rahul Chaudhary

(A) Civil Law - Motor Vehicles Act, 1988 - Income Tax Act, 1961 - Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year

exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - enhancement of quantum - neglience - multiplier shall be applied according to the age of the deceased . (Para -12)

Claimants-appellants (mother of deceased) no.1 - along with claimant-appellant nos.2 to 5, who are brothers of the deceased - filed a Motor Accident Claim Petition - before Tribunal - claiming compensation under Motor Vehicles Act, 1988 - Tribunal awarded a sum of Rs.2,24,500/- as compensation - to the claimants with interest @ 6% simple interest per annum - aggrieved by order - preferred appeal for enhancement of quantum . (Para - 1,2,3,)

HELD:-Tribunal applied multiplier of 11 but multiplier of 18 shall be applied as per the age of the deceased. Rate of interest should be 7.5%. Judgment and award passed by the Tribunal stand modified. Respondent-Insurance Company shall deposit the amount within a period of 08 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. (Para - 12,17)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Munna Lal Jain Vs Vipin Kumar Sharma ,2015 (3) TAC 1 (SC)

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 217 LawSuit (SC) 1093

3. Smt.Sarla Verma Vs Delhi Transport Corporation ,2009 (2) TAC 677 (SC)

4. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr. ,2021 (4) TAC (SC)

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

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

7. Smt. Sudesna & ors. Vs Hari Singh & anr., Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

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

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the claimants-appellants against the judgment and order dated 31.03.2010 passed by Motor Accident Claims Tribunal/Chairman, District Judge, Etah (hereinafter referred to as "Tribunal') in M.A.C.P. No. 259 of 2009 (Smt. Kamla and Others Vs. Shri Gurdeep Singh Kakreja and Another), whereby the learned Tribunal has awarded a sum of Rs.2,24,500/- as compensation to the claimants with interest at the rate of 6% simple interest per annum .

2. The claimants-appellants have preferred this appeal for enhancement of quantum.

3. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for claiming the compensation under Motor Vehicles Act, 1988 for the death of Satyavir @ Satvir in a road accident with the averments that on 20.05.2009 deceased was going with his brother in tractor bearing No.U.P. 21-B 8515 with Trauli filled up with sand, on National Highway-24. At about 2:30 AM (night) when the tractor reached near Akhhar Dham Temple, a truck bearing No. H.R. 12 A 1425 came from behind, which was driven very rashly and negligently by its driver and hit the tractor from behind. In this accident, the deceased fell from the tractor and the wheel of the truck ran over

him due to which he sustained fatal injuries and died on the spot. Respondents filed their respective written statements.

4. Aggrieved mainly with the compensation awarded, the appellants preferred this appeal.

5. Heard Mr. S.C.Kesarwani, learned counsel for the appellants and Dharmendra Kumar, learned counsel for the respondent. Perused the record.

6. The accident is not in dispute. The issue of negligence has attained finality and The Oriental Insurance Co. Ltd. (in short "Insurance Company") has not challenged the liability imposed on it by the Tribunal. The only issued to be decided is the quantum of compensation awarded by the Tribunal.

7. Learned counsel for the appellants-claimants has submitted that the deceased was 21 years of age at the time of accident and was unmarried. It is also submitted that monthly income of the deceased was Rs.15,000/- because he was a labourer but the Tribunal has assessed his income only Rs.2,500/- per moth, which is on the lower side. It is next submitted that the Tribunal has not awarded any sum towards future loss of income.

8. It is argued by learned counsel for the appellants that the Tribunal has applied multiplier of 11 on the basis of the age of the mother of the deceased while the multiplier should have been applied according to the age of the deceased as held by Hon'ble Apex Court in the case of ***Munna Lal Jain vs. Vipin Kumar Sharma [2015 (3) TAC 1 (SC).*** It is also argued that under the non pecuniary damages no amount is awarded for filial consortium and the rate of interest is awarded only 6% per annum and that too simple imprisonment, which is not just and proper.

9. *Per contra*, learned counsel for the Insurance Company has submitted that there is no evidence is on record regarding the income of the deceased, hence assessment of monthly income of the deceased by Tribunal as per the settled principles of law. It is further submitted by Insurance Company that Tribunal has deducted 1/3 towards personal expenses of the deceased while ½ should have been deducted as per the direction of Hon'ble Apex Court in ***Munna Lal Jain (Supra***). The rate of interest awarded is also just and proper, hence, there is no infirmity or illegality in the impugned judgment and order passed by Tribunal which may call for any interference by this court.

10. This fact is not disputed that the deceased was 21 years of age and unmarried boy at the time of accident. Learned Tribunal has assessed his monthly income Rs.2,500/- but keeping in view the fact that deceased was labourer and his daily income may be safely assumed as Rs.100/-, hence, we held that the monthly income of the deceased at Rs.3,000/- which amounts to 3,000 X 12 = Rs.36,000/- per annum.

11. Learned Tribunal has not awarded any amount towards future loss of income of the deceased. The judgment of Hon'ble Apex Court in the case of ***National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 217 LawSuit (SC) 1093*** is applicable retrospectively, hence, as per the aforesaid judgment, keeping in view the age of the deceased, 40% shall be added to the income of the deceased for future prospects. Tribunal has deducted 1/3rd of

the income towards personal expenses of the deceased. As per the direction of Hon'ble Apex Court in ***Munna Lal Jain (Supra),*** ½ shall be deducted towards his personal expenses because the deceased was unmarried boy.

12. In this vary judgment ***Munna Lal Jain (Supra),*** it is also held by Hon'ble Apex Court that multiplier shall be applied according to the age of the deceased. Learned Tribunal has applied multiplier of 11 but we held that as per the judgment of ***Smt.Sarla Verma vs. Delhi Transport Corporation [2009 (2) TAC 677 (SC)*** multiplier of 18 shall be applied as per the age of the deceased. Appellant no.1 shall also get Rs.15,000/- for loss of estate, Rs.15,000/- for funeral expenses. Apart from it, the appellant no.1 shall also be entitled to get Rs.40,000/- towards filial consortium in the light of the judgment of Hon'ble Apex Court in the case of ***Kurvan Ansari alias Kurvan Ali and another vs. Shyam Kishore Murmu and another [2021 (4) TAC (SC)]*** .

13. Hence, the total compensation, in view of the above discussions, payable to the appellants no.1 is being computed herein below:

(i) Annual Income : (Rs3,000 X 12) = Rs.36,000/- Per annum

(ii) Percentage towards future prospects 40% : Rs. 14,400/-

(iii) Total income : Rs. 36,000/- + Rs.14,400/- = Rs. 50,400/-

(iv) Income after deduction ½ : Rs.25,200/-

(v) Multiplier applicable : 18

(vi) Loss of Dependency : Rs. 25,200/- X 18 = Rs.4,53,600/-

(vii) Filial consortium : Rs.40,000/-

(viii) Amount under non pecuniary head : Rs.30,000/-

(ix) Total compensation : Rs.4,53,600 + 40,000 + 30,000 = Rs.5,23,600/-

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

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

15. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

16. Perusal of impugned judgment and award shows that the claim petition was filed by claimant-appellant no.1, who is mother of the deceased along with claimant-appellant nos.2 to 5, who are brothers of the deceased. Learned Tribunal has committed gross error as it has directed that claimant-appellant nos.2 to 5 shall be entitled to Rs.15,000/- each out of the total amount of compensation, while there are not legal representatives of the deceased because mother of the deceased is alive and petitioner no.1 in the claim petition. According to the Hindu Succession Act,

mother is Class-I heir while brothers are Class-II heirs, hence, claimants-appellants no.2 to 5 shall not be entitled to receive any amount of compensation and the entire amount shall be paid to appellant no.1 i.e. Smt. Kamla (mother of the deceased). If appellant nos. 2 to 5 have already received any amount of compensation, it shall be recovered from them and paid to the appellant no.1-Smt. Kamla.

17. In view of the above, the appeal is ***partly allowed***. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent- Insurance Company shall deposit the amount within a period of 08 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

18. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd., [2007(2) GLH 291]*** and this High Court in total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in ***Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001*** (Smt. Sudesna and others Vs. Hari Singh and another) and in ***First Appeal From Order No.2871 of 2016*** (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.) decided on 19.3.2021 while disbursing the amount.

(2022)02ILR A361
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 2737 of 2014
Connected with
First Appeal From Order No. 2795 of 2014

Smt. Manju Singh @ Manju Devi & Ors. ...Appellants
Versus
U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Appellants:
Sri Rakesh Kumar Porwal, Sri M.M. Sahai

Counsel for the Respondents:
Sri A.A. Khan

(A) Civil Law - Motor Vehicles Act, 1988 - Uttar Pradesh Motor Vehicles Rules, 2011 - Rule 220 (a) (3) - Income Tax Act, 1961 - section 194A (3) (ix) - Tax Deducted at Source - statutory instrument has to be allowed to operate unless it is found to be invalid - negligence - composite /contributory neglience - principle of contributory negligence - A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.(Para - 9,12,16,)

Accident between bus of U.P.S.R.T.C. - vehicle driven by deceased met with an

accident on fateful day - Appeal preferred by claimants as well as U.P.S.R.T.C. - challenge - issue of negligence and compensation - finding of fact - factum of compensation and quantum - tribunal granted 20% addition - multiplier of 12 granted - non-granted of filial consortium .(Para - 2,3,4)

HELD:-Filial consortium to be 40% to the wife and by way of love and affection it was Rs.40,000/- to the son and Rs. 30,000/- for the other head . Compensation payable to the appellants Rs. 35,16,256/-. Negligence of the driver of U.P.S.R.T.C. is considered to be 20% . U.P.S.R.T.C. can recover 10% from the owner and Insurance Company of the Truck. In second appeal it will be recoverable from either of the tort-feasors. Compensation is enhanced to additional amount of Rs. 1,05,000/- with additional interest of 7.5% from the date of filing of claim petition till the said amount is recovered. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor. Judgment and award passed by the Tribunal shall stand modified. (Para - 21,23,27)

Appeal partly allowed.(E-7)

List of Cases cited:-

1. UPSRTC Vs Km. Mamta & ors., AIR 2016 SC 948

2. Sarla Verma, 2009 ACJ 1298 (SC)

3. Reshma Kumari, 2013 ACJ 1253 (SC)

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

5. Jacob Mathew Vs St.of Punj., 2005 0 ACJ(SC) 1840)

6. Khenyei Vs New India Assurance Company Limited & ors., 2015 LawSuit (SC) 469 T.O.

7. Anthony Vs Karvarnan & ors. ,2008 (3) SCC 748

8. Smt. K. Anusha & ors. Vs Regional Manager, Shriram General Insurance Co. Ltd., 2021 (4) TAC 341 (SC)

9. National Insurance Company Ltd. Vs Chamundeswari & ors., 2021 (4) TAC 367 (SC)

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

11. New India Assurance Co.Ltd. Vs Urmila Shukla & ors., 2021 ACJ 2081

12. New India Assurance Co. Ltd. Vs Urmila Shukla & ors., 2021 ACJ 2081

13. Rajasthan State Road Transport Corporation Vs Devi Lal & ors., 1991 ACJ 230,

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

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

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

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

1. Heard Sri R.K. Porwal for the appellant, Sri M.M. Sahai for U.P. State Road Transport Corporation and Sri A.A. Khan for the Insurance company in FAFO No.2737 of 2014 and Sri M.M. Sahai for the appellant, Sri R.K. Porwal for the claimant and Sri A.A. Khan for the Insurance company in FAFO No.2795 of 2014.

2. Both these appeals raise issues which have to be decided by the Division Bench in the light of judgment of **UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948**, and the later judgment. The appeal, being Appeal No.2737 of 2014 is preferred by the claimants and the

appeal, being Appeal No.2795 of 2014, is preferred by U.P.S.R.T.C. Both have challenged what is known as the issue of negligence. The U.P.S.R.T.C. has raised the issue of negligence contending that the Tribunal has committed an error which can be said to be an error apparent on the face of record as the site plan, the record and all the factual data would go to show that the truck came and dashed with the bus whereby the driver of the bus and the passenger scummed to injuries. The evidence of PW-2 has also been ignored by the Tribunal and that is how the judgment dated 10.7.2014 is bad in the eyes of law.

3. The twin issues raised are the finding of fact as far as negligence and compensation is concerned.

4. The skeletal facts are that the accident between bus of U.P.S.R.T.C. and the vehicle driven by the deceased met with an accident on the fateful day i.e. 5.6.2008. All other issues are not required to be decided except the factum of compensation and quantum. On 5.6.2008 Sri Raj Bahadur Singh Bhadauriya and some people, who were travelling from Kanpur to Orai at that point of time when the bus passed Orai, a truck, bearing no.UP93E-6362 came rashly and negligently injuring some and causing death of bread winner of Manju Devi and her children.

5. As far as the compensation is concerned, it is submitted that the judgment of ***Sarla Verma, 2009 ACJ 1298 (SC) and Reshma Kumari, 2013 ACJ 1253 (SC)***, will apply and no addition to income will be allowed whereas Tribunal has granted 20% addition which is bad in the eye of law and that the multiplier of 12 granted is on the higher side.

6. Learned Counsel for the U.P.S.R.T.C. has taken us through the assessment and requested that the assessment be recalculated in the light of the settled legal preposition of law.

7. As against this, the appeal preferred by the claimants relates to only compensation. We now come to the factual scenario as it emerged.

8. Shri A.A. Khan has taken us to the site plan and has contended that the facts are such that there was a head-on collision and we should attribute 50% - 50% negligence as there was an injury which shows that the driver of the bus was equally negligent.

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

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

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term,

but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

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

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

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

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence

*altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (**per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

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

11. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

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

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

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding

against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

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

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

What emerges from the aforesaid discussion is as follows :

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

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

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

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

emphasis added

12. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/ contributory negligence.

13. In view of this and the recent decision of the Apex Court in ***Smt. K. Anusha and others Vs. Regional Manager, Shriram General Insurance Co. Ltd., 2021 (4) TAC 341 (SC) and National Insurance Company Ltd. Vs. Chamundeswari and others, 2021 (4) TAC 367 (SC)***, the issue of contributory negligence or composite negligence will have to be decided as qua the deceased it was a case of composite negligence but when the payment of amount is to be decided, we will have to decide the percentage of negligence of each driver. There are 4 facts which emerged from the facts as per record and evidence. It was not a case of head-on collision rather the truck dashed with the bus which was on its correct side. The driver of the bus may have crossed the middle of both but was not to his extreme right (wrong side). The impact was such that the driver of the bus died on the spot and the driver of the truck ran way from the scene of accident. He has not stepped into witness box. The charge-sheet was laid against him. It was on the highway that the accident occurred. Testimonial of all witnesses was permitted us t disturb the finding of the Tribunal to hold that only 10% was attributable to the driver of the bus and 90% was the fault of the Truck driver insured with the Insurance company.

14. As far as claimants are concerned, it will be a case of composite negligence, hence the judgment of **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469**, would apply. The issue of negligence is held in favour of U.P.S.R.T.C. and against the Insurance company.

15. This takes us to the issue which can be said to be the core issue. The submission of Sri Sahai that the judgment in Sarla Verma (supra) does not permit addition of any amount and it is stated that even if any amount is to be added, it should be 15% as per the judgment of Sarla Verma and Pranay Sethi.

16. We cannot accept the submission for two fold reasons. The Tribunal has relied on the Uttar Pradesh Motor Vehicle

Rules, 2011. Rule 220 (a)(3) provides that 20% will be added to the income of the deceased. This issue after the age of 50 as per the rule is no longer res-integra as the Apex Court in ***New India Assurance Co.Ltd. Vs. Urmila Shukla and others, 2021 ACJ 2081***, has held that judgment of Pranay Sethi is an indicia but if the statutory instrument which affords better and greater benefit then it will prevail as it is held that the statutory instrument has to be allowed to operate unless it is found to be invalid. We do not delve further in the issue as the learned Tribunal's view in the afore mentioned judgment. Therefore, para 60 of the said decision, we are obliged to quote here:-

"The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma, (2009) ACJ 1298 (SC), thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari, 2013 ACJ 1253 (SC). Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 and 60 years and there should be no addition thereafter. Similarly, in case of self- employed or person on fixed salary, the addition should be 10% between the age of 50 and 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts."

and this issue is not dealt further.

17. The recent decisions of the Apex Court decision in ***New India Assurance Co. Ltd. Vs. Urmila Shukla and others, 2021 ACJ 2081***, will enure the benefit of claimants. In our case also the owner and the driver of the truck before the Tribunal did not enter into the witness box. The learned Tribunal has decided this issue on the basis of the judgment in ***Rajasthan State Road Transport Corporation Vs. Devi Lal and others, 1991 ACJ 230***, that it was a head-on collision. The eye witnesses have deposed that the accident took place at 7.30 a.m. in the month of June. The injured PW-2 was also admitted to a hospital. The fact that the driver of the truck bearing no. UP93A-6362 came towards the bus without blowing horn dashed with driver side of the bus in such a way that it was injured to certain persons and the deceased died in the hospital. Though owner and the driver of the truck filed his reply, he has not stepped into the witness box. The Insurance company has also not examined anybody. In that view of the matter, documentary evidence appreciated on the same which will not permit us to concur with the submission of Sri Sahai that the driver of the truck was solely responsible.

18. This takes us to the issue of compensation in the case of Manju Singh and others, legal representative of the decision Raj Bahadur Singh Bhadauriya.

19. It is an admitted position even by the Tribunal that his monthly income was Rs.54,512/- as per the evidence led before it and the ocular version of PW-1 as he was a Professor at Janta Degree College. He had about 20 - 22 bighas land also and he was also serving in private institution.

20. The compensation is normally bases on the pay slip and also the tax which

is paid. The assessment for the year 2007 - 08 has shown that gross total income of Raj Bahadur Singh Bhadauriya is Rs. 4,57,504/- as per the acknowledgement. His income as per the document is Rs. 39,539/- per month. He would have retired in the year 2013. this is a certificate given by Principal of Janta Mahavidyalaya Ajitmal (Auraiya), dated 9.7.2008. His pay salary is Rs.18,720/-, DA is Rs.9,360/- and further Rs.11,513/- which is according to 41% DA and he was paying Rs. 890/- as HRA. The submission that he had an agricultural land and tuition also is not born out from the record. The Tribunal, therefore, cannot be said to have committed error which can be said to be error in calculating the income of the deceased at the time of the accident. Thus, the submission of Sri Ram Singh that the income should be considered to be Rs. 55,590/- cannot be accepted.

21. The deduction of 1/3rd is also just and proper as daughters are major and his dependant are only wife and son. The only area which requires reconsideration is non-granted of filial consortium. We ad Rs. 70,000/- + 10% which has been left by Tribunal in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. Therefore, we hold that filial consortium to be 40% to the wife and by way of love and affection it was Rs.40,000/- to the son and Rs. 30,000/- for the other head. Hence, the compensation payable to the appellants in view of the decision of the Apex Court in **Pranay Sethi (Supra)** is computed herein below:

i. Income Rs.39,539/- (Rounded up Rs. 39,540/-)

ii. Percentage towards future prospects : 20% namely Rs.7,908/-

iii. Total income : Rs. 39,540 + 7,908 = Rs. 47,448/-

iv. Income after deduction of 1/3 : Rs. 31,632/-

v. Annual income : Rs.31,632 x 12 = Rs.3,79,584/-

vi. Multiplier applicable : 9

vii. Loss of dependency: Rs. 3,79,584 x 9 = Rs. 34,16,256/-

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

x. Total compensation : Rs. 35,16,256/-

22. The additional amount be deposited in their proportioned by both tort-feasors by U.P.S.R.T.C. and New India Assurance Company Ltd. However, if one deposits, the other will be entitled to recover.

23. Both these appeals are allowed. The negligence of the driver of U.P.S.R.T.C. is considered to be 20% and, therefore, U.P.S.R.T.C. can recover 10% from the owner and Insurance Company of the Truck. As far as appellant of appeal, being appeal no.2737 of 2014 are concerned, it will be recoverable from either of the tort-feasors. The compensation is enhanced to additional amount of Rs. 1,05,000/- with additional interest of 7.5% from the date of filing of claim petition till the said amount is recovered.

F.A.F.O. No.2737 of 2014

24. In view of the fact that we have already decided the appeal preferred by U.P.S.R.T.C., being appeal no.2795 of 2014, the cross objection in the said matter are disposed of. There is no appeal brought to our notice against the order of the Tribunal qua the driver but as we hold that his negligence was only 20%, then 10% will have to be deposited by the respondent in motor accident claim petition filed by the

driver if at all filed by him, the said amount be deposited by the Insurance company.

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

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

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

27. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. The Insurance Company who will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor.

28. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291 and this High Court** in , total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 (**Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd**.) decided on 19.3.2021 while disbursing the amount.

29. The record and proceedings be sent back to the court below.

(2022)02ILR A370
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Single No. 3066 of 2011

Aliganj Sri Mahaveer Ji Trust ...Petitioner
Versus
The D.J. Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
S/Sri Saharsh Srivastava, Alok Sharma, Neeraj Srivastava, Raj Vikram Singh, Srideep Chatterjee

Counsel for the Respondents:
S/Sri Akhilesh Kumar, B.P. Pandey, Girdhari Lal Yadav, H.G.S. Parihar, Karunesh Singh Pawar, Manish Kumar, Radhika Singh, Ramendra Kumar Misra, Vivek Raj Singh

Constitution of India, Article 227 - Aliganj Sri Mahaveer Ji Trust - scheme of management - Trust in question is a public charitable and religious Trust - original scheme of management became in-operative on account of the fact that it could not be traced to any legitimate succession - Court in its endeavour to finalise a scheme of management, nominated retired judge to draft a scheme of management - final draft scheme of management (Annexure-F) was submitted – new scheme of management flagged as Annexure-F approved and substituted in supersession of the original scheme - any future dispute in relation to the management of the Trust to be settled keeping in view the provisions of the new scheme of management finalised in terms of the judgement

Allowed. (E-5)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

A. Relevance of worship in Temples and management

1. Faith in God is a universal phenomenon. The belief of people in the deity Lord Hanuman is well acclaimed in the world and mostly in India i.e. Bharat. Aliganj Sri Mahaveer Ji Mandir in the city of Lucknow, is a place of worship for Hindus where people from all sects, castes and creed come to offer prayers. The centuries old history tells that people from diversities come to make offerings and perform Pooja. The spiritual belief of getting rid of fatal diseases like leprosy is something unique the temple is known for. It is this belief that has led countless to reach the epitome of success in business, professions and other walks of life. For all these characteristics the temple has assumed the significance of a public place of worship. The temple is famous for holding the Pooja of Bada Mangal and large sale fairs on the occasion of festivals are also organised in the precincts of temple.

2. Aliganj Sri Mahaveer Ji temple came to be regulated as a public trust ever since framing of a scheme of management under the judgment reported in **AIR 1920 Oudh 244 (Gauri Nath Kakaji and others vs Ram Narain and others**). The Court while dealing with the lis, first of all dealt with the question as to whether the charitable and religious endowments attached to the deity are a trust private or public. The ingredients of public trust were found dominant, hence it was decided that it is a public religious charitable Trust. The management of the Trust was accordingly designed of which the salient features can be gathered from the scheme of administration embodied in the judgement as under:

"The Scheme of Management

(1) The endowment shall be called the Aliganj Shri Mahabirji Trust,

(2) Trust shall comprise the temple of Mahabirji in Aliganj, Lucknow, with the lands, buildings, groves trees, wells and other properties moveable and immovable appertaining or belonging thereto and shall include any offerings that may be made at the temple on any grants or gifts made therefor and any property that may

hereafter be acquired by the trust or be given or dedicated to it.

(3) The objects of the trust shall be

(a) to maintain the temple of Shri Mahabirji and the properties appertaining thereto in a proper state of repair and in a good sanitary condition,

(b) to arrange for the regular performance of the customary religious services and worship thereat,

(c) to look after and arrange for the convenience of pilgrims or visitors visiting the temple for worship or devotion

(d) to do such other acts, religious, educational or charitable, as may be considered desirable by the committee, for the advancement of learning or religious instruction or for the support of sadhus, fakirs or indigent students visiting or staying in the precincts of the temple for such instruction.

(4) The Trust shall be administered by a committee consisting of five Hindu residents of Lucknow as members of whom one shall be a representative of the family of Mahant Gopi Nath, related by blood or adoption, so long as such a representative is available, with power to appoint a secretary and to elect a chairman from amongst themselves for one year or for such period as the committee may fix.

(5) The first committee shall consist of (a) Lachhman Das, representing the family of Mahant Gopi Nath, (b) Babu Basudeo Lal Bhargava, advocate, (c) Babu Lachhman Prasad Srivastava, vakil (d) Bahtt Gur Prasad, contractor, and (e) Babu Dalli Sah cloth merchant, Aliganj.

(6) The committee shall meet at least once in every three months to examine accounts, check receipts and expenditure for the preceding months and to devise and adopt measures for carrying out the purposes of the trust and the protection of the trust-property. It shall also hold an annual meeting, in the month of Jeth as far as practicable, to pass the annual accounts and to frame the budget for the succeeding year and also to elect a secretary and a chairman for the succeeding year or for such period as the committee may fix.

(7) A book showing the proceedings of the committee and the members attending each meeting shall be maintained by the secretary.

(8) The secretary shall also maintain at the main gate of the temple a visitor's book open to the public in which any suggestions which any member of the public or any person interested in the Trust may have to make for the better administration of the Trust and any complaint which he may have against the servants or employees or managers of the Trust could be recorded. The secretary shall lay the visitor's book for the consideration of the committee of management at its meetings, or earlier when necessary.

(9) Subject to the control and direction of the committee, the member of the family of Mahant Gopi Nath appointed, or hereafter elected on the Committee shall, for the time being, be in immediate charge of the worship and religious services to be daily conducted at the temple and shall keep a regular and accurate account of the offerings received and the expenditure incurred in connection with such worship and religious services from day to day in such manner as the committee may prescribe, and in lieu of such services shall receive for the maintenance of himself and the other members of the family of Mahant Gopi Nath, so long as they or any of them exist and continue faithfully to discharge those duties, an allowance equal to 50 per cent, of the total income of the Trust, such allowance being liable to forfeiture or reduction for non fulfillment, neglect or improper discharge of any of the

obligations herein imposed or unwillingness of the members of the said family to undertake the same, on an application made to the principal Court of original jurisdiction by any two members of the committee.

(10) If the arrangement referred to in the preceding rule is at any time found to be unsatisfactory it will be open to the secretary, subject to the control and direction of the committee of management, to adopt such measures as may be considered necessary for the performance of the duties therein referred to.

(11) Subject to R. 9, the entire management of the Trust shall be vested in the committee of management who shall be empowered to make such arrangement as may be considered necessary for the keeping and examination of accounts, the realization of the rents and income of the Trust property, the collection and disposal of the daily offerings at the temple and the other dues connected therewith, the engagement, dismissal and punishment of servants and the safe custody or investment of the trust property and funds as may from time to time be considered necessary. Every matter coming up before the committee, shall, except as hereinafter provided, be decided by a majority of votes. In the absence of the chairman any member present at the meeting may be elected as chairman for the time being and in the case of equality of votes the president or chairman for the time being shall have a second or casting vote.

(12) Three members shall form a quorum, but when a meeting has been adjourned for want of a quorum the adjourned meeting shall not, except as hereinafter provided, be governed by this rule,

(13) If any member fails to attend the sittings of the committee for four consecutive meetings or is absent from Lucknow for a period of more than one year he shall be deemed, if the committee so declares, to have resigned his seat on the

(14) A member of the committee found guilty of any malfeasance, misfeasance or other improper conduct or otherwise rendered unfit by any physical ailment shall be liable to removal at the instance of any two members of the Committee or any two persons interested in the Trust by an application made to the principal civil Court of original jurisdiction.

(15) On the occurrence of any vacancy in the Committee by death, resignation, removal, or otherwise, the remaining trustees, if not less than three in number, may, subject to the condition laid down in R. 4, by mutual concurrence, fill up the vacancy out of the Hindu residents of Lucknow. In case of their failure or disagreement or in any other event, the principal civil Court of original jurisdiction, Lucknow, may, on the application of any two persons interested in the Trust, select and appoint a person to fill up the vacancy in the manner aforesaid.

(16) Till an appointment is made to fill up a vacancy, any act done by the remaining member or members shall, notwithstanding anything contained in Rr. 4 and 12, be as effectual and binding as if it had been done by the committee itself.

(17) The Committee shall sue and be sued in the name of the Trust through its Secretary and shall have power to do all acts which might be reasonable and proper for the realization, protection, or benefit of the Trust property or for the protection of the title thereto, and for carrying out the object of the Trust, including an authority to compromise, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or any other thing relating

to the Trust, and to execute any agreements, instruments or composition, release and other things as may in the interest of the Trust seem expedient.

(18) Any application arising out of this, scheme or connected with the Trust shall be made in continuance of these proceedings in the principal civil Court of original jurisdiction at Lucknow, and it shall be within the competence of that Court at any time to amend and modify this scheme or any of its provisions in any manner it thinks fit either of its own motion or on an application made by not less than two persons interested in the trust and also to issue further or other directions as may appear necessary from time to time."

3. Before elaborating on the necessity of a management scheme in supersession to the one reproduced above, it is desirable to have a bird's view on the aspect of veneration of a particular deity in constructed temples which practice is unknown to Vedic period and for a long time. The Gods worshipped are personified forms of forces of nature such as Varuna (water), Prithvi (earth), Rivers, Vayu (air), Agni (fire), Surya (Sun) etc. The Fire God was considered as intermediary between the Gods and people. The process observed for worship was yagna or yagya. It consists in offering of milk, ghee, flesh and "soma' (ritual drink) to God through fire. This is gathered from the Hindu Religious Endowment Commission Report (1960-62) drawn under the Chairmanship of C.P. Ramaswami Aiyar.

4. James Heitzman a known historian traces historical significance of Hindu temples not only in the worship of God but more importantly as the centers of culture and social interaction and conglomeration which gave support and patronage to the livelihoods of priests, sculptors, artisans, gardeners and others. They were not epicenter of merely worship and religion but the epicenter of culture, civilisation, economic, social, political and educational activities. This is gathered from the article "Temple Urbanism in Medieval South India" published in the journal of Asian Studies Vol. 46 No. 4 (Cambridge University Press Association for Asian Studies).

5. This understanding, in my humble view, is well supported by examples like Ankorwat Temple City, Vijayanagar Temple City etc. These temples served as producer, consumer of goods, employer and redistributor of income. The performance of their respective duties by the members of the society was itself the way to spiritual attainment.

6. The above understanding, in my respectful consideration, is consistent with Srimad Bhagwat Geeta in its Chapter 18, Shloka 45 and 46 which are reproduced as under:

स्वे स्वे कर्मण्यभिरतः संसिद्धिं लभते नरः |
स्वकर्मनिरतः सिद्धिं यथा विन्दति तच्छृणु || 45||

(Each men, devoted to his own duty, attains perfection. How he attains perfection while being engaged in his own duty, hear now.)

यतः प्रवृत्तिर्भूतानां येन सर्वमिदं ततम् |
स्वकर्मणा तमभ्यर्च्य सिद्धिं विन्दति मानवः || 46||

(He from whom all the beings have evolved and by whom all this is pervaded, woshipping Him with his own duty, man attains perfection)

7. The Shlokas extracted above plainly mean that, "man attains perfection by worshipping the lord through the performance of his own duty, that is, he becomes qualified for the dawn of self knowledge."

8. The Mitakshara School in Hinduism is dominant in the States other than West Bengal and Assam where the leaning of people is more towards Dayabhaga. The Mitakshara School provides for three kinds of religious rites:

1. The Sanskaras (personal law subjects)
2. The worship of Ganpati (Lord Ganesha)
3. The propitiation of Planets (Grah Shanti)

9. The above rites give no presumption as to the construction or management of temples, in any form, trust or otherwise. In fact, there is probably no mention of temples and the mankind by himself is a manifestation of God.

10. The deification of God i.e. worship of a particular God in temples built as place of God (Devsthan) is historically traced to Gupta Period. The ruling class made Religious and Charitable Endowments. They often carried out construction and renovation of the temples at places of religious importance. Such conduct is not only the manifestation of the devotion of the person to deity, but also his duty to maintain the places which hold special religious, spiritual and cultural importance for the subjects believing in uniformity.

11. The point is well supported by recovery of various inscriptions relating to endowments made e.g. Udaigiri Cave inscription, Lumbini inscription. These endowments served to benefit the religious as well as charitable purposes.

12. The temples built for public worship were usually managed by Shebaits under the authority granted by the king, however, the kings left them as independent units and interfered exceptionally. Therefore, the only traceable trustee of such endowments of the community was the king. The deity was personified but had no legal personality as such.

13. It may be beneficial here to point out that the kingdoms usually had a religious identity, as such, the secular character as it grew with the expansion of empires or exists today, did not come in the way. Therefore, it is wrong to presume that the religious endowments may had the singular pious purpose of worship of an idol and maintenance of a system facilitating public worship alone.

14. The purpose of religious endowments was not welfare of temple through people, but welfare of the people through temple. Such welfare could be religious, spiritual, cultural, social or economic.

15. In the present context, where theory of legal personality and the perpetual minority of the deity has developed over the years, the next friend of deity or the parens patriae of the deity or any Trust made for such purpose or the Shebait of the temple or any other Committee of Management are not serving the obligation to maintain the interest of deity (which certainly no human agency can interfere with, being a matter of

religious belief), but the interest of people for whose benefit the endowment was made i.e. the devotees of deity.

16. The secular State undoubtedly is bound to remain equidistant from all the religions, however, the endowments that have attained the beneficent character for devotees or people i.e. citizens in a State by evolution and successive silting over the years must utilise the freedom to use its resources for the purposes of inclusive growth viz. spirit of democracy.

B. The Dispute & its Resolution

17. **Coming to the dispute at hand**, it may be noted that the scheme of management extracted above became in-operative on account of the fact that it could not be traced to any legitimate succession, resultantly, a resolution passed by the so called committee of management of the trust on 30.03.1981 gave rise to an application under Rule 14 and 18 of the Scheme of Management in Regular Suit No.1 of 1919 for confirmation of the said resolution. The application so filed was registered as Misc Case No.236 of 1981 titled as Dr. C.S Pandey vs. Sri Narayan Gupta. This application remained pending for about 8 years without any order being passed thereon and ultimately a further application was made for withdrawal of Misc. Case No.236 of 1981 which was allowed on 08.04.1989.

18. Later on Regular Suit No. 48 of 1994 (Anil Kumar Srivastava and Ors. vs. Sri Narain Gupta and Ors.) was filed for constitution of the committee of management after the death of Late C.S Pandey with some further reliefs. An interim injunction order was passed under Order 39 Rule 1 and 2 CPC restraining the defendants/trustees from functioning as such and they were further restrained to operate the bank account of the trust. Late Hari Krishna Awasthi, former vice-chancellor of Lucknow University and Shri Sharad Narain Saxena, then Reader in the faculty of law, Lucknow University both were appointed as "Receiver" to manage the affairs of the trust. The order passed was assailed before this Court in FAFO No. 80 of 1994 wherein the record of the civil suit was summoned. The civil revision was decided under a compromise, however, the compromise unclear in terms of its authority and contents has culminated the suit proceedings of Regular Suit No. 48 of 1994 accordingly by order of the Additional District Judge (Court No.3) Lucknow passed on 09.09.2013.

19. In the meantime Regular Suit No. 3 of 1999 also came to be filed before the court of District Judge, Lucknow (Ganga Charan Tripathi and four Ors. Vs Shri Mahabeer Ji Temple Trust and Ors.) seeking inter alia a relief for streamlining the management in accordance with the original judgment of 1920 and yet another suit which was registered as Regular Suit No. 33 of 2000 (Shri Narain Gupta and Ors. vs. Collector Lucknow and Ors.). The later suit i.e. Regular Suit No.33 of 2000 has come to be dismissed for want of prosecution on 17.09.2003, whereas, in Regular Suit No.3 of 1999 several orders were passed. Two orders passed in Regular Suit No.3 of 1999 are significant of which the first order was passed on 28.08.2003 whereby a seven member committee to manage the affairs of the trust was constituted and the second order passed on 30.08.2006 whereby one Sri Rajesh Kumar Singh alias Guddu Singh was removed from the managing committee of the trust

constituted by the District Court under its earlier order.

20. The order passed on 30.08.2006 gave rise to Civil Revision No.148 of 2006 before this Court, wherein an order was passed on 22.09.2010 issuing some directions to the Court below with the consent of parties contrary to which a further order was passed by the District Judge on 20.12.2010 giving rise to the present petition. The Civil Revision No. 148 of 2006 filed against the order dated 30.8.2006, it is informed, was dismissed as infructuous on 27.3.2018.

21. The present petition filed under Article 227 of the Constitution of India arose out of the order passed by the court below on 20.12.2010 which was heard many times and orders were passed. The orders passed in exercise of supervisory jurisdiction focused on the constitution of a legitimate management committee in the spirit of original verdict rendered on 6th May, 1920 as noted earlier.

22. This Court looking to the fact that the Trust in question is a public charitable and religious Trust went ahead to constitute a five-member committee for conducting the day-to-day affairs of the Trust and an advisory committee of eminent persons was also named to aid the functioning of the five-member committee.

23. The five-member committee as per order dated 30.5.2017 consists of the following persons:

1. Justice O.P. Srivastava (Retd.)(President)
2. Sri S.K. Kalia, Senior Advocate, Allahabad High Court, Lucknow Bench, Lucknow (member).
3. Sri Anil Kumar Tiwari, Senior Advocate, Allahabad High Court, Lucknow Bench, Lucknow (member).
4. Sri Jaideep Narain Mathur, Senior Advocate, Allahabad High Court, Lucknow Bench, Lucknow (member).
5. Sri Navneet Sahgal, I.A.S. officer of U.P. cadre (member).

24. In order to aid and advice the five-member committee, a seven-member advisory committee was also constituted which comprised of the following members by name and designation:

1. Justice Khem Karan(Retd.)(Chairman)
2. Sri Shri Prakash Singh, I.A.S.(Retd.)(member).
3. Sri R. N. Tripathi, I.A.S.(Retd.)(member).
4. Secretary, Religious Affairs, Lucknow (member).
5. Inspector General of Police, Lucknow(member).
6. Divisional Commissioner, Lucknow(member).
7. C.J.M. Lucknow or a nominee of District Judge (member).

25. Some members of the advisory committee have passed away in the meanwhile but the actual management continues to be carried out by the five-member committee.

26. This Court in its endeavour to finalise a scheme of management, passed several orders and lastly by order dated 9.3.2021, Hon'ble Mr. Justice Kamleshwar Nath (Retd.) was nominated to draft a scheme of management and it is pursuant to the above request that a final draft scheme of management (Annexure-F) alongwith the letter dated 29.6.2021 was submitted by

the most revered nominee whose contribution in this regard deserves to be acknowledged. The Scheme of Administration so framed has thus been placed before the Court by the Senior Registrar alongwith his letter dated 30.6.2021.

27. This Court after reserving the judgement has given an anxious consideration to the final draft of the scheme of management as well as the reasons in support thereof. The Court is of the considered opinion that the scheme of management formulated and placed on record is wisely designed to serve the purpose of the public charitable and religious trust viz. Aliganj Mahabirjji Trust, as such, the scheme of management flagged as Annexure-F is approved and substituted in supersession of the scheme embodied in the judgement reported in ***AIR 1920 Oudh 244 (Gauri Nath Kakaji and others vs Ram Narain and others)***. To the above extent, particularly what is extracted under Part-A hereinabove, the judgement reported in ***AIR 1920 Oudh 244 (Gauri Nath Kakaji and others vs Ram Narain and others***), shall stand modified. It is ordered accordingly.

28. It is also clarified that any future dispute in relation to the management of the Trust shall be settled keeping in view the provisions of the scheme of management finalised in terms of this judgement. This Court has already taken note of the composition of five-member committee and the advisory committee. However, in order to streamline the administration of the Trust as per the "Aliganj Mahabirji Trust Scheme of Management' approved and substituted above, the Court proceeds to nominate a three-member committee comprising of *(1) Hon'ble Mr. Justice Kamleshwar Nath (Retd) (2) Hon'ble Mr. Justice S.V.S. Rathore* (Retd) and (3) Hon'ble Mrs. Justice Rekha Dixit (Retd) for drawing a list of eleven trustees from amongst the respectable Hindus living in Lucknow who shall occupy each of the offices specified in the scheme of management. It shall also be open to the three-member Committee to nominate any of the eligible persons from amongst the two Committees mentioned above. A copy of the scheme of management flagged "Annexure-F' shall be sent to the three-member Committee by Senior Registrar of this Court for necessary guidance. The list of eleven trustees drawn and finalised by the three-member Committee against each office shall be deemed to be the initial legitimate body for taking over the management of the Trust from the specified day mentioned hereinafter. The three-member Committee is requested to finalise the list of trustees within two months. The list of trustees named against each office as well as the Scheme of Management flagged as "Annexure-F' shall be forwarded to the District Judge by the Senior Registrar of this Court within a period of two weeks from the date of receipt of the list of trustees from the three-member Committee. The District Judge, Lucknow shall notify on the notice board of the Trust, the entire "Aliganj Mahabirji Trust Scheme of Management' inclusive of the list of trustees within six weeks from the date of its receipt. The interim five-member Executive Committee shall hand over complete charge of the record and properties, movable or immovable, to the Committee constituted above within a period of three months from the date of publication of the management Scheme flagged as "Annexure-F' inclusive of the list of trustees. The account of all the

income/donation and expenditure incurred by the Trust from the date of this judgement up to the date of handing over charge shall also be accounted for and intimated to the District Judge, Lucknow every month by the interim five-member Committee. The District Judge shall ensure compliance of this order within a period of three months from the date of publication of scheme flagged as "Annexure-F' alongwith the list of trustees nominated against each office. Any order passed by the District Court below or any subordinate court in relation to the management and administration of "Aliganj Mahabirji Trust' is hereby declared null and void and the present petition is accordingly allowed. The cost is made easy.

29. The record of objections considered by Hon'ble Mr. Justice Kamleshwar Nath (Retd.) as well as the entire folder of rule making proceedings from page 1 to 61 shall be treated as a part of the record and preserved in the Court.

(2022)02ILR A379
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

S.C.C. Revision No. 36 of 2020

A.K. Dubey & Anr. ...Revisionists
Versus
Exide Indus. Ltd. & Ors. ...Respondents

Counsel for the Revisionists:
Sri Sheo Shankar Tipathi, Sri Adya Prasad Tewari

Counsel for the Respondents:
Sri Manu Khare

Provincial Small Cause Courts Act, 1887 - Code of Civil Procedure , Order VI, Rule 17 CPC, Proviso - Amendment of pleadings - after Trial commences - 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 - once the trial has commenced, the party making an application for amendment, has to spell out clearly the cause which had prevented it from bringing the amendment prior to the commencement of trial and also disclose the reason that despite due diligence it was not in the notice of the party and only when the said fact came into the knowledge of the party claiming amendment, that such application was filed. (Para 17)

On 10.12.2014 S.C.C. Suit was filed by the plaintiff for a decree for the amount of damages for use and occupation at the rate of Rs.2,000/- per day besides monthly rent of Rs.47,000/- In the year 2017 issue Nos. 8 & 9 were decided and the plaintiff was examined before the Court below - On 11.12.2018, an amendment application was filed by plaintiff by which he sought amendment in relief clause seeking arrears of rent from 01.11.2014 to 31.10.2018 and also sought eviction from property in dispute - Held - In the amendment application no whisper as to why there was delay on the part of plaintiff in filing amendment application - the relief, which was claimed through amendment was available when the suit for damages was filed on 10.12.2014 and the plaintiff could have claimed the relief for arrears of rent and ejectment – Trial court rightly rejected the amendment application

Dismissed. (E-5)

List of Cases cited:

1. Suraj Prakash Bhasin Vs Smt. Raj Rani Bhasin & ors. 1981 AIR SC 485

2. B.K.N.Pillai Vs P.Pillai & anr. 2000 AIR (SC) 614

3. Salem Advocate Bar Association Vs U.O.I. (2005) 6 SC 344

4. Chander Kanta Bansal Vs Rajinder Singh Anand, (2008) 5 SCC 117

5. Rajkumar Guruwara (dead) through LRs Vs S.K.Sarwagi and Company Private Limited and anr. (2008) 14 SCC 364

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri A.P.Tewari, learned counsel for the revisionists. No one has appeared for the opposite parties however, a written argument was filed by Sri Manu Khare, Advocate, on behalf of opposite parties.

2. The present revision filed under Section 25 of Provincial Small Cause Courts Act, 1887 (*hereinafter referred to as "Act, 1887"*) against judgment and order dated 17.01.2020 passed by Additional District Judge/Fast Track Court-II (Constituted under 14th Finance Scheme), Gorakhpur, dismissing amendment application filed under Order VI, Rule 17 CPC in S.C.C. Suit No.41 of 2014.

3. Before adverting to decide the issue raised, a brief introduction of facts is necessary for better appreciation of the controversy in hand.

4. A lease agreement was executed on 03.11.2009 between the plaintiffs-revisionists and Exide Industries Ltd., defendant No.1 in respect of premises at Narayan Complex, Plot No.A-28, Budha Vihar Commercial Yojana, Deoria Bypass, Gorakhpur, U.P., measuring 2600 sq.ft., the owner of which is the plaintiffs-revisionists and was let out for a period of five years w.e.f. 01.11.2009 to 31.10.2014 to the lessee/opposite party No.1 on a monthly rent of Rs.39,000/-. According to the plaintiff, after expiry of lease, the defendant was required to deliver vacant possession of premises but he failed to deliver the same and thus the plaintiff was entitled for damages for use and occupation of premises at the rate of Rs.2,000/- per day in addition to monthly agreed rent. S.C.C. Suit No.41 of 2014 was filed by the plaintiff claiming relief for decree of Rs.1,25,000/- against defendant and a decree for the amount of damages for use and occupation at the rate of Rs.2,000/- per day besides monthly rent of Rs.47,000/-. The aforesaid suit was filed on 10.12.2014. The defendant appeared and filed written statement stating therein that they had refused to extend the lease agreement, as requested by the plaintiff, and had partly removed their goods, which included batteries and inverters by 26.10.2014 and rest of the goods was to be removed before the terms of lease agreement came to an end but the revisionist came to the premises on 26.10.2014 and started abusing employees of the lessee-defendant No.1, which forced them to run away from the premises. Thereafter, the lock was put illegally by the revisionists on the premises. According to the defendant, stock of batteries and office furnitures etc. were still lying inside the premises. Further, the defendant filed an application being Paper No.23-Ga challenging the jurisdiction of Court to entertain the plaint on the ground that it was limited only for recovery of interest in such property and there being no determination of tenancy nor prayer for eviction from the premises in question was made. Thus, in view of Section 15 read with Article 4 of Schedule II of Act, 1887, the suit was not maintainable. The said application was contested and an objection was filed by the revisionist on 08.10.2015

being Paper No.26-Ga. The said application was rejected on 18.01.2016 against which a S.C.C. Revision No.82 of 2016 was filed, which is still pending. Further, proceedings of Suit No.41 of 2014 continued and issues were framed on 24.12.2016. Issue No.8 was decided on 07.02.2017 while issue No.9 was decided on 03.03.2017. Evidence of PW-1 (plaintiff/revisionist) was completed and in his statement recorded on 10.05.2017, he had submitted that no other evidence will be submitted by him.

5. On 11.12.2018, an amendment application was filed by plaintiff under Order VI, Rule 17 C.P.C., being paper No.59Ka/2 by which he has sought amendment in relief clause seeking arrears of rent from 01.11.2014 to 31.10.2018 and also sought eviction from property in dispute. The amendment application was contested by the defendant by filing objection, Paper no.61Ga/1. The Court below vide judgment and order dated 17.01.2020 rejected the amendment application hence the present revision.

6. Sri A.P.Tiwari, learned counsel appearing for the revisionists submitted that the Court below on the vague ground had rejected the amendment application sought by the plaintiff. He contended that there was no delay in seeking amendment on the part of plaintiff and the Court below should have considered that neither the rent was being paid by the defendant nor possession was handed over and the plaintiff was suffering great loss as no rent has been tendered since 01.11.2014. According to him, notice under Section 106 of Transfer of Property Act, 1882 (hereinafter referred to as "Act, 1882") was given on 01.11.2018 terminating the tenancy and thereby the amendment was sought. He next contended that the Court should be liberal in granting amendment as it would avoid multiplicity of litigation. Reliance has been placed upon decision of Apex Court in case of **Suraj Prakash Bhasin vs. Smt. Raj Rani Bhasin and others, 1981 AIR SC 485 and B.K.N.Pillai vs. P.Pillai & anr. 2000 AIR (SC) 614.**

7. In the written argument, filed on behalf of defendant-respondent No.1 it is contended that after the amendment in the provisions of Order VI, Rule 17 and Proviso being inserted, the defendant was required to state in his application that in spite of due diligence, the plaintiff could not raise the matter before commencement of trial, but no such averment was made in the application and simplicitor an amendment has been sought in the plaint, which is based upon new cause of action and the remedy would be by filing a separate suit, as the relief claimed of possession was available to the plaintiff on the date of institution of the suit on 10.12.2014, which he did not claim and only suit for damage was filed.

8. I have heard the rival submissions of the parties and perused the material on record.

9. The short question, which emerges for consideration is, "whether post commencement of trial of suit, an application under Order VI, Rule 17 CPC simplicitor without disclosing any reason as to the delay caused in moving the same can be entertained ignoring the proviso to Order VI, Rule 17 CPC?"

10. For better appreciation of the controversy, a glance of provision of Order VI, Rule 17 CPC, as amended on 01.7.2002 is necessary, which is extracted hereasunder :

"17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleading 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."

11. The legislature, in order to shorten the litigation and speed up the trial of litigation, had earlier omitted Rule 17 of Order VI by amendment in the year 1999 but, after some protest, the provision was restored with certain amendment coming in the form of amending Act 22 of 2002. The present proviso was added to Order VI, Rule 17 CPC. The said amendment was challenged in the case of **Salem Advocate Bar Association versus Union of India (2005) 6 SC 344** before the Apex Court, which was decided by Apex Court and the amendment was upheld. Relevant para 26 of the judgment in the case of **Salem Bar Association (supra)** is extracted hereas under :

"Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

12. Thus, a break was put to the unfettered power of the Court in regard to frequent amendments, which were made by the parties in their pleadings.

13. Post amendment, no application for amendment can be allowed once the trial has commenced. It is only when the Court records its satisfaction and comes to the conclusion that in spite of the due diligence, the party could not have raised the matter before the commencement of trial, the application can be allowed.

14. Thus, two situations arise post amendment, one; where the trial has not commenced, the Courts are liberal in granting amendments, but, where the trial has commenced, the party making application for amendment has to show that despite best effort and due diligence, the fact was not in its notice and came only after the trial commenced, then only the Court can allow such amendments.

15. In **Chander Kanta Bansal vs. Rajinder Singh Anand, (2008) 5 SCC 117**, the Apex Court while considering the effect of the proviso added to Order VI, Rule 17 CPC, in paras 11, 12, 13, 15 and 16 held as under :

"11. In order to find out whether the application of the defendant under Order 6

Rule 17 for amendment of written statement is bona fide and sustainable at this stage or not, it is useful to refer to the relevant provisions of CPC. Order 6 Rule 17 reads thus:

"17.Amendment of pleadings.-- The court may at any stage of the proceedings allow either party to alter or amend his pleading 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."

This Rule was omitted by the Code of Civil Procedure (Amendment) Act, 1999. However, before the enforcement of the Code of Civil Procedure (Amendment) Act, 1999, the original rule was substituted and restored with an additional proviso. The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment.

***12**. With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This Rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy leading to protest all over the country. Thereafter, the Rule was restored in its original form by amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to some extent. The new proviso lays down that no application for amendment shall be allowed after the commencement of trial, 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. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise.*

***13**. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of*

any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.

.....

15. *As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application*.

16*. The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."*

16. Similarly, in **Rajkumar Guruwara (dead) through LRs vs. S.K.Sarwagi and Company Private Limited and another (2008) 14 SCC 364** had considered the scope of amendment post commencement of trial. Relevant paras 12 and 13 of the judgment are extracted hereas under :

"12. In order to consider whether the appellant-plaintiff has made out a case for amendment of his plaint, it is useful to refer Order 6 Rule 17 CPC which reads as under:

"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."

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 are able to satisfy the court that in spite of due diligence they could not raise the issue before the commencement of trial and the court is satisfied with their explanation, amendment can be allowed even after commencement of the trial.

13. To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso."

17. Thus, from the conjoint reading of the amended provisions of Order VI, Rule 17 CPC and the law laid down by Apex Court in the aforesaid cases, it is abundantly clear that the Trial Court has to be cautious while granting or rejecting an amendment once the trial commences. Though, it is a settled law that the Court should be liberal in granting amendment so as to avoid unnecessary complication and multiplicity of litigations, but, once the trial has commenced, the party making an application for amendment, has to spell out clearly the cause which had prevented it from bringing the amendment prior to the commencement of trial and also disclosing the reason that despite due diligence it was not in the notice of the party and only when the said fact came into the knowledge of the party claiming amendment, that such application was filed.

18. Now coming to the case in hand, it was on 10.12.2014 that the plaintiff-revisionist had filed a suit for damages violating the terms of the lease agreement. The plaintiff was fully aware that the lease agreement had come to an end on 31.10.2014 and the remedy for evicting the defendant from the premises let out was already available to him at that time, which he did not chose to claim.

19. In fact, the plaintiff only wanted damages for the occupation of the property by the defendant at the rate of Rs.2,000/- per day, and had tried to enforce Clause 3(c) of the lease agreement. In the meantime, the defendant in the present case had filed suit No.1048 of 2015 before Civil Judge (Senior Division), Gorakhpur claiming relief that the plaintiff herein may permit the defendant to remove his batteries and inverters stock, which was still lying in the premises in dispute on which the lock of the plaintiff was hanging. It was only in the year 2018 that notice under Section 106 of Act, 1882 was served on 31.01.2018 and 26.02.2018 for arrears of rent and ejectment from the premises in dispute. In the meantime, issue Nos. 8 and 9 were decided by the Court below on 07.02.2017 and 03.03.2017 and the plaintiff was already examined before the Court below.

20. There is no whisper as to why there was delay on the part of plaintiff in filing amendment application on 11.12.2018. From perusal of amendment application, Paper No.59Ka/2, it is clear that only amendment has been sought in the plaint claiming arrears of rent and ejectment from property in question and no compliance of proviso to Order VI, Rule 17 CPC has been made by plaintiff while making such application. The plaintiff-

revisionist not only failed to adhere to the proviso to Rule 17 of Order VI CPC by stating reason that despite due diligence the fact pleaded was not within the knowledge and could not be raised earlier but is also barred by Order II, Rule 2 CPC as the suit filed by the plaintiff did not include the whole claim which the plaintiff was entitled to make in respect of the cause of action.

21. The present amendment is a fresh cause of action and by the amendment, the suit for damages cannot be amended. Moreover, the relief, which is being claimed by the revisionist through amendment, was available to him when the suit for damages was filed by him on 10.12.2014 as the lease agreement had already expired on 31.10.2014 and the plaintiff could have claimed the relief for arrears of rent and ejectment, but he chose to press the relief of damages on the basis of Clause 3(c) of the lease agreement, which had come to an end on 31.10.2014.

22. Thus, this Court finds that post amendment in Order VI, Rule 17 CPC, which was brought in the year 2002, the party seeking amendment has to adhere to the proviso while making an application in case of commencement of trial. It is not disputed to either of the parties that after framing of issues in the year 2016, 2 issues had already been decided and the oral evidence of plaintiff has already concluded. It is well settled that Section 17 of Act, 1887 provides that provisions of Code of Civil Procedure is applicable in the matters dealt by the Judge Small Cause Court under the Act, 1887.

23. Considering the facts and circumstances of the case this Court finds that the Trial Court had rightly rejected the amendment application of the revisionist as it does not disclose any reason for filing the same post-commencement of trial, which is against proviso to Order VI Rule 17 CPC.

24. No interference is therefore warranted in the impugned order. Revision fails and is hereby dismissed.

(2022)02ILR A386
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2022

BEFORE

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

Civil Misc. Transfer Application No. 185 of 2020

Smt. Shakshi Agrawal ...Applicant
Versus
Sri Ashutosh Agrawal ...Opp. Party

Counsel for the Applicant:
Sri Pankaj Kumar Ojha

Counsel for the Respondents:
Ms. Shreya Gupta, Sri Ravi Anand Agarwal

A. Civil Procedure Code,1908 – Section 24 – Transfer of cases – Matrimonial disputes – Divorce petition of the husband filed at Gautam Budh Nagar – Two cases was pending *inter parties* in Prayagraj – Held, convenience of the wife is to be accorded preference in the matter of venue of proceeding in causes matrimonial – The relevant factor about the wife not having anyone to accompany her across a long distance, is also a relevant consideration in ordering transfer – High Court transferred the Divorce case from Gautam Budh Nagar to Prayagraj. (Para 24)

Transfer application allowed. (E-1)

List of Cases cited:

1. Manjula Singh Chouhan Vs Vishal Singh Chouhan; 2019 (13) SCC 660

2. Bhartiben Ravibhai Rav Vs Ravibhai Govindbhai Rav; 2017 (6) SCC 785

3. G.R. Bhuvaneshwari Vs G.S. Puttaraju; 2018 (13) SCC 650

4. Vaishali Shridhar Jagtap Vs Shridhar Vishwanath Jagtap; 2016 (14) SCC 356

5. Sumita Singh Vs Kumar Sanjay & anr.; AIR 2002 SC 396

6. Transfer Application (Civil) No. 468 of 2013; Smt. Pinki Rani @ Priyanka Vs Raj Kumar, decided on 02.12.2014.

7. Mona Aresh Goel Vs Aresh Satya Goel; 2000 (9) SCC 255

8. Anindita Das Vs Srijit Das; (2006) 9 SCC 197

9. Kanagalakshmi Vs A. Venkatesan; 2004 (13) SCC 405

10. Teena Chhabra Vs Manish Chhabra; 2004 (13) SCC 411

11. Shiv Kumari Devanndra Ojha Vs Ramajor Shitla Prasad Ojha & ors.

12. Santhini Vs Vijaya Venketesh; 2018 (1) SCC 1

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

1. This is a transfer application on behalf of the wife under Section 24 C.P.C., seeking transfer of Case No. 1326 of 2019, Ashutosh Agrawal vs. Shakshi Agrawal, under Section 12 (1)(b) and (c) read with Section 5 of the Hindu Marriage Act, 1955 from the Principal Judge, Family Court, Gautam Budh Nagar to the Principal Judge, Family Court, Allahabad.

2. Parties have exchanged affidavits and the matter was heard elaborately on 22.09.2021, when the judgment was reserved.

3. Heard Mr. Pankaj Kumar Ojha, learned counsel for the applicant and Ms. Shreya Gupta, learned counsel appearing on behalf of the opposite party.

4. The applicant and the opposite party are an estranged couple. They were married according to Hindu rites on June the 8th, 2019 at NOIDA, District Gautam Budh Nagar. The applicant stayed with the opposite party in their matrimonial home at Gautam Budh Nagar, but complaints of cruelty, including physical violence, appeared early into the marriage. It appears that the opposite party is employed as a Senior Manager in the Human Resource Development, Department of Honda Car India Limited. He is said to draw a salary of Rs. 90,000/- per month. The applicant's father-in-law is also claimed to be gainfully employed. There are allegations also about dowry demand and torture in order to extract more dowry. It is not the province of this Court to go into those allegations, but whatever has transpired between the applicant and the opposite party, their marriage has run into rough weather.

5. The Opposite Party instituted a petition in the Family Court, Gautam Budh Nagar, under Section 12(1)(b) and (c) read with Section 5 of the Hindu Marriage Act, seeking a decree for annulment on the ground that the Applicant was of unsound mind, a condition that her family knew but misrepresented, practicing fraud and deception to induce the opposite party into marrying the Applicant. This petition was registered on the file of the Principal Jude, Family Court, Gautam Budh Nagar as Case No. 1326 of 2019. It is this petition that the Applicant seeks to be transferred from Gautam Budh Nagar to the Family Court at Allahabad.

6. The grounds urged to seek transfer are that there is a case instituted by the wife at Prayagraj under Section 125 Cr.P.C. being Case No. 232 of 2020, besides another under Section 12 of the Protection

of Women from Domestic Violence Act, 2005 that is pending before the Additional Chief Judicial Magistrate, Court No. 7, Allahabad, numbered as Case No. 1800 of 2020. Details of these cases are set out in paragraph nos. 17 and 18 of the affidavit filed in support of the transfer application.

7. The ground culled out on this score is that since two cases are already pending inter partes before the Courts at Allahabad, it would be convenient if the husband's petition for annulment is also transferred from Gautam Budh Nagar to the Family Court at Allahabad, where the parties can request the Court/Courts concerned to fix a uniform date. It is pointed out that the applicant stays at Prayagraj after her estrangement, and the further ground is that she is a woman and unemployed, who cannot travel by herself from Allahabad to Gautam Budh Nagar on each date fixed in the petition there. If she is compelled to do that, her defence will be pre-judicially affected. It is also indicated, amongst the adversity of her circumstances that render it difficult for her to travel from Prayagraj to Gauam Budh Nagar, that her father is an old man, who has retired from service. He suffers from old age ailments. She has no one to travel with or escort her on every date from Prayagraj to Gautam Budh Nagar. It is also averred in paragraph no. 26 of the affidavit filed in support of this transfer application that the applicant has apprehensions about her safety, in the event she were compelled to attend at Gautam Budh Nagar, because the husband-opposite party and his family members are politically well connected. Her life would be in danger.

8. In the counter affidavit filed on behalf of the opposite party, there is a specific denial of the various allegations that the wife has come up with regarding the cause for estrangement, particularly, about domestic violence and dowry demand. It is, as earlier said, not a matter of concern to this Court in the present proceedings. In paragraph no. 11 of the counter affidavit, the institution and pendency of the two cases before the Courts at Allahabad, one under Section 125 Cr.P.C. and the other under the Domestic Violence Act, have not been specifically denied in point of fact. So far as the allegations that the applicant is an unemployed woman, unable to travel alone from Prayagraj to Gautam Budh Nagar is concerned, it is averred in paragraph no. 14 that the applicant is a self-dependent woman, who is a dentist by profession. It is averred that she is self-employed at present. It is also pleaded in paragraph 14 that it is incorrect to say that the applicant cannot travel alone because she is a woman. It is also asserted that the trivial inconvenience involved in travel to the wife cannot be accepted as a ground to transfer the husband's petition for annulment. There is a like stance to the wife's case about her father being a retired man, unable to escort her to Gautam Budh Nagar on every date scheduled there. The allegations about political connections of the husband at Gautam Budh Nagar and the applicant's perception of threat to her life, if she attends at Gautam Budh Nagar have been dispelled on the foot of pleadings in paragraph no. 12 of the counter affidavit, where it is said that the husband belongs to a middle class reputed family. The apprehensions expressed are founded on conjecture. There is an averment in paragraph no. 18 of the affidavit filed in support of this transfer application to the following effect:

"That, since the husband of the applicant and his family was torturing regularly to the applicant therefore she moved a case u/s 12 of Domestic Violence Act before the court of Additional Chief

Judicial Magistrate Room No. 7, Allahabad as Case No. 1800 of 2020 on 26.05.2020 and same has also pending in the District Court Prayagraj."

9. In paragraph no. 14 of the rejoinder affidavit, it is pointed out that the opposite party, on the one hand, says that the applicant is a mentally challenged woman, but on the other, projects her to be an independent woman fit to travel 800 kms on every date fixed from Prayagraj to Gautam Budh Nagar. This stance of the husband's has been castigated as contradictory. It is pleaded that the applicant is, in fact, unemployed and considering that she is a woman, it is unsafe for her to travel all by herself on each date fixed from Prayagraj to Gautam Budh Nagar and back.

10. Reliance has been placed by the learned counsel for the petitioner upon the decision of the Supreme Court in **Manjula Singh Chouhan vs. Vishal Singh Chouhan, 2019 (13) SCC 660**, where it has been held:

"3. As per the submission of the appellant, two cases are already pending in Family Court, Bhopal, and it will be in the interests of both the parties to try all their cases in Bhopal. Learned counsel for the respondent, however, submits that it will suit to the appellant only, therefore, transfer may not be permitted. The fact remains that the respondent has to travel to Bhopal for conduct of other cases pending in Family Court, Bhopal.

4. We are of the view that it will be in the interests of both the parties that all their cases be heard together by the same Court."

11. Again, reliance has been placed on the decision of the Supreme Court in **Bhartiben Ravibhai Rav vs. Ravibhai Govindbhai Rav, 2017 (6) SCC 785**. In **Bhartiben Ravibhai Rav (supra)**, it was held by the Supreme Court thus:

3. The transfer petition is strongly objected to by the respondent husband on the ground that he is employed in Ahmedabad and that he is taking care of his two sons, apart from his aged parents. The petitioner wife, on the other hand, contends that the distance between Ahmedabad and her place Dungarpur, Rajasthan is about 200 km and that she finds it difficult to travel to Ahmedabad to contest the divorce petition. That apart, the petitioner wife has also raised difficulty in pursuing the divorce petition in Ahmedabad because of the language problem, as she is not well-acquainted in Gujarati.

4. Apart from the divorce petition, there are other proceedings pending between the parties which have been filed by the petitioner wife at Dungarpur, Rajasthan viz. (i) FIR under Sections 498-A and 406 IPC and under Section 4 of the Dowry Prohibition Act; (ii) petition under Section 125 CrPC before the Family Court, Dungarpur, Rajasthan, and (iii) petition under Sections 12 and 23 of the Protection of Women from Domestic Violence Act, 2005 pending before the Chief Judicial Magistrate, Dungarpur, Rajasthan. It is stated that the respondent husband is already appearing in Dungarpur Court, Rajasthan in connection with the aforesaid cases instituted by the petitioner wife and that it may not be difficult for the respondent husband to pursue the divorce petition in Dungarpur Court, Rajasthan. Considering the facts and circumstances of the case, we feel that the petition could be transferred to Dungarpur, Rajasthan.

12. Reference has also been made to the decision of their Lordships of the

Supreme Court in **G.R. Bhuvaneshwari vs. G.S. Puttaraju, 2018 (13) SCC 650**, where the facts of the case and the remarks of their Lordships read:

1. ..... This appeal is directed against the impugned order dated 11-3-2013 passed by the High Court of Karnataka, at Bangalore, in G.R. Buvaneshwariv. G.S. Puttaraju [G.R. Buvaneshwari v. G.S. Puttaraju, 2013 SCC OnLine Kar 10559] , whereby the High Court has declined the prayer of the appellant seeking transfer of MC No. 21 of 2010 and WC No. 1 of 2010, filed by the respondent (husband), from the Court of Civil Judge, Senior Division, Maddur to the Family Court at Mysore.

4. We have taken note of the fact that the appellant is employed as a teacher and is a single mother responsible for looking after her 9-year-old son who is studying at a school in Mysore. Moreover, proceedings in Criminal Miscellaneous No. 158 of 2011 between the parties pertaining to maintenance are also pending at Mysore. Considering these facts, we are inclined to allow this appeal.

13. Likewise, learned counsel for the applicant has also relied on the decision of the Supreme Court in **Vaishali Shridhar Jagtap vs. Shridhar Vishwanath Jagtap, 2016 (14) SCC 356.** It was observed in Vaishali (supra):

5. Admittedly, the distance between Mumbai and Barshi is around 400 km. Four cases between the parties are pending at Barshi. Apparently, the comparative hardship is more to the appellant wife. This aspect of the matter, unfortunately, the High Court has missed to take note of.

14. Much faith has been reposed in another decision of the Supreme Court in **Sumita Singh vs. Kumar Sanjay and Anr., AIR 2002 SC 396**. The facts and the holding in the decision read:

1. This is a transfer petition by the wife. She seeks the transfer of matrimonial proceedings filed by the husband against her in Ara, Bhojpur to Delhi. It is her case that she is now living and working in Delhi and that she would be unable to travel up and down from Delhi to Ara, a distance of about 1100 kilometres from Delhi, to defend the matrimonial proceedings. She also states that she has no one with whom she can stay in Ara because her parents are residents of Gurgaon.

2. Learned counsel for the husband states that the wife is an educated woman who is doing very well and can, therefore, travel to Ara while the husband is unemployed.

3. It is the husband's suit against the wife. It is the wife's convenience that, therefore, must be looked at. The circumstances indicated above are sufficient to make the transfer petition absolute.

15. Reliance is also placed on the decision of this Court in **Smt. Pinki Rani @ Priyanka vs. Raj Kumar, Transfer Application (Civil) No. 468 of 2013, decided on 02.12.2014. In Smt. Pinki Rani @ Priyanka (supra)**, it was observed:

12. In the matrimonial matters the convenience of wife and in particular that she has no one in her family to escort her to undertake a long journey has been held to be good ground for transfer of case as is also evident from Apex Court's decision in Anjali Ashok Sadhwani vs. Ashok Kishinchand Sadhwani, AIR 2009 SC 1374 and Fatema vs. Jafri Syed Husain @ Syed Parvez Jafferi, AIR 2009 SC 1773.

19. Sometimes transfer of suit has also been justified on the ground of convenience to the parties or witnesses etc. but in such cases the paramount factor which should be

considered is the convenience of both parties. An exception, however, to some extent, has been made in matrimonial cases where convenience of wife has been given a dominating factor than husband, particularly when she has none to escort her or of quite young age or where she has financial constrained etc.

22. Convenience of wife to pursue the proceedings is a relevant factor if pleaded bona fide for justifying transfer of a matter to the place where it is convenient to the wife. The applicant is not doing any job having no source of income to bear the expenses. None is there to escort her to Ghaziabad from Meerut to do pairavi of the case. Looking to the facts of the case, stated above, I am of the view that it is in the interest of justice that transfer application should be allowed.

16. In **Mona Aresh Goel vs. Aresh Satya Goel, 2000 (9) SCC 255**, the facts and holding of their Lordships read:

2. The transfer petition is filed by the wife to transfer the divorce proceedings taken by the husband in Bombay to Delhi, where she now stays with her parents. The transfer petition avers that the wife has no independent income and that her parents are not in a position to bear the expenses of her travel from Delhi to Bombay to contest the divorce proceedings. She avers that she is twenty-two years old and cannot travel to and stay in Bombay alone for there is no one in Bombay with whom she can stay. We are of the opinion that the transfer petition should, in the circumstances, be allowed.

3. The transfer petition is made absolute in terms of prayer (a). MJ Petition No. A-636 of 1999 pending before the Family Court at Bandra, Bombay is transferred to the Court of the District Judge, Tis Hazari, Delhi, who shall hear it himself or assign it for hearing to a competent court.

17. Ms. Shreya Gupta, learned counsel for the husband, has stiffly resisted the proposition that it is always the convenience of the wife that is the guiding factor in judging a plea for transfer brought by the wife. She has very elaborately addressed the Court about the issue and brought to our notice the guidance in various decisions of the Supreme Court that have considered principles, where a wife's plea for transfer would not be liable to be accepted. The first to be noticed on behalf of the respondent is the decision of the Supreme Court in **Anindita Das vs. Srijit Das, (2006) 9 SCC 197**. In the said decision, it was held that if the husband undertakes to bear the necessary expenses for the wife's travel and stay, the ground based on wanting livelihood or source of income with the wife, would be of no avail. In **Anindita Das (supra)**, the short facts and the holding read:

1. This transfer petition has been filed by the wife on the ground that the petitioner has a small child of six years. She has further claimed that she has no source of income and it is difficult for her to attend the court at Delhi. She has further claimed that she is not keeping good health.

2. In support of this petition, a large number of authorities have been cited, namely, Reena Bahri v. Ajay Bahri [(2002) 10 SCC 136] , Leena Mukherjee v. Rabi Shankar Mukherjee [(2002) 10 SCC 480] , Ram Gulam Pandit v. Umesh J. Prasad[(2002) 10 SCC 551] and Rajwinder Kaur v. Balwinder Singh [(2003) 11 SCC 726] . These authorities are all based on the facts of their respective cases. They do not lay down any particular law which operates as a precedent.

3. Even otherwise, it must be seen that at one stage this Court was showing leniency to ladies. But since then it has been found that a large number of transfer petitions are filed by women taking advantage of the leniency shown by this Court. On an average at least 10 to 15 transfer petitions are on board of each court on each admission day. It is, therefore, clear that leniency of this Court is being misused by the women.

4. This Court is now required to consider each petition on its merit. In this case the ground taken by the wife is that she has a small child and that there is nobody to keep her child. The child, in this case, is six years old and there are grandparents available to look after the child. The respondent is willing to pay all expenses for travel and stay of the petitioner and her companion for every visit when the petitioner is required to attend the court at Delhi. Thus, the ground that the petitioner has no source of income is adequately met.

5. Except for stating that her health is not good, no particulars are given. On the ground that she is not able to come to Delhi to attend the court on a particular date, she can always apply for exemption and her application will undoubtedly be considered on its merit. Hence, no ground for transfer has been made out.

18. Again in **Kanagalakshmi vs. A. Venkatesan, 2004 (13) SCC 405**, the short decision of their lordships of the Supreme Court reads:

1. This is a petition filed by the wife seeking transfer of pending matrimonial dispute before the Family Court at Bandra, Mumbai to the Subordinate Judge, Tirunelveli, Tamil Nadu on the ground that it is difficult for her to travel from Tirunelveli to Mumbai to pursue her case. Learned counsel appearing for the respondent husband has filed his counter stating therein that he is prepared to bear the expenses not only of the petitioner but also of her accompanying person both for travel and stay at Mumbai. Recording the said statement, we think it is not necessary to transfer the pending case at the Family Court, Bandra, Mumbai. However, we direct the respondent to pay to the petitioner the travel expenses as well as for their stay during the dates of hearing in Mumbai. We direct the Family Court to dispose of the petition and applications for interim maintenance if any within six months from the receipt of this order and direct the Family Court, if possible, to cross-examine both the parties in regard to their affidavit on the same day.

2. The transfer petition is disallowed.

19. In **Teena Chhabra vs. Manish Chhabra, 2004 (13) SCC 411**, it was observed:

2. At the hearing, the learned counsel for the respondent husband submitted that the respondent is ready and willing to bear the expenses of the petitioner wife from Chandigarh to Bombay, whenever her presence is required at Bombay for the purpose of this case, by second class train fare.

3. Having regard to the facts and circumstances of the case, we dismiss this transfer petition, subject to the condition that the respondent will bear the travel expenses of the petitioner from Chandigarh to Bombay, whenever her presence is required at Bombay for the purpose of this case, by second class train fare and rupees five hundred towards incidental expenses for lodging and boarding.

20. Still again, in **Shiv Kumari Devanndra Ojha vs. Ramajor Shitla Prasad Ojha & Ors.,** the short facts and holding of their Lordship read:

1. The petitioner has filed this petition for transfer of proceedings, viz., Succession Application No. 43 of 1995 along with Miscellaneous Application No. 23 of 1996 titled Ramajor Shitla Prasad Ojha v. Shiv Kumari Devendra Ojha pending in the Court of Civil Judge, Senior Division, Valsad, Gujarat to the competent court of Civil Judge at Sadar, District Pratapgarh in Uttar Pradesh. We had adjourned the matter by our order dated 9-12-1996 to find out whether the suit was still pending or stood disposed of. It is reported that the matter is still pending and the Civil Judge, Senior Division is yet to take up the matter. The learned counsel for the petitioner has stated that the petitioner being a lady is unable to travel from Uttar Pradesh to Valsad in Gujarat and it is really a great difficulty for her to meet the expenditure in that behalf. Shri Upadhyay, learned counsel appearing for the respondents has agreed to bear the expenditure for her travel and stay whenever she attends court. Under the circumstances, we do not find that there is any justification for transferring the matter to Pratapgarh, U.P. Whenever the petitioner goes to the court, the respondents would pay Rs 750 (Rupees seven hundred and fifty only) on each occasion to the petitioner and the amount would be paid to her in advance. The petitioner would intimate the Civil Judge, Senior Division who would direct the respondents to pay the amount to the petitioner.

2. It is next contended that the petitioner had to engage her counsel from Surat since no advocate would be available at Valsad where the suit is pending. We think that the apprehension of the petitioner is not correct. The petitioner is at liberty to engage counsel at Valsad and the counsel would give his best to the petitioner in defending her case. If the petitioner requires any financial assistance from the respondents, it would be open to her to file an application in the Court of Civil Judge, Senior Division, Valsad for this purpose and the same would be ordered by the Civil Judge. The learned Civil Judge is directed to dispose of the application for restoration immediately and would simultaneously take up the main matter and dispose of the same expeditiously.

21. Depending on these decisions, learned counsel for the respondent, Ms. Shreya Gupta, very persuasively submits that the wife does not have any indefeasible right to ask the case filed by the husband at a different station to be moved to a station where she is located. Rather the difficulty, if any, that she faces on account of financial constraints, can be offset by the husband being required to compensate her expenses for travel and stay on each day the cause is scheduled before the Court where the husband has instituted it.

22. It is, in the last, submitted that the husband being employed in the NCR, the interest of both parties will be best served by requiring the wife's participation in the hearing through video conferencing.

23. This Court has considered the rival submissions advanced by parties. So far as the suggestion to direct hearing at Gautam Budh Nagar through Video Conferencing for the wife is concerned, it may not accord with the law. Though, it is a possibility to be seriously considered, if the law were to permit it. But, the law on the subject is laid down in **Santhini vs. Vijaya Venketesh, 2018 (1) SCC 1**, where

speaking for the majority, the learned Chief Justice of India has held:

56. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam [Krishna Veni Nagam v. Harish Nagam, (2017) 4 SCC 150 : (2017) 2 SCC (Civ) 394] that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh[Bhuwan Mohan Singh v. Meena, (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200] , the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in videoconferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. **However, we make it clear that in a transfer petition, no direction can be issued for videoconferencing**. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing. (Emphasis by Court)

24. In view of the decision in **Santhini** (*supra*), it is not possible for this Court to direct the wife to address the Court or contest the case before the Family Court at Gautam Budh Nagar through Video Conferencing. That is a possibility which the learned Judge, Family Court could consider, but the present application is not the proceeding to consider that prayer in view of the guidance in **Santhini.** The preponderant opinion, on the other hand, that has evolved in latter pronouncement of their Lordships of the Supreme Court like those in **Manjula Singh Chouhan, Bhartiben Ravibhai Rav, G.R. Bhuvaneshwari, Vaishali Shridhar Jagtap, Sumita Singh** appear to favour the principle that convenience of the wife is to be accorded preference in the matter of venue of proceeding in causes matrimonial. Also, if proceedings have been instituted by the wife at one station, proceedings instituted by the husband at another are favoured for a transfer to the station where

the husband, in any case, would have to appear, to wit, where the wife has brought proceedings. The question would then be of a convenient disposition at one station. The relevant factor about the wife not having anyone to accompany her across a long distance, is also a relevant consideration in ordering transfer. Here, the distance is about 700 Kms. between Gautam Budh Nagar and Prayagraj. Two cases are already pending at Prayagraj and the wife has no one in her family to act as her escort on every date that is scheduled before the Court at Gautam Budh Nagar. The wife, though well qualified, has not been shown to be possessed of any gainful occupation in her profession for the time being. The handicap that arises from lack of resources, cannot be always arithmetically calculated in terms of money spent on travel, lodging and board. Lack of financial resources bring many other kinds of handicaps, that cannot always be liquidated through taxable recompense.

25. In the opinion of this Court, therefore, this transfer application **succeeds** and is **allowed**. The proceedings of Case No. 1326 of 2019, Ashutosh Agrawal vs. Shakshi Agrawal, under Section 12 (1)(b) and (c) read with Section 5 of the Hindu Marriage Act, 1955 are withdrawn from the Principal Judge, Family Court, Gautam Budh Nagar and transferred to the learned Principal Judge, Family Court, Allahabad. The Principal Judge, Family Court, Allahabad, upon receipt of the record, shall proceed to try and determine the case himself or make it over for trial and decision in accordance with law to an Additional Judge available on the Court, as he may consider appropriate. The parties shall appear before the Principal Judge, Family Court, Allahabad on **28.02.2022**. During this period of time, the Principal Judge, Family Court, Gautam Budh Nagar shall ensure that the records are transmitted to the Principal Judge, Family Court, Allahabad. The parties take notice of this order through learned counsel.

26. Let this order be communicated to the Principal Judge, Family Court, Gautam Budh Nagar and the Principal Judge, Family Court, Allahabad by the Registrar (Compliance).

(2022)02ILR A395
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 2126 of 2020

Uday Narayan Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vikas Tiwari

Counsel for the Respondents:
C.S.C.

A. Pay – Definition of Pay.- Fundamental Rule 9(21) of Fundamental Rules.- Means the amount drawn by a Government servant as the pay which has been sanctioned for a post held by him substantively or in the officiating capacity, or to which he is entitled because of his position in a cadre; and includes an overseas pay, special pay and personal pay; and any other emoluments which may be specially classed as pay by the President but does not include the special pay or pay granted because of the personal qualification of the Government servant.(Para 25)

B. As per regulation 38(a) of CSR applicable in U.P., pay means "monthly substantive pay and

includes also overseas allowance and technical allowance.(Para 26)

C. Increment.—Is an increase in or addition on a fixed scale; it is a regular increase in salary on such a scale. The Government servant is entitled to increments as a matter of course subject to conclusion of past one year satisfactory service.(Para 27).

D. According to Article 151 of CSR the annual increment will accrue to a government servant from the day following that date on which it is earned i.e. annual increment would accrue only after completion of the year and become payable on the next day.

E. Date of Retirement.-Rule 56(a) of Financial Hand Book provides that every Government servant shall retire from service on the afternoon of the last day of the month in which he attained the age of 60 years.

F. That the Government servant is considered retired at 12:00 a.m. i.e. midnight on the last working day and his last working day in the establishment is considered working day as a result the respondents denial of in increment to the petitioner who retired on 30.06.2016 based on proviso to Rule 56 of the Fundamental Rules and Regulation 14 of CSR is erroneous and not sustainable in law. Judgment of P. Ayyam Perumal v The Registrar & ors. of Madras High Court dated 15.09.2017 passed in Writ Petition No. 15732 of 2017, P.P. Pandey v St.of U.P. Civil Misc. Writ Petition (S/S) No. 18375 of 2020 passed by High Court, Allahabad, S. Banerjee v U.O.I. 1989 Supp(2) SCC 486, Mohd. Hussain v St.of U.P. & ors. 2010(3) AWC 2964 and Ram Anjor Singh v UOI 2007(7) ADJ 273(DB) followed.

G. A Government employee is entitled to one increment as a matter of right after completing one year of service which becomes due on the following day of the years end.

H. Pension- Is not a bounty but a hard earned benefit which is in the nature of property. Hence, it cannot be taken away without complying with the due process of law under Article 300-A of Constitution of India. St.of Jharkhand v Jitendra Kumar Srivastava (2013)12 SCC 210 followed.

Petition allowed. (E-12)

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

1. Heard learned counsel for the petitioner and Sri Yashwant Singh, learned Standing Counsel for the respondent nos. 1 to 6.

2. Petitioner through present writ petition has assailed the order dated 17.01.2020, by which, his claim for the grant of one notional increment due on 01.07.2016 has been rejected.

3. The facts of the case, in brief, are that the petitioner was Water Supervisor (Seench Paryavekshak/Ameen) in the office of respondent no.6-Executive Engineer, Nalkoop Khand-2, District Allahabad. The date of birth of the petitioner is 18.06.1956. The petitioner on attaining the age of 60 years retired on 30.06.2016 from the office of respondent no.6. The service of the petitioner was satisfactory.

4. The further case of the petitioner is that the State Government by Government Order dated 04.05.2010 provided that the 1st July would be the date for fixation of new increment/revised salary. Accordingly, the petitioner is entitled to one notional increment for a period from 01.07.2015 to 30.06.2016 on 01.07.2016 after retirement for computation of pension. The petitioner claiming notional increment due on 01.07.2016 submitted detailed representation dated 11.09.2019 relying on the judgment of ***P.Ayyamperumal Vs. The Registrar and Ors.*** of Madras High Court dated 15.09.2017 passed in Writ Petition No.15732 of 2017. Accordingly, he prayed

that his pension may be revised/refixed. When the petitioner did not receive any reply to the said representation, he submitted a reminder on 09.01.2020 before the respondent.

5. Respondent no.6 by order dated 17.01.2020 rejected the claim of the petitioner for grant of notional increment on two grounds; the petitioner had retired in the afternoon of the last day of service, therefore he was not in service on the day when the increment was due. Secondly, as per Rule 14 of Civil Service Regulations, the last date of service of a Government servant is not counted as a working day, hence the government servant is retired without completing one year of service before retirement. The said order is impugned in the present writ petition.

6. In the counter affidavit filed by the respondent-State, the ground for denying the claim of the petitioner has been stated in paragraphs no. 4, 5, and 6 of the counter affidavit wherein it is averred that Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV applies to the government servant of Uttar Pradesh which provides that every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years. It is further stated that any Government Servant, whose date of birth is the first day of the month, upon attaining the age of 60 years would retire from service on the afternoon of the last day of the preceding month.

7. The further case of the respondent in the counter affidavit is that Rule 14 of the Civil Service Regulations provides that when an Officer is to retire at a specified age, the day on which he attains that age is reckoned non-working day. Accordingly, it is stated that it is clear from Rule 56(a) of Financial Hand Book, Vol.II, Chapter II to IV and Rule 14 of Civil Service Regulations that Government servant retires without completing one year of service. The further case of the respondent in the counter affidavit is that judgment of P.Ayyamperumal Vs. The Registrar and Ors. of Madras High Court (supra) is not applicable as the said judgment has been rendered in the context of rules of Central Government and the judgment referred therein namely *State of Tamil Nadu, rep. by its Secretary to Government, Finance Department, and others Vs. M. Balasubramaniam, reported in CDJ 2012 MHC 6525* has been rendered in the context of fundamental rules of State of Tamil Nadu. Hence, the judgment of *P.Ayyamperumal (supra)* is not applicable in the present case as the petitioner is an employee of the Uttar Pradesh Government.

8. In the rejoinder affidavit, it is stated that the denial of the claim of the petitioner is based on Rule 14 of Civil Service Regulation and Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV is misplaced since the day on which a Government servant retires or is discharged or is allowed to resign from service as the case may be, shall be treated as a last working day. The day of death of a Government servant shall also be treated as a working day. It is also stated that the judgment of the Madras High Court in the case of P.Ayyamperumal (supra) is applicable in the facts of the present case. Hence, the petitioner is entitled to the benefit of said judgment.

9. Challenging the aforesaid order, learned counsel for the petitioner contends that the interpretation by respondent no.6 of

Rule 14 of Civil Service Regulations and Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV in rejecting the claim of the petitioner is incorrect. It is submitted that admittedly the petitioner has rendered his service from 01.07.2015 to 30.06.2016, and as such he is entitled to receive all the benefits that had accrued to him during that period. Accordingly, it is submitted that the right to get an increment on completion of one year of service is an accrued right for rendering one year of good and satisfactory service, therefore, the respondent cannot deny the benefit of such accrued right to the petitioner on misconceived grounds. It is further contended that the petitioner on completion of one year's service becomes entitled to an increment which is not otherwise withheld.

10. The further contention of learned counsel for the petitioner is that as the petitioner's entitlement to receive increment accrues on completion of one year of service, and what remains thereafter is the enforcement of such an accrued right in the form of payment which cannot be denied to the petitioner on misconceived grounds. It is further submitted that there is no rule which stipulates that a government servant must continue in service to receive benefits that have accrued to him during the service period. In support of his case, learned counsel for the petitioner has placed reliance upon the Full Bench judgment of Andhra Pradesh High Court in ***P.Ayyamperumal (supra) (ii) P.P. Pandey Vs. State of U.P. & Ors., Civil Misc. Writ Petition (S/S) No. 18375 of 2020 passed by this Court (iii) S.Banerjee Vs. Union of India reported in 1989 Supp2 SCC 486 (iv) Mohd. Hussain Vs. State of U.P. & Ors. reported in 2010 (3) AWC 2964 (v) Ram Anjore Singh Vs. Union of India & Ors. reported in 2007 (7) ADJ 273 (DB).***

11. Per-contra, learned Standing Counsel would contend that Fundamental Rule 56 (a) of Financial Hand Book, Vol.II, Part II to IV is explicit and states that every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years and in a case where a Government servant's date of birth is the first day of the month, he shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

12. it is further contended that as per Rule 14 of Civil Service Regulations, since the last day of retirement is not a working day, therefore, the petitioner has not completed one year of service, hence he is not entitled to increment.

13. Learned Standing Counsel has placed reliance upon Full Bench judgment of Andhra Pradesh High Court in ***Principal Accountant General Vs. C.Subba Rao, reported in 2005 (4) ESC 2862***, the judgment of Madhya Pradesh High Court in ***Madhav Singh Tomar & Ors. Vs. M.P. Power Management Co. Ltd. & Ors. in Writ Petition No. 9940 of 2020 decided on 29.07.2020***, and judgment of Himachal Pradesh High Court in case of ***Hari Prakash Vs. State of Himachal Pradesh & Ors. in CWP No. 2503 of 2016***. On the strength of the aforesaid judgments, he submits that the date of birth of the petitioner is 18.06.1956 and under Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV, he shall be treated to have retired in the afternoon of 30.06.2016, therefore he was not in service on the date when the increment was due. Hence, his claim has rightly been rejected by respondent no.6.

14. I have heard learned counsel for the petitioner and learned Standing Counsel

for the State-respondents and perused the record.

15. The court believes that in view of argument advanced by respective parties, the questions which arise for consideration of this Court is that:

(i) what the word "afternoon" used in Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV connotes in the context of expression 'retirement of an employee on the last day of the month';

(ii) whether the respondent has rightly placed reliance upon Rule 14 of Civil Service Regulation to deny the benefit of notional increment to the petitioner;

(iii) whether the petitioner can be denied the benefit of notional increment on the ground that the petitioner was not in service on the date when the increment was due to the petitioner.

16. Before answering the aforesaid questions, it is apposite to refer to the relevant provisions of the Financial Hand Book, Vol.II, Part II to IV, Civil Service Regulations as applicable in Uttar Pradesh, (hereinafter referred to as "CSR') Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as "Pension Rules, 1972').

17. Rule 9(21), Rule 9(28) and (31) of Financial Hand Book, Vol.II, Part II to IV defines 'pay', 'substantive pay', and 'scale of pay' reads as under:

*"**9(21) Pay**- Pay means the amount drawn monthly by a Government servant as-*

(i) the pay, other than special pay or pay granting in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, technical pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the Governor."

*"**9(28)Substantive Pay**- Substantive pay means the pay other than special pay, personal pay or emoluments classed as pay by the Governor under Rule 9(21) (ii), to which a Government servant is entitled on account of a post to which he has been appointed substantively or by reasons of his substantive position in a cadre.*

***9(31)** (a) **Time Scale Pay**- Time-scale pay means pay which, subject to any conditions prescribed in these rules, rises by periodical increments from a minimum to a maximum. It includes the class of pay formerly known as progressive.*

(b) Time-scales are said to be identical if the minimum, the maximum, the period of increment and the rate of increment of the time-scale are identical.

(c) A post is said to be on the same time-scale as another post on a time- scale if the two time-scales are identical and the posts fall within a cadre, or a class in a cadre, such cadre or class having created in order to fill all posts involving duties of approximately the same character or degree of responsibility, in a service or establishment or group of establishments, so that the pay of the holder of any particular post is determined by his position in the cadre or class and not by the fact that he holds that post.

18. Rule 3(2) and 3(9) of The Uttar Pradesh Retirement Benefits Rules 1961 (hereinafter referred to as 'Rules 1961') defines 'Emoluments' and 'Retirement ' reads as under:

*"**3(2).** Emoluments' means the pay as defined in Rule 9(21) of the U.P. Fundamental Rules, which the Officer was receiving immediately before his retirement:-*

Provided that in the case of an Officer who on the date of his retirement is drawing pay in the scale of pay as in force on 29.3.62 the term "emoluments" shall also include the dearness allowance as admissible therein on that date.

Note.....

"3(9). "Retirement" means discharge of an officer from government service on superannuation, retiring, invalid or compensation pension or gratuity.

19. Regulation 14,151 to 153 of the CSR reads as under:

*" **14. Age**-When an officer is required to retire on attaining a specified age, the day on which he attains that age is reckoned as a non-working day, and the officer must retire.....with effect from and including that day.....*

*"**151**. An increment accrues from the day following that on which it is earned.*

Exception.-An officer appointed in England by the Secretary of State for service in India receives the increment in his pay in accordance with the terms of his engagement.

152. A periodical increment should not be granted to an officer serving on Progressive pay, as a matter of course, or unless his conduct has been good. When an increment is withheld, the period for which it is withheld is at the discretion of the authority having power to withhold, who will also decide whether the postponement is or is not to have the effect of similarly postponing future increments. The authority having powers to withhold is, in the case of ministerial and menial officers, the head of the office, and in the case of other officers, the Local Government, which may delegate the powers to heads of departments or other supervising officers.

153 (a). A proposal to grant an increment of Progressive pay in advance of the due date should always be scrutinized with special jealousy: it is contrary to the principle of Progressive pay to grant an increment before it is due, and such a grant should not be recommended or allowed, excepting under circumstances which would justify a personal allowance to an officer whose pay is fixed, - that is to say, seldom if ever.

(b) The powers of the Government of India, of Local Governments and of subordinate authorities to grant a premature increment to an officer are subject to the limits upto which each such authority can raise the officer's remuneration.

20. At this juncture, it is also relevant to refer to Rule 24 Financial Hand Book Vol.II Part II to IV, which is extracted herein as under:

***"24. An increment shall ordinarily be drawn as a matter of course unless it is withheld** -An increment may be withheld from a Government servant by the Government, or by any authority to whom the Government may delegate this power under Rule 6, if his conduct has not been good or his work has not been satisfactory. In ordering the withholding of an increment, the withholding authority shall state the period for which it is withheld, and whether the postponement shall have the effect of postponing future increments."*

21. In the facts of the present case, it would also be relevant to notice Regulation 38 of CSR as applicable in the State of

Uttar Pradesh which defines 'Pay and Salary'. Clause (a) and (c) defines 'pay' and 'salary' respectively and are reproduced herein-below:

38. *Pay and Salary :*

"(a) "pay" means "monthly substantive pay". It includes also "overseas allowance" and "technical allowance".

(b).....

(c) "Salary" means the sum of pay an acting allowance, or charge allowance, under Article 94 of Chapter VIII.

1. Personal allowance is treated, for the purposes of calculating leave allowance and pensions, as part of an officer's substantive pay, but not for purposes of travelling allowance, unless it has been granted to protect from loss an officer, the pay of whose appointment has been changed.

2. The allowance of an officer holding conjointly with another office a Professorship of Lecturership in any Government institution, are part of his salary.

3. "Salary" does not include a local allowance, deputation (local) allowance, house rent, tentage, or travelling allowance, whether daily, monthly or yearly.

4. The charge allowance admissible to Inspectors and Charge Clerks Indo-European Telegraph Department, are part of their salary.

5. The good conduct allowance of policemen is treated as salary for the purpose of calculating leave allowances, but not pension.

6. Deputation (duty) allowance and duty allowances are treated as salary for the purpose of calculating leave allowances and are included in the term "emoluments" for calculating pensions."

22. Section 1 of Chapter XLVIII of CSR deals with payment of pension and the relevant regulation in the present case is Regulation 930 of Section 1 of Chapter XLVIII of CSR as applicable in Uttar Pradesh which reads as under:

***"930**. Apart from special orders, a pension, other than a Wound or Extraordinary pension under the Uttar Pradesh Civil Services (Extraordinary Pension) Rules, is payable from the date on which the pensioner ceased to be borne on the establishment, or from the date of his application, whichever is later. The object of this later alternative is to prevent unnecessary delay in the submission of applications. The rule may be relaxed, in this particular, by the authority sanctioning the pension when the delay is sufficiently explained.*

1. The pension of an officer who under Article 436, has received a gratuity in lieu of notice is not payable for the period in respect of which the gratuity is paid."

23. Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as 'Rules 1972') have been promulgated in exercise of power under proviso to Article 309 of the Constitution of India. It would also be apt to refer to Rule 5 of Pension Rules, 1972 which is reproduced herein as under:

*"5**. Regulation of claims to pension or family pension** :-(1) Any claim to pension or family pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies, as the case may be.*

(2) The day on which a Government servant retires or is retired or is discharged

or is allowed to resign from service, as the case may be, shall be treated as his last working day. The date of death shall also be treated as a working day:

Provided that in the case of a Government servant who is retired prematurely or who retires voluntarily under clauses (j) to (m) of Rule 56 of the Fundamental Rules or Rule 48 or Rule 48-A, as the case may be, the date of retirement shall be treated as a non-working day.

24. Chapter IX of Financial Hand Book, Vol.II Part II to IV deals with compulsory retirement. The relevant provision in the context of the present case is Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV which is being reproduced herein as under:

"56 (a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government servant, whose date of birth is the first day of a month, shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years:"

Provided further that a Government servant, who has attained the age of fifty-eight years on or before the first day of the November, 2001 and is on extension in service, shall retire from service on expiry of his extended period of service.

25. Now this Court proceeds to analyse the aforesaid provisions to appreciate the controversy in the present case. Pay as defined in Fundamental Rule 9(21) of Fundamental Rules means the amount drawn by a Government servant as the pay which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled because of his position in a cadre; and includes overseas pay, special pay and personal pay; and any other emoluments which may be specially classed as pay by the President but does not include the special pay or pay granted because of the personal qualification of a government servant.

26. As per Regulation 38(a) of CSR applicable in Uttar Pradesh, "Pay' means "monthly substantive pay" and includes also overseas allowance and technical allowance. As per Rule 9(28) of Fundamental Rules, Substantive pay means the pay other than special pay or emoluments classed as pay by the Governor under Rule 9(21)(ii) to which a government servant is entitled on account of a post to which he has been appointed substantively or because of his substantive appointment in the cadre. It is worth noticing that Rule 9(21), (28) of Fundamental Rules and Regulation 38(a) of CSR does not exclude 'increment' paid to a government servant from the definition of 'Pay' and 'Substantive Pay'. Further, the perusal of point no.3 mentioned below Regulation 38(c) of CSR also reveals that the increment paid to a Government servant under Regulation 151 of CSR is not excluded from the salary.

27. In service jurisprudence, the increment has a distinct concept. It is an increase in or addition on a fixed scale; it is a regular increase in salary on such a scale. In other words, Increment is an incidence of service and is an addition in the same scale and not to a higher scale. The government servant is entitled to increment as a matter of course subject to the conclusion of past one year satisfactory

service. As a result of the preceding discussion, the natural corollary is that it is part of "pay" and "Substantive Pay" as defined in Rule 9(21) & 9(28) of Fundamental Rules and Regulation 38(a) of the CSR and also part of "salary" as defined in Regulation 38(c) of the CSR, as applicable.

28. According to Article 151 of CSR, the annual increment will accrue to a Government servant from the day following that date on which it is earned. The right to get an annual increment would accrue to a Government servant only after completion of the year and become payable on the next day.

29. At this point, it is appropriate to consider Fundamental Rule 24, which states that an increment is normally drawn as a matter of course unless it is withheld. A combined reading of Fundamental Rule 24 and Regulation 151 of CSR suggests that the government servants shall receive increment as a matter of right from the next date when it falls due under Regulation 151 of CSR, and the only condition under which the increment accrued to a government servant can be denied is if his conduct has not been good or his work has not been satisfactory. In other words, reading the Fundamental Rules 24 leads to the inevitable conclusion that a government servant has an accrued right to receive an increment as per Regulation 151 and can be denied only if his conduct was not good or his work was not satisfactory, as stipulated in Fundamental Rule 24.

30. At this juncture, it is appropriate to consider Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV which states that every Government servant shall retire from the service on the afternoon of the last day of the month in which he attains the age of sixty years. To understand in what context the word 'afternoon' has been referred to in Rule 56(a) and proviso to Rule 56(a) of Financial Hand Book, Vol.II, Part II to IV, it would be beneficial to refer to a few judgments on which learned counsel for the petitioner has relied.

31. In the case of S.Banerjee vs. Union of India (supra), the petitioner-S.Banerjee claimed the benefit of paragraph 17.3 of Chapter 17 of Part II on page 93 of the Pay Commission Report, which states that for employees retiring between January 1, 1986, and September 30, 1986, the government may consider treating the entire dearness allowance drawn by them up to December 31, 1985, as pay for pensionary benefits. The said benefit was denied to him because he did not draw a salary for January 1, 1986, in view of the proviso to Rule 5(2) of the Pension Rules, 1972. The aforementioned contention was rejected by the Apex Court. Paragraph 6 of the judgment is relevant which reads as under:

(6) "Under paragraph 17.3, the benefits recommended will be available to employees retiring during the period, January 1, 1986 to September 30, 1986. So the employees retiring on January 1, 1986 will be entitled to the benefit under paragraph 17.3. The question that arises for our consideration is whether the petitioner has retired on January 1, 1986. We have already extracted the order of this Court dated December 6, 1985 whereby the petitioner was permitted to retire voluntarily from the service of the Registry of the Supreme Court with effect from the forenoon of January 1, 1986. It is true that in view of the proviso to rule 5(2) of the Rules, the petitioner will not be entitled to

any salary for the day on which he actually retired. But, in our opinion, that has no bearing on the question as to the date of retirement. Can it be said that the petitioner retired on December 31, 1985? The answer must be in the negative. Indeed, Mr. Anil Dev Singh, learned counsel appearing on behalf of the respondents, frankly conceded that the petitioner could not be said to have retired on December 31, 1985. It is also not the case of the respondents that the petitioner had retired from the service of this Court on December 31, 1985. Then it must be held that the petitioner had retired with effect from January 1, 1986 and that is also the order of this Court dated December 6, 1985. It may be that the petitioner had retired with effect from the forenoon of January 1, 1986 as per the said order of this Court, that is to say, as soon as January 1, 1986 had commenced the petitioner retired. But, nevertheless, it has to be said that the petitioner had retired on January 1, 1986 and not on December 31, 1985. In the circumstances, the petitioner comes within the purview of paragraph 17.3 of the recommendations of the Pay Commission."

32. In the case of Ram Anjore Singh (supra), the petitioner's last day of service was December 31, 1995. He claimed the benefit of a revised pension as per the revised pay scale, claiming that his retirement date is January 1, 1996. His claim was denied on the ground that he retired on December 31, 1995, and thus was not entitled to the benefit of the office memorandum dated October 27, 1997, which extended the benefit of the revised pay scale and pension fixation to a Government servant who retired on January 1, 1996, or later. This Court held that the denial of the benefit of office memorandum to the petitioner is illegal. This Court in paragraph 15 of the judgment has noted the decision in Special Appeal No. 1056 of 2005 (Sushila Devi Vs. District Collector and others) in which this Court has held that for the retirement of Government servant, the time afternoon must be construed as a time after the noon (12 O'Clock) until the end of the day (12:00 PM). Relevant paragraph nos. 15, 16, 17, 18 are reproduced herein as under:

"15. Which of the aforesaid O.Ms. would be attracted to the case of the petitioner would depend upon the fact as to when the petitioner can be said to have retired from service. From a perusal of O.M.I, it is evident that the same is applicable to such government servants who retire on 1st January, 1996 or thereafter. The O.M.II, however provides that the pension/family pension shall be determined in the manner prescribed thereunder to all pre-1996 pensioners/family pensioners in the manner indicated in the subsequent paragraphs. Though para 2.1 states that the order shall be applicable to all those who were drawing pension/family pension on 1st January, 1996, but from the definition of the existing pensioner or existing family pensioner or existing pension or existing family pension, it would be evident that the said order is applicable to those who were drawing/entitled to pension on 31st December, 1995 and therefore were also drawing pension on 1st January, 1996. Thus only such persons can be said to be pre-1996 pensioners/family pensioners. The question as to whether the petitioner can be said to be a pre-1996 pensioner/family pensioner, in order to attract the meaning of the word "government servants who retired on 1st January, 1996". In other words can it be said that the petitioner retired on 31st

December, 1995 and is also an existing pensioner on 31st December, 1995. It is no doubt true that 31st December 1995 was the last day of working of the petitioner on which date he would retire on attaining the age of superannuation as per Fundamental Rule 56, which requires that a government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years. Since the petitioner attains the age of 58 years on 31st December, 1995 itself, therefore he will retire in the afternoon of 31st December, 1995. The word afternoon would mean up to midnight of 31st December, 1995/1st January, 1996. It is true that normally on the last day of the working a government servant is required to hand over his charge and work is complete during office hours, but legally the status of the concerned person would continue to be a "government servant" till the midnight of the last working day, since the afternoon would come to an end at 12.00 P.M. i.e. end of the day. A Division Bench of this Court in Special Appeal No. 1056 of 2005 (Sushila Devi Vs. District Collector and others, decided on 6th September, 2005, held as under :-

"From the foregoing discussions, we are of the opinion that for purposes of retirement of a government servant, the time afternoon has to be construed as a time after the noon (12 O'clock) till the end of the day (12 P.M.)."

16. The 31st December, 1995 being the last working day, the petitioner was also entitled for full salary of the said day, which is also inconsonance with Rule 5(2) of the Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as "Pension Rule 1972"), which reads as under :-

"5(2) The date on which a government servant retires or is retired or has discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. The day of death shall also be treated as working day.

Provided that in the case of a government servant, who is retire or immediately to retire or who retires voluntarily under clause (j) to (m) to Rule 56 of Fundamental Rule or Rule 48 (or Rule 48-A), as the case may be, the date of retirement shall be treated as a non working day."

17. This results to an inference that the last working day in the service of the government servant is also the date of his retirement, but it cannot be said that the said government servant would be entitled for pension on 31st December, 1995 and therefore is an existing pensioner or existing family pensioner on 31.12.1995. For the purposes of pension, he would be entitled to draw the same w.e.f. 1st January, 1996 and not prior thereto. The O.M.I is applicable to those who are not pre-1996 pensioners/family pensioners since they are governed by O.M.II. Since the petitioner cannot be said to be a pre-1996 pensioner/family pensioner, therefore in our view his case will be covered by O.M.I. It is not the case of the respondents that besides the aforesaid two office memorandums, there is any other office memorandum, which would be applicable to the cases which are not covered by the aforesaid two office memorandums. The view which we have taken has not been shown to be inconsistent to any statutory provision and on the other hand since O.M.II is clearly applicable to pre1996 pensioner/family pensioner, and the petitioner cannot be said to be a pensioner on 31st December, 1995 since that being the last working day and he being entitled for full salary, he would not be entitled for pension on 31st December, 1995, therefore

the O.M.II has no application to his case, the same would have to be governed by O.M.I.

18. In this view of the matter, in our view, for the purposes of para 3.1 of O.M.I, the petitioner is entitled to be governed by the provision thereof as he retired on 1st January, 1996. The provision of OM-I, being beneficiary in nature, in the absence of any contrary, express or necessary implication, it should be given a meaning which may cover a larger number of persons without doing any violence to the language of the Statute. The judgement of Andhra Pradesh High Court in the case of R. Malakondaiah and others (supra) relied upon by learned counsel for the petitioner, in our view does not apply to the facts of the present case, since the issue involved therein was different and the provision up for consideration before the Andhra Pradesh High Court was also in different context. That was a case of increment of a government servant and interpreting Article 151 CSR, the Andhra Pradesh High Court held that a government servant is entitled for the benefit of increment after completion of the conditions attracting said benefit, even if the same day of his last day of the working, since actual grant thereto is only in the nature of execution."

33. In the case of ***Mohd. Hussain (supra***), in almost identical circumstances, this court has granted the benefit of notional increment to the petitioner whose last working day was 30.06.2009. The relevant paragraph no.6 of the judgment is reproduced herein below:

"(6) following the aforesaid pronouncement of law, we are of the opinion that since the petitioner was retired on 30.06.2009, his last working day shall be treated as 30.06.2009 and that he would be retired on 1.7.2009. Since he was to be given benefit of one increment according to his date of birth (1.7.1949), he would have retired on 1.7.2009 taking with him the benefit of one increment payable to him in 2006 entitled to calculation of his pension accordingly."

34. It is not the case of the respondent since the government servant retires in the afternoon in terms of Rule 56 of the Fundamental Rule so he is paid the salary until the afternoon of the last working day, rather he is paid the salary for the full day of the last working day. Thus, the word 'afternoon' mentioned in the proviso to Rule 56 (a) of the Fundamental Rules in view of the aforementioned judgment stands for after the noon until 12:00 A.M. i.e. midnight.

35. Now coming to the other ground of rejection of the claim of the petitioner by the respondent by relying upon Regulation 14 of CSR, the perusal of Regulation 14 extracted above shows that it explains the definition of 'Age'. Regulation 14 of the CSR does not apply in this case because the government servant's right to an increment is governed by Regulation 151 of the CSR. The government servant earns an increment as a matter of course if he maintains good behaviour and provides satisfactory service for the previous year. It appears that the purpose for specifying in Regulation 14 of the CSR that the last day of retirement is a non-working day of the government servant where the government servant is required to retire on attaining a specified age is perhaps for the reason that it is his last working day in the establishment, therefore, he may not be given any new assignment to enable him to complete all the paperwork and formalities relating to his retirement.

36. In this regard, it would also be relevant to consider Rule 930 of Section 1 of Chapter XLVIII of CSR which states that a pension is payable from the date on which the pensioner ceased to be borne on the establishment or from the date of his application, whichever is later. Rule 9(9) of Rules 1961 defines 'Retirement' which means discharge of an officer from service on superannuation. In accordance with Rule 9(9) of the Rules 1961, the government servant on superannuation is discharged from government service and ceases to be a member of the establishment upon retirement, and becomes eligible for pension thereafter under Regulation 930 of CSR. So, can it be said that the government servant is entitled to receive the pension from his last day of retirement or the afternoon of his last day of retirement? In my opinion, the answer is emphatic 'No' in light of Rule 930, because entitlement to the pension to the petitioner is not from the last working day in the establishment but from the day on which he ceased to be a member of the establishment, which is the following day of the employee's last working day in the establishment.

37. Viewed from another perspective, Regulation 930 of the CSR is incorporated under Chapter XLVIII of the CSR and enumerates the conditions under which a government servant becomes entitled to a pension, whereas Regulation 14 of the CSR explains the definition of age and is not concerned with the payment of pensions; thus because Regulation 930 covers the field, Regulation 14 has no application in the instant case. In this regard, it would also be appropriate to refer to Rule 5(2) of the Rules of 1972, which states unequivocally that the day on which a government servant retires shall be treated as the last working day; thus, the respondent's reliance on Regulation 14 of the CSR to reject the petitioners' claim is misplaced in view of Rule 5(2) of the Rules of 1972.

38. The inescapable conclusion from the preceding discussion is that the government servant is considered retired at 12:00 AM i.e. midnight on the last working day, and his last working day in the establishment is considered working day. As a result, the respondent's denial of an increment to the petitioner based on Proviso to Rule 56 of the Fundamental Rule and Regulation 14 of the CSR is erroneous and unsustainable in law.

39. The Madras High Court in the case ***P.Ayyamperumal (supra***) has extended the benefit of notional increment to the petitioner who retired on 30.06.2013 and the increment fell due on 01.07.2013 on which date he was not in service. Relevant paragraphs no. 6 and 7 of the judgment are reproduced herein below:

"6. In the case on hand, the petitioner got retired on 30.06.2013. As per the Central Civil Services (Revised Pay) Rules, 2008, the increment has to be given only on 01.07.2013, but he had been superannuated on 30.06.2013 itself. The judgment referred to by the petitioner in ***State of Tamil Nadu, rep.by its Secretary to Government, Finance Department and others v. M.Balasubramaniam, reported in CDJ 2012 MHC 6525****, was passed under similar circumstances on 20.09.2012, wherein this Court confirmed the order passed in W.P.No.8440 of 2011 allowing the writ petition filed by the employee, by observing that the employee had completed one full year of service from 01.04.2002 to*

31.03.2003, which entitled him to the benefit of increment which accrued to him during that period.

7. The petitioner herein had completed one full year service as on 30.06.2013, but the increment fell due on 01.07.2013, on which date he was not in service. In view of the above judgment of this Court, naturally he has to be treated as having completed one full year of service, though the date of increment falls on the next day of his retirement. Applying the said judgment to the present case, the writ petition is allowed and the impugned order passed by the first respondent-Tribunal dated 21.03.2017 is quashed. The petitioner shall be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he has completed one full year of service, though his increment fell on 01.07.2013, for the purpose of pensionary benefits and not for any other purpose. No costs."

40. A Special Leave Petition (Civil) Diary No(s) 22283 of 2018 has been preferred by the Union of India against the aforesaid judgment of P.Ayyamperumal (supra) which was dismissed by Apex Court vide order dated 23.07.2018, which is reproduced herein below:

"Delay condoned.

On the facts, we are not inclined to interfere with the impugned judgment and order passed by the High Court of Judicature at Madras.

The special leave petition is dismissed."

41. In the case of P.P. Pandey (supra), this Court took a similar view and allowed the writ petition of a petitioner who was an employee of UPSRTC and was denied the benefit of notional increment due to him on 01.07.2010 because he retired on 30.06.2010.

42. As a consequence of the preceding discussion, it can be easily concluded that a government employee is entitled to one increment as a matter of right after completing one year of service which becomes due on the following day of the year's end; what remains thereafter is the enforcement of such right in the form of monetary benefit.

43. Now coming to the judgments which have been relied upon by the learned counsel for the respondent.

44. The first case is the Full Bench decision of the Andhra Pradesh High Court in the case of C. Subba Rao (Supra), in which the court denied the benefit of an increment due on January 1, 2002, in the case of a government servant who last day in the service was December 31, 2001. The reading of paragraphs 23 to 25 of the decision indicates that the Full Bench has primarily proceeded to deny the benefit of increment because the increment fell due on 01 January, on which date the government servant was not in service, and the emoluments drawn by the government servant as per Rule 34 during the last ten months of his service are treated as emoluments for computing the pension, and since the increment was not due on the 31 December, which does not form part of emoluments, therefore, the government servant is not entitled to the increment falling due on the next date of last working day.

45. With due respect to the Full Bench judgement of the Andhra Pradesh High Court, I respectfully disagree because the entitlement to increment to the government servant is for satisfactory service rendered by him for the past one year, and the completion of one year is the

last day of the year. So, the increment is being paid to the government servant for services rendered during his service period; therefore, the question is whether this benefit can be denied to the government servant because he was not in service since the payment of said benefit is due on the day of retirement and does not form part of emoluments under Rule 34. In my opinion, the answer is 'no,' because such an interpretation would be hit by Article 14 of the Indian Constitution as any benefit accrued to a government servant during service can only be denied only on a reasonable and valid legal ground. It is important to note that because the condition for grant of increment is one-year satisfactory service, it is obvious that the government servant is entitled to receive the benefit of increment upon completion of one year of satisfactory service, and if the completion of one year is followed by the day of retirement, on which date only payment of said benefit remains, the denial of said benefit on the said ground is not only arbitrary but abuse of process of law and is against the principles enshrined in Article 14 of the Constitution of India.

46. The petitioner is demanding that he is entitled to get a notional increment falling due on 1st July 2016 for pension. It is no longer res-Integra that for government employees whose service conditions are governed by statutory rules, pension, a deferred salary, is a right and its payment is not subject to the Government's discretion. It is also settled in law that the pension is not a bounty but a hard-earned benefit by a government servant and is in the nature of the property. Thus, it cannot be taken away except with due process of law as per Article 300A of the Constitution of India. The Apex Court in paragraph 20 of ***D.S. Nakara Vs. Union of India, 1983 (1) SCC 305*** placing reliance upon judgments of Apex Court in the Deokinandan Prasad Vs. State of Bihar [1971 (2) SCC 330] and State of Punjab Vs. Iqbal Singh [1976 (2) SCC 1] has observed as under:

"20. The antiquated notion of pension being a bounty, a gratituous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar & Ors. wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab & Anr. v. Iqbal Singh (1)."

47. In State of ***Jharkhand Vs. Jitendra Kumar Srivastava and others, 2013 (12) SCC 210*** the Apex Court held that the pension is not a bounty but a hard-earned benefit which is in the nature of the property. Hence, it cannot be taken away without complying with the due process of law under Article 300-A of the Constitution of India.

48. Once it is a settled position of law that pension is not a bounty and has been

earned by the government servant by dint of his long, continuous, faithful, and unblemished service, the same cannot be curtailed except as per law. Since the benefit of increment has accrued to the government servant for the service rendered by him during his service period, therefore, such benefit earned by the government cannot be denied on the pretext that the government servant has retired on the day on which he is entitled to receive such benefit and it does not form part of emoluments under Rule 34 for calculating the pension. The Court believes that the denial of notional increment on the aforementioned grounds is nothing but an abuse of process of law and is an arbitrary act of the respondents, as such is hit by Article 14 of the Constitution of India.

49. So far as the judgment of Madhya Pradesh High Court in ***Madhav Singh Tomar (supra)*** is concerned, the Division Bench of the Madhya Pradesh High Court has rejected the claim relying upon the aforesaid judgment of the Andhra Pradesh High Court, therefore, the law enshrined in the said decision is also not applicable in the facts of the present case. For the same reason, the judgment of the Himachal Pradesh High Court which has denied the claim of petitioners on the ground that when the increment fell due he was not an employee, is also not applicable in the facts of the present case.

50. Now coming to the facts of the present case, undisputedly the petitioner had retired on 30.06.2016 and the increment for the service rendered by him for the past one year i.e. 01.07.2015 to 30.06.2016 became due to him on 01.07.2016. The denial of the increment to the petitioner on the ground that the last day of the service of the petitioner was not the last working day and the petitioner had retired in the afternoon cannot be sustained given discussions aforesaid; as from the discussion aforesaid, it is evident that the last working day of the petitioner is 30.06.2016 till 12:00 P.M. Thus, the petitioner had completed one full year from 01.07.2015 to 30.06.2016. Consequently, he cannot be denied the benefit of notional increment which fell due on 01.07.2016 as the right to get increment is an accrued right for the services rendered for one year, and the next date on the conclusion of the year is only the date on which he is entitled to receive the monetary benefit. Thus, for grant of notional increment, it is immaterial that the petitioner was not in service on the day when it fell due. Accordingly, this Court believes that the order impugned is not sustainable.

51. For the reasons given above, the impugned order dated 17.01.2020 passed by respondent no.6-Executive Engineer, Nalkoop Khand-2, Allahabad is hereby quashed and a writ of mandamus is issued to the respondent to grant the benefit of one notional increment to the petitioner and accordingly, revise and refix his pay and pension.

52. The writ petition is ***allowed*** with no order as to cost.

(2022)02ILR A410
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 12726 of 2021

Sohan Lal Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Kumar Jain, Mr. Raghvendra Yadav

Counsel for the Respondents:
C.S.C.

A. Article 226 - Writ of *Quo Warranto* - For issuance of Writ of Quo Warranto it has to be seen by the court as to whether incumbent is holding public office or not and further he is having essential qualifications to hold the said post or not.

B. Only an aggrieved person can file a writ petition. In service jurisprudence only aggrieved person can assail the offending action. Third party has no locus standi to canvass the legality or correctness of the action.

C. The post of Chief Medical Superintendent of District Hospital is not a public office and, therefore, writ of *quo warranto* cannot be issued.

Petition dismissed. (E-12)

List of Cases cited:-

1. Ravi Kant Tiwari Vs St.of U.P. Service Single No. 36210 of 2019

2. R.K. Jain Vs U.O.I. (1993)4 SCC 119

3. Dr. Prabhu Nath Prasad Gupta Vs St.of U.P. & ors. 2003(52) ALR 520

4. Shanker Verma Vs St.of U.P. Service Single No. 14329 of 2019

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Mr. Raghvendra Yadav, Advocate holding brief of Mr. Aklank Kumar Jain, learned counsel for the petitioner and Dr. D.K. Tiwari, learned Additional Chief Standing Counsel for the State-respondents.

2. Present petition has been filed with the following prayers:

"(i) Issue a suitable order or direction in the nature of certiorari quashing the impugned order dated 29.9.2020 passed by the Government of U.P., Chikitsa Anubhag-2, Lucknow with regard to the respondent no.4 whose name is placed at serial No.5 of the aforesaid impugned order.

(ii) Issue a suitable order or direction in the nature of quo warranto commanding the respondents to oust the respondent no.4 from the post of Chief Medical Superintendent, District Hospital, Etah."

3. Learned counsel for the petitioner submitted that petitioner is Netra Parikshan Adhikari posted at District Hospital, Etah from 8.2.2020 and presently working under the respondent no.4, against whom writ of quo warranto is sought. He next submitted that respondent no.4 was working as Senior Consultant at District Hospital, Etah and he was promoted as Chief Medical Superintendent in the same hospital vide impugned order dated 29.9.2020. He further submitted that earlier Chief Medical Officer, Kanpur Nagar passed an order dated 7.7.2015 by which respondent no.4 was transferred and relieved from District Hospital Kanpur Nagar to District Hospital Etah, but he has not submitted his joining and ultimately he was unauthorizedly absent for more than three years from the service. Further, instead of submitting his joining, he has challenged the said order by filing Case No.CP1540 of 2018 (Dr. Rajesh Kumar Agrawal Vs. Family Welfare) before the State Services Tribunal, Lucknow, which is still pending. Ignoring his unauthorized absence, in compliance of order dated 29.9.2020, respondent no.4 was permitted to join his service as Chief Medical Superintendent, District Hospital, Etah. He further submitted that once the respondent no.4 was unauthorizedly absent from the service for more than 3 years, he

cannot be permitted to join his service on the post of Chief Medical Superintendent, District Hospital, Etah. He also submitted that post of Chief Medical Superintendent is Public Office and respondent no.4 cannot hold the said post illegally as he was absent from service for more than three years and also filed a Case No.CP1540 of 2018 (Dr. Rajesh Kumar Agrawal Vs. Family Welfare) before the State Services Tribunal, Lucknow. Lastly, he submitted that under such facts and circumstances of the case, order is bad in law, writ of certiorari as well as quo warranto may be issued for cancelling the promotional order of respondent no.4 dated 29.9.2020 and removed him from the post of Chief Medical Superintendent, District Hospital Etah.

4. Dr. D.K. Tiwari, learned Additional Chief Standing Counsel has opposed the submission of learned counsel for the petitioner and submitted that present petition for writ of certiorari as well as quo warranto is not maintainable for many reasons. He next submitted that first of all impugned order dated 29.9.2020 is not a promotional order, but it is a transfer order only. He further submitted that in service matter, writ petition can only be filed by the person aggrieved, whereas in the present case, petitioner is not the person aggrieved. He is admittedly subordinate to respondent no. 4 in the same hospital and even in case of quashing of impugned order dated 29.9.2020, petitioner would not be entitled to hold the post of Chief Medical Superintendent at District Hospital, Etah, therefore, writ petition for writ of certiorari is not maintainable.

5. In support of his contention, he has placed reliance upon the judgments of the Apex Court as well as this Court in the cases of ***R.K. Jain Vs. Union of India and others*** reported in ***1993 (4) SCC 119, Dr. Prabhu Nath Prasad Gupta vs. State of U.P. And others*** reported in ***2003 (52) ALR 520 and Sanker Verma vs. State of U.P. Thru. Prin. Secy. Edu. Lucknow and others*** passed in ***Service Single No. 14329 of 2019 decided on 23.5.2019.***

6. Learned Standing Counsel further submitted that writ of quo warranto may also not be issued in the present case. For issuance of writ of quo warranto, it has to be seen by the Court as to whether incumbent is holding the Public Office or not and further he is having essential qualification to hold the said post or not. So far as present case is concerned, on both the grounds, writ of quo warranto may not be issued.

7. He next submitted that post of Chief Medical Superintendent, District Hospital, Etah is not Public Office. The very same matter came before this Court in the case of ***Ravi Kant Tiwari vs. State of U.P.*** Thru. Sanjay Gandhi Pg. Institute and others passed in ***Service Single No. 36210 of 2019*** and this Court after considering so many judgments, held that post of Chief Medical Superintendent is not a Public Office.

8. So far as qualification is concerned, there is no dispute on the point that respondent no.4 is fully qualified to hold the said post, therefore, mere his absence for more than three years from service, filing of a case and ultimately permitted by the employer of State Government to join his service cannot be a ground for issuance of writ of quo warranto.

9. I have considered the rival submissions advanced by the learned

counsel for the parties and perused the record as well as judgment relied by the leaned Standing Counsel for the State-respondents. There is no dispute on the issue that in service matter, writ petition can only be filed by the person aggrieved. Undisputedly, petitioner is not aggrieved by the order of Government of U.P. Chikitsa Anubhag-2 Lucknow dated 29.9.2020 by which respondent no.4 was transferred and posted as Chief Medical Superintendent, District Hospital Etah as he is not prospective incumbent for the same post.

10. In the matter of ***R.K. Jain (Supra)***, Court has held that in service jurisprudence, only aggrieved person can assail the illegality of offending action. Paragraph 74 of the said judgment is quoted hereinbelow:-

"74. Shri Harish Chander, admittedly was the Senior Vice-President at the relevant time. The contention of Shri Thakur of the need to evaluate the comparative merits of Mr. Harish Chander and Mr. Kalyansundaram a seniormost member for appointment as President would not be gone into a public interest litigation. Only in a proceedings initiated by an aggrieved person it may be open to be considered. This writ petition is also not a writ of quo warranto. In service jurisprudence, it is settled law that it is for the the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public spirited person."

11. Again in the matter of ***Dr. Prabhu Nath Prasad Gupta (Supra),*** this Court after considering so many judgments, has taken similar view that only person aggrieved can only be filed writ petition.

12. The similar issue was again came before this Court in the matters of ***Sanker Verma (Supra)***, Court after considering judgments of Apex Court, has held that in service matter, only person aggrieved can file writ petition. Paragraph 8 of the said judgment is quoted hereinbelow:-

"8. From a perusal of the law laid down by the Apex Court in the case of Ravi Yashwant Bhoir (supra) as well as the Division Bench judgment in the case of Dharam Raj (supra) it clearly comes out that for a person to prefer the petition, he has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. Thus in order to prefer a writ, the person entitled would be one who has either been wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. It is settled proposition of law that the person who suffers from legal injury only can challenge the act or action or order by filing a writ petition inasmuch as the writ petition under Article 226 of Constitution of India is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is breach of statutory duty on the part of authorities. Thus, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to and not for the purpose of settlement of a personal grievance."

13. In the present case too, there is no doubt on the point that petitioner is not aggrieved by the impugned order dated

29.9.2020, which is necessary requirement in service matter for filing a writ petition, therefore, in light of facts as well as judicial pronouncement made by Courts, this petition is not maintainable and no writ of certiorari can be issued for quashing the impugned order dated 29.9.2020.

14. Coming to the second point as to whether writ of quo warranto against the respondent no.4 can be issued or not. The very same issue came before this Court in the case of ***Ravi Kant Tiwari (supra)*** and Court after considering so many judgments, has held that post of Chief Medical Superintendent is not a Public Office. Paragraph 16 of the said judgment is quoted hereinbelow:-

"16. From the aforesaid discussion, it is evident that the post of Chief Medical Superintendent of SGPGIMS cannot be held to be a 'Public Office' merely because the SGPGIMS is in the field of medical service. The office of Chief Medical Superintendent does not seem to involve an obligation of any of the sovereign functions of the Government either Executive or Legislative or Judicial for public benefit. It cannot be said that the public in general is interested and non-observance of the obligations of employment of respondent no.3 as a Chief Medical Superintendent, in any event, shall effect the interest of public at large; and even if it would affect, the same shall be too remote so as to make the office of the Chief Medical Superintendent a 'Public Office'."

15. In light of judgment of this Court in the matter of ***Ravi Kant Tiwari (Supra)*** as well as facts of the case, once the post of Chief Medical Superintendent is not Public Office, no writ of quo warranto can be issued.

16. Now coming to the second point as to whether respondent no.4 is having eligibility to hold the said post or not, which is a core issue for issuance of writ of quo warranto. Undisputedly, respondent no.4 is qualified Doctor, duly appointed by the respondents in the State Medical Services having all qualification for holding the post of Chief Medical Superintendent. Therefore, mere absence from service for certain time, cannot be a ground for issuance of writ quo warranto. The State Government is the employer of respondent no.4 and employer has always right to condone/waive off the certain deficiencies, if found. In the present case, assuming it respondent no.4 has not joined his service for certain time, it can only be an irregularity and not illegality for which State Government has full right to condone the same. It is also undisputed that respondent no.4 was earlier posted as Senior Consultant District Hospital, Etah and he was very well in service. Therefore, his transfer/adjustment from one post to another post in same hospital cannot said to be illegality and mere his absence from the service for certain period would not attach any ineligibility or disqualification to respondent no.4 to hold the post resulting into issuance of writ of quo warranto.

17. Therefore, under such facts of the case and law laid down by Courts, I found no substance, writ petition lacks merit and is accordingly, **dismissed**. No order as to costs.

(2022)02ILR A414
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 15480 of 2021

Reeta Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Girijesh Tiwari

Counsel for the Respondents:
C.S.C., Sri A.P.M. Tripathi

Civil Law - Constitution of India-Article 226 - U.P. Recognized Basic School (Junior High School) (Recruitment and Condition of Service of Teachers) Rules, 1978 - Petitioner's selection and appointment was challenged on the ground that they lack relevant qualifications-A direction was given to proceed with conduct of regular inquiry for such fraudulent appointment-Mere continuing on a particular post for a long time does not establish that the selection was in accordance with law-the Manager of the institution was close relatives of the petitioners while the law prohibits such an appointments-If someone had committed a fraud to get a job, no matter how long they had been employed, their punishment will be inevitable too-no infirmity in the impugned order directing regular enquiry against the petitioner.(Para 1 to 32)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Allahabad Bank & ors. Vs Krishna Narayan Tiwari,(2017) 2 SCC 308

2. Chairman & M.D. FCI & ors. Vs Jagdish Balaram Bahira & ors. (2017) 8 SCC 670

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

1. Heard Sri Girijesh Tiwari, learned counsel for the petitioners, learned Standing counsel for the State while Sri A. P. M. Tripathi has accepted notice on behalf of respondent No.4.

2. The petitioners are aggrieved by the inquiry report submitted by Assistant Director of Education (Basic) on basis of a private complaint and have approached Court with the prayer to quash the said inquiry report, and further directing the respondnets not to proceed with conduct of regular inquiry,and not to take any coercive action against the petitioners and to allow them to continue as Assistant Teacher in institution.

3. The brief conspectus of the case is that the petitioners are working as Assistant Teacher in the institution known as Maa Reshma Kuwari Balaika Vidyalaya Manihari, Salempur, District Deoria which is a recognised and aided institution up to Junior High School standard, and provisions of the U.P. Recognised Basic School (Junior High School) (Recruitment and Condition of Service of Teachers) Rules, 1978 as well as the Provisions of U.P. Junior High School Payment of Salaries of Teachers and other Employees Act, 1978 are applicable and consequently the salary of the teaching and non teaching staff's is being disbursed under the provisions of the above Act.

4. It has been submitted that all the petitioners have been appointed in accordance with the relevant rules after publication of the advertisement and they fulfill all the requisite qualifications, and even their appointments were approved by the competent authority, and hence there is no infirmity in the same.

5. The grievance of the petitioners have commenced on account of a complaint sent by one Ritul Bisen to the District Magistrate Deoria levelling allegations that there was irregularity committed in the selection and appointment of the petitioner and also that they lack the relevant qualifications required for being appointed on the said posts.

6. The District Magistrate, Deoria by order dated 28/09/2020 directed the Basic Education Officer to conduct an inquiry into the matter, who in turn delegated it to Block Education Officer, Salempur, District Deoria. The Block Education Officer conducted an inquiry and submitted its report on 17/08/2020 to the Basic Education Officer holding that there was no infirmity in the appointment of petitioners, and consequently the said report was forwarded to the District Magistrate by the Basic Education Officer on 18/08/2020 reiterating the findings recorded by the Block Education Officer.

7. It is submitted that the similar complaint was submitted by Ritul Bisen to the Assistant Director of Education (Basic) Gorakhpur Region, Gorakhpur, who proceeded to inquire into the allegations himself and issued directions to the Manager of the institution as well as Basic Education Officer to submit their comments with regard to the allegations made in the said complaint. The Assistant Director of Education (Basic) after calling for the replies and also after examining the records produced by them as well as giving an opportunity to the petitioners has prepared an inquiry report which has been forwarded to the District Basic Education Officer, Deoria to conduct a regular inquiry in accordance with law. It is the said inquiry report which has been assailed by the petitioners in the present writ petition.

8. Counsel for the petitioners has submitted that once an inquiry has already been conducted by the District Basic Education Officer and the report was forwarded to the District Magistrate by order dated 18/08/2020 then there was no occasion for a regular inquiry into the same allegations and the same constitutes,harassment and consequently prayer has been made to set aside the order for conducting the regular inquiry on the said complaint.

9. The second ground urged by the petitioners is that all the petitioners are working for more than 10 years, and after such a long period of time questioning the qualifications and the process of selection is not permissible and constitutes harassment and consequently have submitted that no such inquiry should permitted to continue against the petitioners.

10. In order to consider submissions raised by learned counsel of the petitioners it would be relevant to consider the nature of the allegations made against the petitioners and also the material available in support of the allegations and the findings recorded in the impugned inquiry so conducted against the petitioners.

11. The copy of the complaint has not been annexed, but the details of the allegations finds mention in the report dated 12/08/2021 submitted by the Assistant Director of Education (Basic), according to which it has been alleged inter alia:-

A. Petitioner no.1 Km Rita Pandey was appointed by the Management without issuing any advertisement nor constituting any selection committee and even the approval granted was irregular and she did not possess the requisite educational qualifications required for the post of Assistant Teacher.

B. Petitioners nos.2, 3 and 4 are also alleged to have been appointed without any advertisement nor any constitution of a selection committee and the did not have

the requisite qualifications in as much as the degree of B.Ed was not a recognised qualification for the said post at the time of appointment.

C. It is also alleged that some of the teachers do not possess Teachers' Eligibility Test qualification which was the essential qualification required to the post of Assistant Teacher and all these appointments were made during the period Sri A.N.Maurya was the Basic Education Officer by using corrupt methods. The allegations with regard to petitioner No. 4 is that she is the wife of the younger brother of the Manager of the Institution and even petitioner no 2 is very closely related to the Manager and consequently in light of the bar imposed in the rules of 1978 they could not appointed as such.

12. Initially the matter was left to the Block Education Officer to conduct the inquiry into the said allegations and he duly submitted his report on 17/08/2020. A perusal of his inquiry report reveals that he had sent his report on the basis of the material furnished by the Manager of the Institution against whom the allegations were also levelled and he was said to be the close relative of some of the teachers.

13. The Block Education Officer in his inquiry looked into the selection process, has laid great emphasis on the fact that the complaint should have been made on affidavit, only then said inquiry can take place. His report clearly indicates his reluctance to enquire into the alleged malpractices in the appointment of the teachers, and subsequently he has observed that all the teachers are duly qualified without even examining the details of their qualification and only stating that the appointment process has been and concluded on the orders of the High Court. The said inquiry on the face of it is totally unsatisfactory and does not indicate that any sort of effort was made by him to unravel the truth or to go into the allegations levelled against petitioners.

14. There is no letter order on record, nor any averment in writ petition that the District Magistrate has recorded his satisfaction or approved the inquiry conducted by the Block Education Officer.

15. The Assistant Director Education (Basic) has also conducted the inquiry on the same allegations. In his inquiry report, which has been forwarded to the District Basic Education Officer along with the impugned letter dated 12/08/2021 clearly narrates the entire process undertaken by him while conducting the said inquiry. It is stated in his letter dated 11/09/2020 that he had required the District Basic Education Officer, Deoria as well as the Manager of the Institute to be present on 28/09/2020. The complainant was also present on the said date and he presented all the evidence in support of the allegations, but the Manager of the Institution did not put up any case in his defence and consequently the next date fixed was 20/10/2020 after intimation to all the persons. The Manager of the Institution required that an affidavit should be filed by the complainant with regard to the allegations levelled therein and consequently the same was done and a copy was given to the Manager of the Institution. Number of dates were fixed and the District Education Officer was also required file a response, and it is also mentioned that the concerned teachers including the petitioners were also given an opportunity to submit documents and present their defence by means of letter dated 09/03/2021. On 08/04/2021 all the seven teachers were present and were given

an opportunity to give their defence in writing which they refused, but produced their appointment letters and other educational qualifications/documents during the said hearing.

16. The Assistant Director of Education (Basic) has considered the complaint as well as, the version of the Manager of the Institution and thereafter recorded his findings on each of the points made in the complaint. His findings are recorded in a comparative chart from which the version of all the parties is clearly evident. With regard to Ms Rita Pandey he has held that she has completed B.Ed in year 2006 and she was appointed in the year 2008 and consequently it is not possible for her to have completed five years experience. He has raised a suspicion about the approval granted to her as well as with regard to her age and opined that these issues are required to be gone into and inquired by the District Basic Education Officer, Deoria.

17. With regard to the allegation that Rita Pandey was the wife of the Manager, Ajit Kumar Upadhaya, a copy of the marriage invitation card was produced in support of the allegations but it seems she was married after her appointment, and another piece of evidence produced was a copy of the election card, which also indicates Ajit Kumar Upadhaya to be her husband but it was not clear as to when the said election card prepared and consequently he was of the opinion that the matter may be inquired into after collecting relevant information. With regard to the allegation regarding that Ms Neetu who is said to be the wife of Dhananjaya Upadhaya, brother of the Manager as per election card, the said fact stood confirmed and he opined that her appointment is contrary to the rules.

18. This Court at this stage would not go into the veracity of the allegations in the present proceedings, but the inquiry report has been perused by us to determine the nature of allegations and the material in support of the same to determine and also to evaluate as to whether the allegations are frivolous or levelled due to sheer malice or there is any substance in the same, and also the manner in which the inquiry has been conducted, so as to consider the allegation of harassment levelled by the petitioner and also to determine whether a prima facie case is made out against petitioner.

19. Considering the inquiry report submitted by the Assistant Director of Education (Basic) it seems that he has considered all the material placed before him in detail and his observations seems to be in sync with the material produced, and wherever there is lack of any material or clarity in the documents, he has sought further inquiry into that aspect by the District Basic Education Officer.

20. The Assistant Director of Education has only considered the nature of allegations and the material produced in support of the same allegations and was opinion that a regular inquiry is necessary for which purpose is he has forwarded the entire material to the District Basic Education Officer. The exercise conducted by the Assistant Director of Education can only be equated with a fact-finding inquiry, and he has not given any final determination with regard to the allegation. From the impugned order, it cannot be said that the allegations are baseless or can be

rejected outright but the matter deserves to be inquired further and consequently necessary directions have been given to the District Basic Education Officer. It is seen that even during the preliminary inquiry the petitioners were given an opportunity to participate and even the documents submitted by then were duly considered. On substance being found in the allegations, a regular inquiry is being sought which has been assailed by the petitioners.

21. One of the grounds urged by the counsel of the petitioner while assailing the impugned order is that the inquiry has already been conducted by a superior authority, that is the Assistant Director of Education (Basic), who has directed the District Basic Education Officer to conduct the inquiry, and therefore it is the apprehension of the petitioners that in all probability the District Basic Education Officer being subordinate to the Assistant Director of Education (Basic) would act on his dictate and not conduct inquiry independently.

22. From a perusal of the impugned order, the Assistant Director of Education (Basic) it is clear that he has only conducted a preliminary inquiry into the veracity of the allegations, and on a number of aspects he has recorded that the material was not sufficient to come to any conclusion, and therefore has left it to the District Basic Education Officer to conduct a regular inquiry and to record a finding in that regard. Considering the aforesaid inquiry report, this Court is of the considered opinion that The Assistant Director of Education (Basic) has only proceeded to verify the contents of the complaints, and it is at the most a fact-finding inquiry, which is necessary for initiating a regular inquiry, inasmuch as where the complaint is found to be frivolous and without any basis, then the complaint can be dropped, and there would be no need to proceed for a regular inquiry. In the instant case, the Assistant Director of Education (Basic) has verified the allegations levelled in the complaint are made against the petitioners, and only after satisfying himself has directed for a regular inquiry in accordance with law. The apprehension of the petitioners seems to be baseless, and only a vein attempt to prevent a regular inquiry.

23. In this regard it is relevant to mention that petitioner no.7 had approached this Court in an earlier occasion where The Assistant Director of Education (Basic) had only asked for the relevant records pertaining to the petitioners vide his order dated 09/03/2021, and in the said writ petition a similar ground was raised that an earlier inquiry has been conducted by the District Basic Education Officer, Deoria at the behest of a private individual and consequently a flawed inquiry into the same allegations would not be maintainable. This Court in its order dated 06/08/2021 passed in writ petition no. Writ "A" 5211 of 2021 disposed of the writ petition by providing that the inquiry officer shall take note of the earlier inquiry report dated 01/03/2021. From the above order it is clear that the grounds urged by the petitioners were not accepted by this Court and the prayer to stall the regular enquiry was unsucessful and on similar facts the present writ petition has been preferred.

24. Under ordinary circumstances there is no need for judicial interferance with the inquiry report in as much as the delinquent employee does not suffer any

adverse consequences on mere submission of the inquiry report. Needless to say ,the inquiry report is subject to consideration by the disciplinary authority who is required to pass a reasoned and speaking order after giving a copy of the same to the employee concerned. It is open for the disciplinary authority either to accept the inquiry report or to reject the same, and therefore unless it is shown that the said inquiry report suffers from some jurisdictional error or that there is some element of malafide in conduct of the said inquiry interference is not required to be made by this Court in exercise of power under Article 226 of the Constitution of India.

25. The Hon'ble Supreme Court in the case of ***Allahabad Bank & Ors. vs. Krishna Narayan Tiwari, (2017) 2 SCC 308*** has held as under:-

7. We have given our anxious consideration to the submissions at the bar. It is true that a writ court is very slow in interfering with the findings of facts recorded by a Departmental Authority on the basis of evidence available on record. But it is equally true that in a case where the Disciplinary Authority records a finding that is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified if not duty bound to examine the matter and grant relief in appropriate cases. The writ court will certainly interfere with disciplinary inquiry or the resultant orders passed by the competent authority on that basis if the inquiry itself was vitiated on account of violation of principles of natural justice, as is alleged to be the position in the present case. Non-application of mind by the inquiry Officer or the Disciplinary Authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment. The High Court has, in the case at hand, found all these infirmities in the order passed by the Disciplinary Authority and the Appellate Authority. The respondent's case that the inquiry was conducted without giving a fair and reasonable opportunity for leading evidence in defense has not been effectively rebutted by the appellant. More importantly the Disciplinary Authority does not appear to have properly appreciated the evidence nor recorded reasons in support of his conclusion. To add insult to injury the Appellate Authority instead of recording its own reasons and independently appreciating the material on record, simply reproduced the findings of the Disciplinary Authority. All told the inquiry Officer, the Disciplinary Authority and the Appellate Authority have faltered in the discharge of their duties resulting in miscarriage of justice. The High Court was in that view right in interfering with the orders passed by the Disciplinary Authority and the Appellate Authority.

26. In the present case the allegation against the petitioners are very serious. Some of the petitioners are alleged to be very close relatives of the Manager of the institution where they have been appointed, while the law prohibits such an appointment. In the complaint copy of the election cards of the petitioners where produced showing that the Manager is the husband of one of the petitioners, and the other petitioner is also the wife of the brother of the Manager.

27. A perusal of the impugned inquiry report, reveals that the educational qualifications of the petitioners have also

found to be suspect, and even as per their own version they might not have completed the minimum experience required for the appointed on the post of Assistant Teacher. These allegations go to the very root of appointment of the petitioners and the further continuance on the said post. Mere continuing on a particular post for a long period of time does not establish that the selection of the individual was in accordance with law, and it can always be a subject of inquiry to establish that the appointment was lawfully made or not and that the said employees is not a usurper of office. Appointments in educational institutions have to be made strictly in accordance with the qualifications laid down in the rules existing at the time of the appointment, as it has widespread ramifications, inasmuch as an ineligible person appointed as a teacher may do more harm to the students and where a person who has tried to manipulate his appointment as a teacher, is less likely to inculcate the values desired to the student specially at the primary and Junior High school level.

28. It was submitted that the petitioners have been continuing in the said institution for a very long time and, therefore, after such a long time no inquiry should be held with regard to the mode of appointment or their qualifications. This argument in the facts of the present case is bereft of merit and is liable to be rejected outrightly. Any person who has been appointed on the basis of false declaration or on the basis of false documents regarding their eligibility, does not have any right to continue on the said post even if he/she has been woking for a long time. Fraud, cannot be condoned and as soon as it is determined that a person has obtained appointment fraudently, the appointment deserve to be set aside.

29. The Hon'ble Supreme Court held that anyone found guilty of using a forged caste certificate for getting education and employment will lose their degree and their job. To add to that, the guilty will be punished heavily too, announced the apex court.

30. If someone had committed a similar fraud to get a job, no matter how long they had been employed, their punishment will be inevitable too.

31. The Hon'ble Supreme Court in the case of ***Chairman and managing director FCI and ors vs. Jagdish Balaram Bahira and ors, (2017) 8 SCC 670*** has held as under:-

"20 The next decision which is of relevance on the issue, is a judgment of three Judges of this Court in R. Vishwanatha Pillai Vs. State of Kerala4 . In that case the appellant who did not belong to a designated reserved community obtained a caste certificate and was selected as a Deputy Superintendent of Police on a seat reserved for the Scheduled Castes. However, it was found upon a complaint that the appellant did not belong to a Scheduled Caste and the Scrutiny Committee rejected his claim. The order of the Scrutiny Committee was upheld by the High Court and by this Court. Subsequently at the behest of the appellant the Central Administrative Tribunal directed that he should not be terminated from service without following the procedure under Article 311. The High Court reversed that decision and the appellant was dismissed from service. Before this Court the appellant inter alia sought protection since

he had rendered nearly 27 years of service. Rejecting the submission this Court held that:

"15. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eyes of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under the Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India, Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Caste. In view of the finding recorded by the Scrutiny Committee and upheld upto this Court he has disqualified himself to hold the post. Appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India, As appellant had obtained the appointment by playing a fraud he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practising fraud or deceit such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all." (Id. at p. 115) (emphasis suppled)

The Bench of three Judges also rejected the submission that since the appellant had rendered 27 years of service, the order of dismissal should be substituted with an order of compulsory retirement or removal to protect his pensionary benefits. The Court observed :

"19.....The rights to salary, pension and other service benefits areentirely statutory in nature in public service. Appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to thepost was void and non est in the eyes of law. The right to salary or pension after retirement flow from a valid andlegal appointment. Theconsequential right of pension and monetary benefits can be given only ifthe appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for Scheduled Caste thus depriving the genuine Scheduled Caste of appointment to that post does not deserve any sympathy or indulgence of this Court. A person who, seeks equity must come with clean hands. He. who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction

cannot be exercised in the case of a person who got the appointment on the basis of false castecertificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud." (Id. at p. 116)"

32. Considering the arguments raised by counsel for the petitioners as well as the nature of allegation against the petitioner and also that, this Court is of the considered view that there is no infirmity in the impugned order directing regular enquiry against the petitioner and no ground is made out requiring interference by this Court at this stage and hence the petitioners being devoid of merit is **dismissed**.

(2022)02ILR A423
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2022

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE VIKRAM D CHAUHAN, J.

Writ-A No. 17043 of 2021

Ram Harsh ...Petitioner
Versus
The U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Aftab Alam

Counsel for the Respondents:
A.S.G.I., Sri Naresh Chandra Tripathi

A. Civil Law - Constitution of India-1950-Article 226 - Armed Force Tribunal Act, 2007-Section 30 & 31- challenge to-delayed payment of pension -Petitioner was discharged from his service being deserter- -Tribunal dismissed the original application-petitioner by-passed statutory alternative remedy provided under the Act, 2007-petitioner invoked extraordinary jurisdiction Under Article 226 of the Constitution of India for entertaining the writ petition on the ground of old age related ailments and complications-he did not file medical certificate nor any document brought on record in support of his pleadings that he is not physically fit to approach the Supreme Court-Even he took plea that he is alone his sons are living separately but failed to provide any evidence that his sons are not supporting him to approach the Apex Court-On the basis of vague and bald statement, the petitioner cannot be permitted to bypass the alternative remedy of appeal.(1 to 32)

B. The pleadings are the foundation of litigation. In pleadings the necessary and relevant particulars and material must be included. In case where the petitioner is praying for intervention in exercise of powers under Article 226 of the Constitution bypassing the statutory remedy, it is the duty of the petitioner to bring complete facts and circumstances by way of pleadings. if the factual foundation for the cause of action in approaching the court is missing or is vague, then it is always open for the court to deny the relief to the petitioner in the facts and circumstances of the particular case. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. the rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. The existence of such remedy does not mean that the jurisdiction of the High Court is ousted. (Para 19 to 27)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. U.O.I. Vs Major General Shri Kant Sharma & ors. (2015) 6 SCC 773

2. Ram Naresh Ram Vs U.O.I. & ors., Writ –A No. 15281 of 2021

3. Mahesh Chand Ex-LNK/CI Vs U.O.I. (2014) 3 ESC 1614

4. Balkrishna Ram Vs U.O.I. & anr. (2020) 2 SCC 442

(Delivered by Hon'ble Vikram D Chauhan, J.)

1. The present writ petition is filed by the petitioner challenging the order dated 27th August, 2021 passed by the Armed Forces Tribunal (RB), Lucknow in Original Application No.475 of 2017. It is further prayed in the present writ petition to issue direction commanding the respondent authorities to pay interest at the rate of 18 % per annum on the arrears of pension and other retiral dues w.e.f. 7th August, 1991 to the date of actual payment of the aforesaid arrears of pension and other retiral dues.

2. The brief facts of the case arising in the present writ petition are that the petitioner was enrolled in the Army Medical Corps of Indian Army on 6th August, 1971 and was discharged from service on 20th April, 1997, being deserter. Being aggrieved, petitioner preferred Civil Misc. Writ Petition No.16478 of 2001 before this Court. Upon creation of the Armed Forces Tribunal, the same was transferred and renumbered as Transfer Application No.1469 of 2010. The aforesaid Transfer Application was allowed by the order dated 21st April, 2016 to the extent that the respondents were directed to pay pension and all other retiral benefits to the petitioner, considering him to be in service upto 6th August, 1991 within a period of three months. When the respondents did not comply with the aforesaid order, the petitioner preferred Execution Application No.173 of 2016. In execution proceedings on 29th May, 2017, the authorities concerned handed over the Pension Payment Order bearing No.5001122017 dated 28th June, 2017 and the petitioner was paid pension w.e.f. 28th June, 2017. Thereafter, the respondent authorities have paid all the retiral dues of the petitioner w.e.f. 7th August, 1991 in terms of PPO dated 26th May, 2017.

3. The petitioner thereafter, preferred Original Application No.475 of 2017 before the Armed Forces Tribunal, Regional Bench, Lucknow with the following prayers:-

"i. This Hon'ble Tribunal may kindly be pleased to issue a writ, order, rule or direction directing the respondents authorities specially the respondent no.4 to pay interest @ 18% per annum on account of delayed payment of pension other retiral dues such as Gratuity, G.P.F., Group Insurance, Commutation of pension, Leave encashment and arrears of pension etc. w.e.f. 08.11.1991 to the date of actual payment of the aforesaid retiral dues.

ii. This Hon'ble Tribunal may further be pleased to pass such other and/or further orders as deem fit, proper and necessary in the circumstances of this case.

iii. Award cost to the applicant."

4. The above mentioned original application was contested by the respondents before the Tribunal below and the Tribunal below by impugned judgment dated 27th August, 2021 has dismissed the above mentioned original application of the petitioner.

5. It is the impugned order dated 27th August, 2021 passed by the Armed Forces Tribunal, Regional Bench, Lucknow, that is subject matter of challenge in the present writ petition.

6. Sri Naresh Chandra Tripathi, learned counsel appearing on behalf of respondents has raised a preliminary objection with regard to the maintainability

of the writ petition under Article 226 of the Constitution of India on the ground that the petitioner has a statutory alternative remedy of filing an appeal under Sections 30 and 31 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the "Act No.55 of 2007") and in view of the aforesaid, the present writ petition is liable to be dismissed on the ground of alternative remedy. In this reference, Shri N.C.Tripathi has relied upon the judgment of the Apex Court in ***Union of India Vs Major General Shri Kant Sharma and others***, reported in ***2015 (6) SCC 773*** and judgment dated 1st November, 2021 passed by this Court in ***Writ-A No 15281 of 2021 - Ex-Hav Clerk (Stores) Ram Naresh Ram Vs Union of India and others*** to contend that the present writ petition is not liable to be entertained on the ground of alternative remedy of filing an appeal being available to petitioner.

7. Confronted with the aforesaid preliminary objection raised on behalf of the respondents, the counsel for the petitioner has submitted that although there is an alternative remedy under Sections 30 and 31 of the Act of 2007, by way of preferring an appeal before the Hon'ble Supreme Court, however, on account of the pitiable condition of the petitioner, the aforesaid remedy would not be efficacious in the facts and circumstances of the case and as such, the writ petition is liable to be entertained. Counsel for the petitioner has placed reliance on the Full Bench judgment of this Court in ***Mahesh Chand Ex-LNK/CI Vs Union of India, 2014 (3) ESC 1614*** to contend that the powers of judicial review by the High Court under Article 226 of the Constitution of India cannot be abrogated by Armed Forces Tribunal Act. The counsel for the petitioner has further relied upon the judgement of the Apex Court in ***Balkrishna Ram Vs Union of India and another, 2020 (2) SCC 442*** in support of his submissions.

8. The Act No. 55 of 2007 has been enacted to provide for the adjudication or trial by the Armed Forces Tribunal of disputes and complaints with respect to commission, appointments, enrolment and conditions of service in respect of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 and also to provide for appeals arising out of orders, findings or sentences of court martial held under the said Acts and for matters connected therewith or incidental thereto.

9. The aforesaid Act No. 55 of 2007 under Section 4 provides for establishment of Armed Forces Tribunal to exercise the jurisdiction, powers and authority conferred on it by or under this Act. The jurisdiction of the Tribunal has been provided under Section 14 of the Act No. 55 of 2007. Section 14 provides that a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal in relation to all service matters. Under Section 14(4) of the Act, the Tribunal is vested with the same powers as vested with the civil court while trying a suit in respect of matters enumerated under Section 14(4). It is further to be seen that the Tribunal is the authority under the aforesaid Act to decide both the questions of law and facts as may be raised before it.

10. The provisions of appeal under Sections 30 and 31 of the Act no 55 of 2007 is provided against an order passed by the Armed Forces Tribunal to the Supreme Court. It is not in dispute between the parties that the remedy of appeal is provided under the Act against the

impugned order dated 27th August, 2021 passed by the Armed Forces Tribunal, Regional Bench, Lucknow. Further, Section 33 of the Armed Forces Tribunal Act provides for exclusion of the jurisdiction of the civil court.

11. It is trite of law that the power of judicial review vested in the High Court under Article 226 and 227 of the Constitution to exercise judicial superintendents over the decision of all Courts and Tribunals within the respective jurisdiction is also part of the basic structure of the Constitution. Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The present case pertains to judicial review of judicial decisions.

12. The jurisdiction under Article 226 of the Constitution of India is extraordinary and discretionary in nature. It is also to be noted that the powers to be exercised by the High Court under Articles 226 and 227 are constitutional powers and the same cannot be excluded by legislation. The Armed Forces Tribunal Act cannot curtail the powers under the grand-norm being the constitution. The legislations under the constitutional framework is required to be in consonance with the scheme of the Constitution specially the scheme of judicial review provided in the Constitution under Articles 226 and 32 of the Constitution.

13. The Full Bench of this Court in ***Mahesh Chand Ex-LNK/CI Vs Union of India (supra)*** in paragraph 71 has held as follows:-

(i) Our jurisprudence in over six decades since the adoption of the Constitution has evolved a clear, categoric and unambiguous recognition of the importance of judicial review by the Supreme Court under Article 32 and by the High Courts under Article 226. Judicial review is an indispensable safeguard to the preservation of liberty, freedom and to the realization of rights founded on the rule of law. Without constitutionally entrenched remedies, the realisation of fundamental constitutional rights would be illusory or, as Dr B R Ambedkar described it, a mere 'pious declaration': "It is the remedy that makes a right real. If there is no remedy, there is no right of all, and I am therefore not prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities but for which the Constitution makes no provision by way of a remedy. It is much better to be limited in the scope of our rights and to make them real by enunciating remedies than to have a lot of pious wishes embodied in the Constitution. I am very glad that this House has seen that the remedies that we have provided constitute a fundamental part of this Constitution..."50

(ii) The power of judicial review of the Supreme Court and of the High Courts is firmly entrenched as a basic feature of the Constitution which lies beyond the amending power. Even more so, ordinary legislation cannot abrogate the constitutional power of judicial review that is vested in the Supreme Court under Article 32 and in the High Courts under Article 226;

(iii) The Armed Forces Tribunal Act, 2007 does not contain, either expressly or by necessary implication, any exclusion of the power of judicial review that is conferred upon the Supreme Court under Article 32 or upon the High Courts under

Article 226. The legislation in fact contains a statutory recognition in Section 14 that the jurisdiction which is conferred upon the Armed Forces Tribunal is a jurisdiction in relation to service matters as defined in Section 3(o) as was exercisable by all courts and tribunals immediately before the appointed day, save and except the jurisdiction exercisable by the Supreme Court and the High Courts;

(iv) Having said this, it needs to be emphasised that the existence of jurisdiction and the nature of its exercise have distinct connotations in constitutional law. The Armed Forces Tribunal is constituted by legislation which provides for a specialized and efficacious administration of justice in matters falling within its jurisdiction under the provisions of the Act. This is coupled with the need to maintain discipline in the Armed Forces;

(v) The Armed Forces Tribunal is a court of first instance and ordinarily, matters which fall within the purview of its jurisdiction have to proceed for adjudication before the Tribunal and the Tribunal alone. Against the decision of the Tribunal, there is a statutory remedy of an appeal which is provided under Sections 30 and 31 to the Supreme Court;

(vi) Since a statutory remedy of an appeal is provided, the principles which are well established for the exercise of the jurisdiction under Article 226, would warrant that the High Court should be circumspect and careful while determining as to whether any case for the exercise of jurisdiction under Article 226 of the Constitution is made out;

(vii) The jurisdiction under Article 226 has not been abrogated as it could not have been, being a basic and essential feature of the Constitution."

14. The Apex Court in ***Union of India v. Major General Shri Kant Sharma and another, (2015) 6 SCC 773*** has held as under:-

"The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including the Armed Forces Tribunal Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra Kumar [L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] and S.N. Mukherjee [(1990) 4 SCC 594 : 1990 SCC (Cri) 669] .)

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act. (Refer: Mafatlal Industries Ltd. [(1997) 5 SCC 536])

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer:Nivedita Sharma [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] .)

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947].)"

15. The Apex Court in ***Union of India v. Major General Shri Kant Sharma***

(supra) has highlighted the anomalous situation that will be created in case the statutory alternative remedy is permitted to be bypassed. In this reference, attention is drawn to paragraph 43 and 44 of ***Union of India v. Major General Shri Kant Sharma (supra):-***

"Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of the Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 of the Armed Forces Tribunal Act.

The High Court (the Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of the Act. However, we find that the Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that the Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India."

16. The Apex Court in ***Balkrishna Ram Vs Union of India (supra)*** has held as under:-

"1. Leave granted. One of the issues raised in this appeal is whether an appeal against an order of a Single Judge of a High Court deciding a case related to an Armed Forces personnel pending before the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court.

14. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a rule of prudence and not a rule of law. The writ courts

normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available [Union of India v. T.R. Varma, AIR 1957 SC 882]. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction. There may be cases where the High Court would be justified in exercising its writ jurisdiction because of some glaring illegality committed by AFT. One must also remember that the alternative remedy must be efficacious and in case of a Non-Commissioned Officer (NCO), or a Junior Commissioned Officer (JCO); to expect such a person to approach the Supreme Court in every case may not be justified. It is extremely difficult and beyond the monetary reach of an ordinary litigant to approach the Supreme Court. Therefore, it will be for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. There cannot be a blanket ban on the exercise of such jurisdiction because that would effectively mean that the writ court is denuded of its jurisdiction to entertain such writ petitions which is not the law laid down in L. Chandra Kumar (supra)."

17. It is further to be seen that the controversy involved before the Apex Court in the matter of ***Balkrishna Ram Vs Union of India and another (supra)*** was whether an appeal against an order of Single Judge of High Court deciding a case related to an Armed Forces personnel pending before the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court.

18. A Division Bench of this Court in Writ- A No 15281 of 2021 by order dated 1st November, 2021 has considered a similar issue and held as under:-

"5. The judgment in the case of Balkrishna Ram (supra) and judgment in the case of Major General Shri Kant Sharma (supra) both were rendered by Division Benches of Hon'ble Supreme Court. In the case of Major General Shri Kant Sharma (supra) the question consdiered by Hon'ble Supreme Court was as under :

"Whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 against an order of Armed Forces Tribunal with the leave of the Tribunal under Section 31 of the Act or leave granted by the Supreme Court, or bar of leave to appeal before the Supreme Court under Article 136(2) of the Constitution of India, will bar the jurisdiction of the High Court under Article 226 of the Constitution of India regarding matters related to Armed Forces.?"

6. The aforesaid question was specifically answered by Hon'ble Supreme Court in the aforequoted paragraphs 37, 38, 39 of the judgment.

7. The controversy involved before the Hon'ble Supreme Court in the case of Balkrishna Ram (supra) is reflected from the paragraph 2 of the aforequoted paragraph of the judgment which indicates that the question involved was "whether an appeal against an order of a single judge of a High Court deciding a case related to an Armed Forces personnel pending before

the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court. ?"

8. The question so framed was answered by Hon'ble Supreme Court with the observations made in paragraph 14 as aforequoted and ultimately the appeal was dismissed with the observations made in paragraph 19 of the judgment.

9. The question with respect to the interpretation of Section 30 of the Armed Forces Tribunal Act, 2007 was directly and essentially in issue and consideration by Hon'ble Supreme Court Union of India & Ors. Vs. Major General Shri Kant Sharma & Anr (supra) and it was held that no person has a right of appeal against the final order or decision of the Tribunal to the Supreme Court other than those falling under Section 30(2) of the Act, but it is statutory appeal which lies to the Supreme Court. Thus, against the impugned order the petitioner has a right of appeal before the Hon'ble Supreme Court under under Section 30 read with Section 31 of the Act. The judgment of Hon'ble Supreme Court in the case of Balkrishna Ram (supra) reiterates the well settled principle of law with regard to the extraordinary and discretionary jurisdiction of High Court under Article 226 of the Constitution of India."

19. The power of the High Court under Article 226 of the Constitution for judicial review of the order of the tribunal below is not curtailed or restricted in any manner. The remedy provided under Article 226 of the Constitution is a extraordinary and discretionary remedy.

20. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a rule of prudence and not a rule of law. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction.

21. It is further to be seen that from the decisions stated herein above, it is clear that the judicial review is part of the basic structure of the Constitution and the High Court under Article 226 of the Constitution is not denuded of its power of judicial review in view of Armed Forces Tribunal Act. The power of the High Court under Article 226 is discretionary and extraordinary and is to exercise with great caution. The exercise of the powers of judicial review by the High Court under Article 226 of the Constitution will depend on the facts and circumstances of each case. The discretion under Article 226 of the Constitution is to be exercised by objective assessment of the plea of the petitioner that the statutory forum provided under the Armed Forces Tribunal Act is not efficacious remedy in the facts and circumstances of the case.

22. It is further to be seen that the case of the petitioner is that although there is an alternate remedy to approach the Hon'ble Supreme Court under Sections 30 and 31 of the Armed Forces Tribunal Act, 2007 however the petitioner has approached this Court under Article 226 of

the Constitution as the remedy provided by way of appeal under Sections 30 and 31 of the aforesaid Act is not efficacious for the petitioner on account of the pitiable condition of the petitioner.

23. The petitioner on the basis of his condition has come up before this Court to exercise the extraordinary jurisdiction under Article 226 of the Constitution. In the writ petition, the petitioner claims that he was working as a sepoy (cook) in the Indian Army and further on account of his pitiable condition the remedy of appeal is not an efficacious remedy.

24. The pleadings are the foundation of litigation. In pleadings, the necessary and relevant particulars and material must be included and unnecessary and irrelevant material must be excluded. Pleadings in a particular case are the factual foundation on which the case of the litigant is based on. The pleadings should be specific in the petition and should disclose the complete cause of action for approaching the court. In case where the petitioner is praying for intervention of this court in exercise of powers under Article 226 of the Constitution bypassing the statutory alternate remedy, it is the duty of the petitioner to bring complete facts and circumstances by way of pleadings in the writ petition as to why the remedy of appeal (statutory alternative remedy) is not an efficacious remedy in the facts and circumstances of the case. If the factual foundation for the cause of action in approaching the court is missing or is vague, then it is always open for the court to deny the relief to the petitioner/litigant in the facts and circumstances of the particular case.

25. In the present case, the factual foundation with regard to the remedy of appeal being not efficacious is pleaded in paragraph 4 and 35 of the writ petition and the same is quoted hereinbelow :-

"4. That the petitioner states that though he has an alternative remedy to approach Hon'ble Supreme Court by way of an appeal under section 30 and 31 of the Armed Forces Tribunal Act, 2007 against the impugned Order of the Hon'ble Tribunal but owing to his pity condition that remedy will not prove equally efficacious for him. He is an old person with various age related ailments and complications and aged about 73 years. His wife died on 29th May, 2017 in a road accident leaving him alone in this world as his two sons who are married are living separately and not with the petitioner. The copy of the Death Certificate of petitioner's wife dated 21st July, 2017 issued by Allahabad Municipal Corporation and the copy of the FIR bearing case crime Number 505 of 2017 under Section 279 and 304A IPC, Police Station-Dhoomanganj, District Allahabad lodged regarding the accidental death of petitioner's wife are being collectively filed herewith and marked as Annexure No.1 to the Writ Petition.

35.That the petitioner has an alternative remedy to approach the Hon'ble Supreme Court under Section 30 and 31 of the Armed Forces Tribunal Act, 2007 against the impugned order of the Hon'ble Tribunal but owing to his pity condition that remedy will not prove equally efficacious for him, therefore he is constrained to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, on the following amongst other grounds."

26. A perusal of the aforesaid paragraph 4 and 35 of the writ petition would demonstrate that the petitioner has preferred the present writ petition and has sought the bypassing of alternative remedy on the ground that the petitioner is an old person with various age related ailments and complications and that his wife has expired on 29th May, 2017. The petitioner has also filed the death certificate of his wife as annexure 1 to the writ petition.

27. The primary ground for bypassing the alternative remedy and for entertaining the writ petition is that the petitioner is suffering from old age related ailments and complications. It is to be seen that the petitioner has not filed any medical certificate in support of his pleadings nor has brought on record any document to demonstrate that the petitioner is not physically fit to approach the Supreme Court. The petitioner has also not stated the details of the ailments on account of which the petitioner is seeking intervention of this court. It is also to be seen that the petitioner has not laid the foundation for bypassing the remedy of appeal in the writ petition nor has proved by documentary evidence that his physical condition is not such that the petitioner would be able to travel to New Delhi.

28. The petitioner has also stated that the petitioner has two sons however they are not living with him. It is to be noted that the pleadings in respect of the sons not living with the petitioner are wholly vague in nature as the petitioner has not stated that his sons have refused to assist him in availing the statutory alternative remedy nor the petitioner has brought on record any evidence showing the place where the sons of the petitioner are residing.

29. The petitioner in the past has been contesting the litigation before the Armed Forces Tribunal, Lucknow whereas the petitioner is stated to be residing at Allahabad. Once the petitioner is in the position to contest the litigation at Lucknow then it was the duty of the petitioner to have brought on record the material circumstances which are preventing the petitioner from approaching the statutory alternative remedy of appeal before the Supreme Court and a bald allegation that the petitioner is suffering from ailment without giving any details of the ailments and without there being any material particulars about the plea of the petitioner, the plea of the petitioner cannot be accepted.

30. The country is witnessing a revolution in the digitalisation activity. The digitalisation is not only about implementation of technology. It encompasses the transformation of the courts and justice delivery system using technology in order to enable the experiences to be better, effective and within the reach of the ordinary citizens. The digitalisation is bridging the gap between the courts and the litigant. The process of digitalisation has enabled the litigant to approach the various forum of justice delivery system and the issue of distance of the courts have been effectively addressed. The Apex Court has put in place various digitalisation processes including addressing the court through video conference. Further, with the advancement of technology and telecommunication including internet services the litigant is empowered to approach his counsel through telecommunication/Internet. The process of digitalisation and technology advancement has further been accelerated during the pandemic. The digitalisation and technology are playing a crucial role in ensuring the efficient last mile delivery of

services to citizens. Even during the pandemic the courts have delivered justice to the citizens without the citizens being physically present at the place where the court is situated and in this respect the role of digital technology has been crucial. A citizen has all the means in place to approach the Supreme Court using the digital process and technology. The Internet, emails, e-filing and video conference have revolutionised the way a person can communicate and avail Justice. In the recent past, the country has witnessed "work from home" as an important tool for the working class and on the same footing various measures have been taken by the apex court for enabling the citizens to get "justice at doorstep" and the distance between the citizen and the apex court is of no consequence as a result of the digital process. The alternative digital channel being put in place by the Apex Court for justice delivery can always be availed by the petitioner to approach the statutory remedy under the Armed Forces Tribunal Act. Once the alternate channel is available to the petitioner by using telecommunication and digital technology, the plea of the petitioner that the present writ petition may be entertained is not acceptable.

31. Once the petitioner has not demonstrated before this Court that there exists special circumstances and his physical disability is such that the petitioner is not in a position to approach the Apex Court, the writ petition cannot be entertained. A generalized and bald statement has been made by the petitioner in the writ petition with regard to his physical condition and ailment. However, no specific ailment has been described in the writ petition in order to permit this Court to assess the physical condition of the petitioner. On the basis of vague and bald statement, the petitioner cannot be permitted to bypass the alternative remedy of appeal.

32. In the result, we do not find any good reason to by-pass the statutory alternative remedy provided under the Armed Forces Tribunal Act, 2007. The writ petition is dismissed on the ground of statutory alternative remedy available to the petitioner leaving it open for the petitioner to file an appeal before the Hon'ble Supreme Court in accordance with the provisions of the Armed Forces Tribunal Act, 2007.

(2022)02ILR A433
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2022

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE VIKRAM D CHAUHAN, J.

Writ-A No. 19332 of 2021

Sandeep Yadav ...Petitioner
Versus
Armed Forces Tribunal, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rang Nath Pandey, Sri Rahul Pandey

Counsel for the Respondents:
A.S.G.I., Sri Arvind Nath Agrawal

A. Civil Law - Constitution of India-1950-Article 226 - Armed Force Tribunal Act, 2007-Section 30, 31 - challenge to-dismissal order-Petitioner was discharged from his service being failed in final-test in military training-Tribunal dismissed the original application for paying salary with consequential benefits during the pendency of the

case-petitioner by-passed statutory alternative remedy provided under the Act, 2007-petitioner invoked extraordinary jurisdiction Under Article 226 of the Constitution of India for entertaining the writ petition on the ground of economic disability-nothing on the record to demonstrate the poor financial condition of the petitioner-remedy provided under the statute by way of appeal before the Apex Court, being not efficacious on the ground of economic disability, is not permissible unless the mechanisms under the Legal Service Authority Act, 1987 and the Supreme Court Middle Income Group Legal Aid Scheme has been approached and exercised by the petitioner in the case of economic disability.(1 to 32)

B. In exercise of powers under Article 226 of the Constitution bypassing the statutory remedy, it is the duty of the petitioner to bring complete facts and circumstances by way of pleadings. if the factual foundation for the cause of action in approaching the court is missing or is vague, then it is always open for the court to deny the relief to the petitioner in the facts and circumstances of the particular case. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. the rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. The existence of such remedy does not mean that the jurisdiction of the High Court is ousted.(Para 19 to 27)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. U.O.I. Vs Major General Shri Kant Sharma & ors. (2015) 6 SCC 773

2. Ram Naresh Ram Vs U.O.I. & ors., Writ –A No. 15281 of 2021

3. Mahesh Chand Ex-LNK/CI Vs U.O.I .(2014) 3 ESC 1614

4. Balkrishna Ram Vs U.O.I. & anr. (2020) 2 SCC 442

(Delivered by Hon'ble Vikram D Chauhan, J.)

1. The present writ petition is filed by the petitioner challenging the order dated 28th October, 2021 passed by the Armed Forces Tribunal (RB), Lucknow in Original Application No.208 of 2017, Sandeep Yadav Vs. Union of India and others. The petitioner has further challenged discharge/dismissal order dated 7th March, 2017 passed by respondent no.5 and order dated 10th January, 2017 passed by the Director General Recruiting/Recruiting B AG's Branch, Integrated Head Quarter of Ministry of Defence (Army), New Delhi.

2. The brief facts of the case arising in the present writ petition are that the petitioner was enrolled in the Army on 4th June, 2014 and he underwent basic military training at The Parachute Regimental Training Centre w.e.f. 4th August, 2014. On completion of basic military training, he was sent to Maratha Light Regimental Centre for technical training of Clerk (Staff Duties) which commenced on 22nd December, 2014. However, the petitioner failed in midterm test and was relegated thrice in terms of policy letter dated 6th January, 1995 and 10th April, 1996. According to aforesaid policy, a recruit who could not pass even after relegating and three months detention, should be re-mustered or discharged from service. The petitioner failed in final test on 9th February, 2016 and was returned to the Parachute Regimental Centre. Petitioner made a request for change of his trade from Clerk (Staff Duties) to Soldier Tradesman (Dresser) vide personal application dated 31st March, 2016. Accordingly, a case was taken up with Ministry of Defence (Infantry-6) and his case was turned down

on the ground that his height was 06 cms short to become a soldier tradesman. A show cause notice dated 25th January, 2017 was served upon the petitioner to which he replied on 13th February, 2017 and after receipt of reply he was discharged from service w.e.f. 7th March, 2017 under Rule 13(3)(iv) of Army Rules, 1954 on the ground of 'Unlikely to become a soldier'.

3. The petitioner thereafter, preferred Original Application No.208 of 2017 before the Armed Forces Tribunal, Regional Bench, Lucknow with the following prayers:-

"i. That this Hon'ble Tribunal may kindly be pleased and directed to the opp. Parties to quash the dismissal/discharge order dated 7-3-2017 and letter No.62518/Rangroot B(A) dated 10.01.2017 or any adverse order which was passed by the opposite parties after summoning the same during the pendency of the case & pay salary with consequential benefits etc. to the petitioner.

ii. That this Hon'ble Tribunal may kindly be pleased to to pass any other order or directions which is deem just & proper in favour of the petitioner."

4. The above mentioned original application was contested by the respondents before the Tribunal below and the Tribunal below by impugned judgment dated 28th October, 2021 has dismissed the above mentioned original application of the petitioner.

5. It is the impugned order dated 28th October, 2021 passed by the Armed Forces Tribunal, Regional Bench, Lucknow, which is subject matter of challenge in the present writ petition.

6. Sri Arvind Nath Agrawal, learned counsel appearing on behalf of respondents has at the very outset raised a preliminary objection with regard to the maintainability of the writ petition under Article 226 of the Constitution of India on the ground that the petitioner has a statutory alternative remedy of filing an appeal under Sections 30 and 31 of the Armed Forces Tribunal Act, 2007 (*hereinafter referred to as the "Act No.55 of 2007*") and in view of the aforesaid, the present writ petition is liable to be dismissed on the ground of alternative remedy. In this reference, Shri Arvind Nath Agrawal has relied upon the judgment of the Apex Court in ***Union of India Vs Major General Shri Kant Sharma and others***, reported in ***2015 (6) SCC 773*** and judgment dated 1st November, 2021 passed by this Court in ***Writ-A No 15281 of 2021 - Ex-Hav Clerk (Stores) Ram Naresh Ram Vs Union of India and others*** to contend that the present writ petition is not liable to be entertained on the ground of alternative remedy of filing an appeal.

7. Confronted with the aforesaid preliminary objection raised on behalf of the respondents, counsel for the petitioner has submitted that although there is an alternative remedy under Sections 30 and 31 of the Act of 2007, by way of preferring an appeal before the Hon'ble Supreme Court, however, on account of the poor financial condition of the petitioner, the aforesaid remedy would not be efficacious in the facts and circumstances of the case and as such, the writ petition is liable to be entertained. Further, the counsel for the petitioner has also relied upon the order dated 5th January, 2021 passed in Service Bench No.26242 of 2020, annexure 16 and order dated 8th December, 2015 in Service Single No.6239 of 2015, annexure 17 to the writ petition to contend that on previous

occasions in similar facts and circumstances, the writ petition has been entertained by this Court.

8. The Act No. 55 of 2007 has been enacted to provide for the adjudication or trial by the Armed Forces Tribunal of disputes and complaints with respect to commission, appointments, enrolment and conditions of service in respect of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 and also to provide for appeals arising out of orders, findings or sentences of court martial held under the said Acts and for matters connected therewith or incidental thereto.

9. The aforesaid Act No. 55 of 2007 under Section 4 provides for establishment of Armed Forces Tribunal to exercise the jurisdiction, powers and authority conferred on it by or under this Act. The jurisdiction of the Tribunal has been provided under Section 14 of the Act No. 55 of 2007. Section 14 provides that a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal in relation to all service matters. Under Section 14(4) of the Act, the Tribunal is vested with the same powers as with the civil court while trying a suit in respect of matters enumerated under Section 14(4). It is further to be seen that the Tribunal is the authority under the aforesaid Act to decide both the questions of law and facts as may be raised before it.

10. The provisions of appeal under Sections 30 and 31 of the Act of 2007 is provided against an order passed by the Armed Forces Tribunal to the Supreme Court. It is not in dispute between the parties that the remedy of appeal is provided under the Act against the impugned order dated 27th August, 2021 passed by the Armed Forces Tribunal, Regional Bench, Lucknow. Further, Section 33 of the Armed Forces Tribunal Act provides for exclusion of the jurisdiction of the civil court.

11. It is trite of law that the power of judicial review vested in the High Court under Article 226 and 227 of the Constitution to exercise judicial superintendents over the decision of all Courts and Tribunals within the respective jurisdiction is also part of the basic structure of the Constitution. Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The present case pertains to judicial review of judicial decisions.

12. The jurisdiction under Article 226 of the Constitution of India is extraordinary and discretionary in nature. It is also to be noted that the powers to be exercised by the High Court under Articles 226 and 227 are constitutional powers and the same cannot be excluded by legislation. The Armed Forces Tribunal Act cannot curtail the powers under the grand-norm being the constitution. The legislations under the constitutional framework is required to be in consonance with the scheme of the Constitution specially the scheme of judicial review provided in the Constitution under Articles 226 and 32 of the Constitution.

13. The Full Bench of this Court in ***Mahesh Chand Ex-LNK/CI Vs Union of India (supra)*** in paragraph 71 has held as follows:-

"(i) Our jurisprudence in over six decades since the adoption of the Constitution has evolved a clear, categoric and unambiguous recognition of the

importance of judicial review by the Supreme Court under Article 32 and by the High Courts under Article 226. Judicial review is an indispensable safeguard to the preservation of liberty, freedom and to the realization of rights founded on the rule of law. Without constitutionally entrenched remedies, the realisation of fundamental constitutional rights would be illusory or, as Dr B R Ambedkar described it, a mere 'pious declaration': "It is the remedy that makes a right real. If there is no remedy, there is no right of all, and I am therefore not prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities but for which the Constitution makes no provision by way of a remedy. It is much better to be limited in the scope of our rights and to make them real by enunciating remedies than to have a lot of pious wishes embodied in the Constitution. I am very glad that this House has seen that the remedies that we have provided constitute a fundamental part of this Constitution..."50

(ii) The power of judicial review of the Supreme Court and of the High Courts is firmly entrenched as a basic feature of the Constitution which lies beyond the amending power. Even more so, ordinary legislation cannot abrogate the constitutional power of judicial review that is vested in the Supreme Court under Article 32 and in the High Courts under Article 226;

(iii) The Armed Forces Tribunal Act, 2007 does not contain, either expressly or by necessary implication, any exclusion of the power of judicial review that is conferred upon the Supreme Court under Article 32 or upon the High Courts under Article 226. The legislation in fact contains a statutory recognition in Section 14 that the jurisdiction which is conferred upon the Armed Forces Tribunal is a jurisdiction in relation to service matters as defined in Section 3(o) as was exercisable by all courts and tribunals immediately before the appointed day, save and except the jurisdiction exercisable by the Supreme Court and the High Courts;

(iv) Having said this, it needs to be emphasised that the existence of jurisdiction and the nature of its exercise have distinct connotations in constitutional law. The Armed Forces Tribunal is constituted by legislation which provides for a specialized and efficacious administration of justice in matters falling within its jurisdiction under the provisions of the Act. This is coupled with the need to maintain discipline in the Armed Forces;

(v) The Armed Forces Tribunal is a court of first instance and ordinarily, matters which fall within the purview of its jurisdiction have to proceed for adjudication before the Tribunal and the Tribunal alone. Against the decision of the Tribunal, there is a statutory remedy of an appeal which is provided under Sections 30 and 31 to the Supreme Court;

(vi) Since a statutory remedy of an appeal is provided, the principles which are well established for the exercise of the jurisdiction under Article 226, would warrant that the High Court should be circumspect and careful while determining as to whether any case for the exercise of jurisdiction under Article 226 of the Constitution is made out;

(vii) The jurisdiction under Article 226 has not been abrogated as it could not have been, being a basic and essential feature of the Constitution."

14. The Apex Court in ***Union of India v. Major General Shri Kant Sharma and another, (2015) 6 SCC 773*** has held as under:-

"The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including the Armed Forces Tribunal Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra Kumar [L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] and S.N. Mukherjee [(1990) 4 SCC 594 : 1990 SCC (Cri) 669] .)

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act. (Refer: Mafatlal Industries Ltd. [(1997) 5 SCC 536])

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer:Nivedita Sharma [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] .)

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947].)"

15. The Apex Court in ***Union of India v. Major General Shri Kant Sharma (supra)*** has highlighted the anomalous situation that will be created in case the statutory alternative remedy is permitted to be bypassed. In this reference, attention is drawn to paragraph 43 and 44 of ***Union of India v. Major General Shri Kant Sharma (supra):-***

"Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of the Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is

binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 of the Armed Forces Tribunal Act.

The High Court (the Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of the Act. However, we find that the Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that the Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India."

16. The Apex Court in ***Balkrishna Ram Vs Union of India (supra)*** has held as under:-

"1. Leave granted. One of the issues raised in this appeal is whether an appeal against an order of a Single Judge of a High Court deciding a case related to an Armed Forces personnel pending before the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court.

14. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a rule of prudence and not a rule of law. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available [Union of India v. T.R. Varma, AIR 1957 SC 882]. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction. There may be cases where the High Court would be justified in exercising its writ jurisdiction because of some glaring illegality committed by AFT. One must also remember that the alternative remedy must be efficacious and in case of a Non-Commissioned Officer (NCO), or a Junior Commissioned Officer (JCO); to expect such a person to approach the Supreme Court in every case may not be justified. It is extremely difficult and beyond the monetary reach of an ordinary litigant to approach the Supreme Court. Therefore, it will be for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. There cannot be a blanket ban on the exercise of such jurisdiction because that would effectively mean that the writ court is denuded of its jurisdiction to entertain such writ petitions which is not the law laid down in L. Chandra Kumar (supra)."

17. It is further to be seen that the controversy involved before the Apex Court in the matter of ***Balkrishna Ram Vs Union of India and another (supra)*** was whether an appeal against an order of Single Judge of High Court deciding a case related to an Armed Forces personnel pending before the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court.

18. A Division Bench of this Court in Writ- A No 15281 of 2021 by order dated 1st November, 2021 has considered a similar issue and held as under:-

"5. The judgment in the case of Balkrishna Ram (supra) and judgment in the case of Major General Shri Kant Sharma (supra) both were rendered by Division Benches of Hon'ble Supreme Court. In the case of Major General Shri Kant Sharma (supra) the question consdiered by Hon'ble Supreme Court was as under :

"Whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 against an order of Armed Forces Tribunal with the leave of the Tribunal under Section 31 of the Act or leave granted by the Supreme Court, or bar of leave to appeal before the Supreme Court under Article 136(2) of the Constitution of India, will bar the jurisdiction of the High Court under Article 226 of the Constitution of India regarding matters related to Armed Forces.?"

6. The aforesaid question was specifically answered by Hon'ble Supreme Court in the aforequoted paragraphs 37, 38, 39 of the judgment.

7. The controversy involved before the Hon'ble Supreme Court in the case of Balkrishna Ram (supra) is reflected from the paragraph 2 of the aforequoted paragraph of the judgment which indicates that the question involved was "whether an appeal against an order of a single judge of a High Court deciding a case related to an Armed Forces personnel pending before the High Court is required to be transferred to the Armed Forces Tribunal or should be heard by the High Court. ?"

8. The question so framed was answered by Hon'ble Supreme Court with the observations made in paragraph 14 as aforequoted and ultimately the appeal was dismissed with the observations made in paragraph 19 of the judgment.

9. The question with respect to the interpretation of Section 30 of the Armed Forces Tribunal Act, 2007 was directly and essentially in issue and consideration by Hon'ble Supreme Court Union of India & Ors. Vs. Major General Shri Kant Sharma & Anr (supra) and it was held that no person has a right of appeal against the final order or decision of the Tribunal to the Supreme Court other than those falling under Section 30(2) of the Act, but it is statutory appeal which lies to the Supreme Court. Thus, against the impugned order the petitioner has a right of appeal before the Hon'ble Supreme Court under under Section 30 read with Section 31 of the Act. The judgment of Hon'ble Supreme Court in the case of Balkrishna Ram (supra) reiterates the well settled principle of law with regard to the extraordinary and discretionary jurisdiction of High Court under Article 226 of the Constitution of India."

19. The power of the High Court under Article 226 of the Constitution for judicial review of the order of the tribunal below is not curtailed or restricted in any manner. The remedy provided under Article 226 of the Constitution is a extraordinary and discretionary remedy.

20. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a rule of prudence and not a rule of law. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the

jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction.

21. It is further to be seen that from the decisions stated herein above, it is clear that the judicial review is part of the basic structure of the Constitution and the High Court under Article 226 of the Constitution is not denuded of its power of judicial review in view of Armed Forces Tribunal Act. The power of the High Court under Article 226 is discretionary and extraordinary and is to exercise with great caution. The exercise of the powers of judicial review by the High Court under Article 226 of the Constitution will depend on the facts and circumstances of each case. The discretion under Article 226 of the Constitution is to be exercised by objective assessment of the plea of the petitioner that the statutory forum provided under the Armed Forces Tribunal Act is not efficacious remedy in the facts and circumstances of the case.

22. It is the case of the petitioner that although there is an alternative remedy of filing an appeal under Sections 30 and 31 of the Armed Forces Tribunal Act, 2007 before the Apex Court. However, the petitioner has approached under Article 226 of the Constitution as the remedy provided by way of appeal under Sections 30 and 31 of the aforesaid Act is not efficacious for the petitioner on account of financial disability of petitioner who is not in a position to afford the expenses of litigation and the fees of the Advocates at the Supreme Court which is also very exorbitant.

23. The petitioner on the basis of his poor financial condition has sought intervention of this Court under Article 226 of the Constitution against the impugned order passed by the Armed Forces Tribunal.

24. The pleadings are the foundation of litigation. In pleadings, the necessary and relevant particulars and material must be included and unnecessary and irrelevant material must be excluded. Pleadings in a particular case are the factual foundation on which the case of the litigant is based on. The pleadings should be specific in the petition and should disclose the complete cause of action for approaching the court. In case where the petitioner is praying for intervention of this court in exercise of powers under Article 226 of the Constitution by passing the statutory alternate remedy, it is the duty of the petitioner to bring complete facts and circumstances by way of pleadings in the writ petition as to why the remedy of appeal (statutory alternative remedy) is not an efficacious remedy in the facts and circumstances of the case. If the factual foundation for the cause of action in approaching the court is missing or is vague, then it is always open for the court to deny the relief to the petitioner/litigant in the facts and circumstances of the particular case.

25. In the present case, the factual foundation with regard to the remedy of appeal being not efficacious is pleaded in paragraph 23 of the writ petition and the same is quoted hereinbelow :-

"That, petitioner belongs to poor labourer family and having responsibilities of earning bread and butter for his entire

family members including old ailing parents and has been discharged from Army service and is unable to afford the expenses of Hon'ble Apex Court to challenge the impugned order dated 28.10.2021 passed by respondent no.1 as advocates of Hon'ble Supreme Court are very expensive, hence left with no options filling the same before this Hon'ble court and this Hon'ble court is having jurisdiction to entertain the same as per power vested under Article 226 of Constitution of India."

26. A perusal of the aforesaid paragraph 23 of the writ petition would demonstrate that except for the bald statement with regard to poor financial condition of the petitioner, there is nothing on record to demonstrate the poor financial condition of the petitioner. Further, the petitioner has also alleged that the Advocates in the Supreme Court are very expensive and as such he is not in a position to engage the aforesaid Advocates and bear the litigation expenses.

27. The submission of the petitioner that he is not in a position to prefer an appeal before the Supreme Court on account of his pity condition further cannot be accepted as the Parliament has promulgated Legal Service Authority Act, 1987 to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Section 12 of the Legal Service Authority Act, 1987 enlist the sections of the society who are entitled to free legal services. In furtherance thereof, Supreme Court Legal Services Committee has been constituted to provide legal aid and assistance to the marginalized and weaker sections of the Society.

28. Apart from the aforesaid, the Apex Court has also constituted a scheme known as "Supreme Court Middle Income Group Legal Aid Scheme" to provide legal services to the middle income group citizens. The scheme is applicable to cases intended to be filed before the Supreme Court. The aforesaid scheme has been constituted under the aegis of Supreme Court Middle Income Group Legal Aid Society of which the Chief Justice of India is the patron-in-Chief.

29. The aforesaid Act of 1987 and the Scheme for Middle-Income Group are necessitated in furtherance of Article 39A of the Constitution that provides the State shall secure that the operation of the legal system promotes justice on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

30. The Government and the Supreme Court has constituted channels for free legal service to all the persons who are not in a position to access justice on account of their weak financial position and as such, the citizens are entitled to take the benefit of the aforesaid free legal service where a person finds himself not in a position to approach the court on account of his financial position.

31. It is also to be seen that once various avenues for providing free legal aid has been set up at the Supreme Court in order to enable the litigant to secure justice and that his distressed financial position

may not come in the way of his securing justice and the justice is not denied to the litigant by reason of his economic disability, we do not find any reason to entertain the present writ petition under extraordinary jurisdiction under Article 226 of the Constitution. The economic disability of a litigant has been addressed by the Apex Court by constitution of Supreme Court Legal Service Committee and Supreme Court Middle Income Group Legal Aid Scheme. Once the channels for addressing the economic disability of the litigant has been set up by the Apex Court and the litigants have been provided fair opportunity to secure justice by providing free legal aid under the various scheme and the Act of 1987, the financial/economic disability may not be a ground for by-passing the statutory alternative remedy provided under the Armed Forces Tribunal Act, 2007. The economic disability of a litigant has already been addressed and the institutional framework for securing justice to litigants having economic disability have already been put in place. It is always open for the petitioner to approach the aforesaid mechanisms to secure justice and to prefer appeal before the Supreme Court. The question that the remedy provided under the statute by way of appeal before the Apex Court, being not efficacious on the ground of economic disability, is not permissible unless the mechanisms under the Legal Service Authority Act, 1987 and the Supreme Court Middle Income Group Legal Aid Scheme has been approached and exercised by the petitioner in the case of economic disability.

32. In the result, we do not find any good reason to by-pass the statutory alternative remedy provided under the Armed Forces Tribunal Act, 2007. The writ petition is dismissed on the ground of statutory alternative remedy available to the petitioner leaving it open for the petitioner to file an appeal before the Hon'ble Supreme Court in accordance with the provisions of the Armed Forces Tribunal Act, 2007.

(2022)02ILR A443
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 9414 of 2017

Rituraj Textiles & General Indus. (P) Ltd. ...Petitioner

Versus

Presiding Officer Labour Court (I) Ghaziabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jamal Ahmad Khan

Counsel for the Respondents:
C.S.C., Sri Harish Chandra

A. Labour Law – Principle of natural justice – Applicability – Award passed ex-parte – No service of notice to the employer – Restoration application was rejected solely on the ground of delay – Held, the learned court below while passing the impugned order neglected to consider the fact that the petitioner was not served notice of the proceedings and hence could not prosecute the case – The applicant was prevented by good cause from contesting the case on merits. The impugned award was passed in violation of principles of natural justice. (Para 6 and 8)

Writ petition allowed. (E-1)

List of Cases cited:

1. M/s Haryana Suraj Malting Ltd. Vs Phool Chand; 2018 (16) SCC 567

2. Devyani Beverages Ltd. Vs Labour Court II, Deputy Labour Commissioner; 2005 (6) AWC 6249 All

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Matter is taken up on the revised call. Sri Jamal Ahmad Khan, learned counsel for the petitioner is present. None appears on behalf of the respondents.

2. The petitioner has assailed the award dated 24.12.2014 (published on 02.04.2016) and also the order dated 27.01.2017 rejecting the application for recall of ex-parte award dated 24.12.2014.

3. The award was passed on 24.12.2016 and was published on 02.04.2014. The learned labour court dismissed the restoration application by the impugned order dated 27.01.2017 solely on the footing that the same had been filed after 30 days.

4. The validity of a restoration application filed after a period of 30 days was examined in ***M/s Haryana Suraj Malting Ltd. Vs. Phool Chand reported at 2018 (16) SCC 567. In M/s Haryana Suraj Malting Ltd. (supra)***, it was held that the power to restore a case dismissed for non prosecution lay squarely within the ambit of ancillary powers of the tribunal to do justice:

"34. In case a party is in a position to show sufficient cause for its absence before the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal, in exercise of its ancillary or incidental powers, is competent to entertain such an application. That power cannot be circumscribed by limitation. What is the sufficient cause and whether its jurisdiction is invoked within a reasonable time should be left to the judicious discretion of the Labour Court/Tribunal.

35. It is a matter of natural justice that any party to the judicial proceedings should get an opportunity of being heard, and if such an opportunity has been denied for want of sufficient reason, the Labour Court/Tribunal which denied such an opportunity, being satisfied of the sufficient cause and within a reasonable time, should be in a position to set right its own procedure. Otherwise, as held in Grindlays[Grindlays Bank Ltd.v.Central Govt. Industrial Tribunal, 1980 Supp SCC 420 : 1981 SCC (L&S) 309] , an award which may be a nullity will have to be technically enforced. It is difficult to comprehend such a situation under law.

37.Merely because an award has become enforceable, does not necessarily mean that it has become binding. For an award to become binding, it should be passed in compliance with the principles of natural justice. An award passed denying an opportunity of hearing when there was a sufficient cause for non-appearance can be challenged on the ground of it being nullity. An award which is a nullity cannot be and shall not be a binding award. In case a party is able to show sufficient cause within a reasonable time for its non-appearance in the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal is bound to consider such an application and the application cannot be rejected on the ground that it was filed after the award had become enforceable. The Labour Court/Tribunal is not functus officio after the award has become enforceable as far as setting aside an ex parte award is concerned. It is within its powers to entertain an application as per the scheme of the Act and in terms of the rules of natural justice. It needs to be restated that

the Industrial Disputes Act, 1947 is a welfare legislation intended to maintain industrial peace. In that view of the matter, certain powers to do justice have to be conceded to the Labour Court/Tribunal, whether we call it ancillary, incidental or inherent."

5. By declining to entertain the application for restoration of an exparte award, the learned labour court was misdirected in law. The impugned order dated 20.01.2017 is in the teeth of the law laid down in **M/s Haryana Suraj Malting Ltd. (supra).**

6. The application for restoration asserts that the petitioner-employer got knowledge of the exparte order on 13.04.2016. It is further stated that no notice was served upon the petitioner-employer prior to the impugned award. The learned court below while passing the impugned order neglected to consider the fact that the petitioner was not served notice of the proceedings and hence could not prosecute the case.

7. The pleadings in the writ petition regarding the lack of notice are corroborated by the record and not contested. The cause for absence of the petitioner in the proceedings before the learned labour court is bonafide. These facts have been overlooked by the court below while rejecting the restoration application. The restoration application is liable to be allowed and is allowed.

8. Admittedly the award is exparte to the applicant. The applicant was prevented by good cause from contesting the case on merits. The impugned award was passed in violation of principles of natural justice.

9. There is another aspect to the matter. While entering an exparte award the labour court cannot simply accept the pleadings on their face value. The labour court in such cases has to apply its mind independently to the pleadings and materials in the record and return specific findings thereon. The credibility of the evidences, pleadings and materials have to be tested by the court below even in an ex-parte award. The labour court has passed the impugned award solely on the foot that there was no contest on behalf of the petitioner-employer. The labour court has failed to make independent findings on the materials in the record. The impugned award is bereft of reasons

10. In ***Devyani Beverages Ltd. Vs. Labour Court II, Deputy Labour Commissioner,*** reported at ***2005 (6) AWC 6249 All***, this Court held:

"13. In the present case, the award has been passed merely on the basis of the written statement of the employee. The entire award is bereft of any discussion on the merits of the case. A perusal of the award shows that only the case of the workman has been set out and without analytically examining the material on record and recording reasons for its conclusion, the claim of the employer has been allowed simply on account of the provisions of Rule 12 (9) of the U.P. Industrial Disputes Rules, 1957. The said award being totally unsupported by reasons or discussions, cannot be said to be an award on merits of the case Failure to give reasons would amount to denial of justice. The award speaks of the filing of the written statement by the employer but has not dealt on the comparative merit of the claims and counter claims. Jumping to the conclusion that the termination of the

workman was illegal after merely setting out the factual aspect of the case, and without discussing the merits, would render the award illegal and unsustainable in law. There is no analytical examination of the merits of the claim which shows total non-application of mind."

11. The law laid down in ***Devyani Beverages (supra)*** is squarely applicable to the facts of this case and shall govern its fate. The impugned award 24.12.2014 (published on 02.04.2016) is vitiated by cryptic findings made therein which reflect non application of mind.

12. The impugned award dated 24.12.2014 (published on 02.04.2016) and order dated 27.01.2017 are liable to be set aside and are set aside.

13. In wake of the preceding discussion, the matter is remitted to the learned labour court.

14. The learned labour court shall make all endeavours to decide the controversy on merits after giving opportunity of hearing to all the necessary parties to the lis, preferably within a period of four months from the date of receipt of a certified copy of this order.

15. All parties are directed to cooperate in the proceedings before the court below.

16. The writ petition is allowed.

(2022)02ILR A446
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ -C No. 21916 of 2010

Mahmood Rais & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ch. N.A. Khan, Rizwan Ahmad, Thakur Pramod Singh

Counsel for the Respondents:
C.S.C.

Criminal Law - Constitution of India, 1950 - Petition U/Article – 226 - U.P. Imposition of Ceiling on Land Holdings Act, 1960 - Section - 10(2), Section – 38-B- Declaration of surplus land – Validity – In earlier three times proceedings – repeated notices issued and same were dropped or set aside by a reasoned order on every occasion – being there were no surplus land – prior to notices names of each tenure holder have been mutated by the prescribed authority in the revenue record on the basis of a family settlement being considered to be genuine and at that time there was no issue of fraud or misrepresentation – those proceedings were never challenged by the state authorities thus get finality.

Criminal Law - Constitution of India, 1950 - Petition U/Article – 226 - U.P. Imposition of Ceiling on Land Holdings Act, 1960 - Section - 10(2), Section – 38-B- Declaration of surplus land – Validity – fresh fourth notice was issued by the prescribed authority - failed to consider earlier orders on the issue of family settlement and gone beyond power under section – 38.B of the Act, 1960 and wrongly re-determined issue of family settlement without any legal or valid ground only on the basis of presumption – proceedings reopen after two years by ignoring the point that issue has already been settled during the multiple proceedings - hit by the principle of' constructive res judicata' against the petitioners' – impugned orders order are set aside. (Para 24, 29, 31, 32)

Writ petition allowed. (E-11)

List of Cases cited:

1. Devendra Nath Singh (Dead) through LRs & ors. Vs Civil Judge & ors. (AIR 1999 SC 2264)

2. Ram La Vs St. of U.P. & ors. (1978 ALJ 1197: 1978 SSC OnLine All 419)

3. St. of UP Vs Nawab Hussain (1997 Vol. 2 SCC 806)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. This case has a chequered history and this is the third round of litigation which has reached up to this Court. The facts in brief are that the for first time, proceedings were initiated against the Rais Ahmed predecessors of the petitioners under Section 10(2) of the U.P. Imposition of Ceiling on Land Holding Act, 1960 (*hereinafter referred to as 'the Act of 1960*') in the year 1961, which were dropped by the Prescribed Authority, by an order dated 1.5.1963 on the ground that their had been a family settlement in the year 1959 before the due date and the land with tenant holder was within ceiling limit.

2. Thereafter, a second notice was issued under *'the Act of 1960'* in the year 1974 and again objections were filed. The notice was cancelled by the order dated 31.1.1975 passed by the Prescribed Authority again on the ground that there was a family settlement and due to that, there was no surplus land with the tenant holder. It appears that a recall/review application was entertained and it was allowed on 25.7.1975 on the ground that mutation order which had been carried out, pursuant to the family settlement, had been put in abeyance by the Additional Commissioner and consequently, declared certain land to be surplus. The said order was challenged by way of filing an Appeal No.26 of 1975 and the same was allowed by an order dated 24.9.1975 and the order impugned therein was set aside. It was held that review/recall application was not maintainable and the question of title which was finally decided by the Prescribed Authority on 31.1.1975, could not be reviewed on discovery of a mutation order only. The order dated 24.9.1975 was not challenged by the respondent State Authorities.

3. A third notice was served on the petitioners and the objections were filed by the tenure holder, however, the Prescribed Authority by an order dated 23.7.1976 declared certain land of the tenure holder to be surplus. The said order was challenged by way of filing two appeals before the District Judge, Hamirpur, which were allowed by an order dated 27.9.1977. The family settlement between Rais Ahmed and his minor sons was accepted. It was declared that there was no surplus land with the tenure holder. It was also noted that the then Lekhpal, who was examined on behalf of the State also accepted that there had been a family settlement amongst Rais Ahmed and his sons. Despite proceedings against the petitioners were dropped three times, a fourth notice was issued on 14.5.1982 in view of the amendment whereby Section 38(b) was inserted in 'the Act of 1960' (came into force w.e.f. 10.10.1976). The objections were filed, which were rejected by the Prescribed Authority by an order dated 26.4.1984 on the ground that neither any entry on the basis of the family settlement was on record in any revenue records nor any circumstance was brought on record under which the said family settlement took place. The said order was challenged by

way of filing an appeal which was allowed by an order dated 19.3.1985 and the matter was remanded back. The Prescribed Authority passed a fresh order on 14.5.1987 whereby certain land of the tenure holder was declared surplus on the ground that it was an oral family agreement as well as it was already set aside by an order dated 22.10.1959 which was not brought on record by the tenure holder. The said order was challenged by way of filing an appeal, however, the appeals were rejected by the Additional Commissioner, Jhansi, Division Jhansi, by an order dated 18.11.1987. The said order was challenged by the tenure holders by way of filing Civil Misc. Writ Petition before this Court, which was allowed by judgment and order dated 15.5.2006 and the matter was sent back to decide afresh. The Court noticed that there was no doubt about the family settlement of the rights in favour of tenure holder and his minor sons.

4. In pursuance of the above order, the Prescribed Authority decided the matter afresh and by an order dated 5.3.2008, declared certain land as surplus. The Prescribed Authority held that the alleged oral family agreement was result of a fraud. There was no provision for oral family agreement under Zamindari Abolition Act, 1950. There was no reason with the tenure holder to execute family settlement to divide the land among his six children, aged about 3 to 15 years. The said order was challenged by way of filing an appeal, however, when no stay was granted, the tenure holder preferred a Writ Petition No.28072 of 2008, before this Court, which was allowed, vide order dated 27.4.2009 reported in **2009 (5) ADJ 529**. This Court has observed that neither the family settlement was disbelieved by this Court in the earlier round of litigation nor the theory of any fraud or misrepresentation on the part of petitioners was believed by this Court or by the Authorities.

5. Thereafter, the appeals were rejected by order dated 23.2.2010 on the ground that the alleged oral agreement dated 15.6.1959 was not a real one and it was executed only in order to save the land from the ceiling proceedings. There was no explanation with the petitioners why the said family settlement was not registered and also that there was no possible good reason to divide the land among the minor children. By way of present writ petition, order dated 5.3.2008 passed by the Prescribed Authority and order dated 23.2.2010 passed by the Appellate Authority are impugned.

6. Shri Ch. N.A. Khan, learned Senior Counsel assisted by Shri Rizwan Ahmad, learned counsel for petitioners submitted that the findings in regard to the family agreement dated 15.6.1959 was upheld upto this Court in earlier three proceedings. Repeated notices issued under the *'the Act of 1960'* were either dropped or set aside by a reasoned order on every occasion. Therefore, fourth notice and proceedings under *'the Act of 1960'* are hit by principle of constructive res judicata. Learned Senior Counsel read out the relevant portion of the earlier orders whereby family settlement was considered to be genuine and further that there was no allegation of fraud or misrepresentation to disbelieve the family settlement. The issue in regard to the family settlement had already became final after contest and after having led evidence in this regard. Therefore, it cannot be reopened under the garb of provisions of Section 38-B of *'the Act of 1960'*. In this regard, learned Senior Counsel has relied upon a judgment passed by the Supreme

Court in the case of ***Devendra Nath Singh (Dead) through LRs. And others vs. Civil Judge and others; AIR 1999 Supreme Court 2264*** that Prescribed Authority did not have the jurisdiction to reopen the question which was already settled on the basis of evidence. The relevant paragraph nos.2, 3 and 4 of the said judgment are mentioned hereinafter :-

"2. The learned Counsel appearing for the appellants contends that the power under Section 38B will not enlarge the power of redetermination of surplus land conferred on the Prescribed Authority under Section 13A of the Act and, therefore, the Prescribed Authority did not have the jurisdiction to reopen the question of the majority of the two sons. The learned Counsel appearing for the respondent on the other hand contended that the land holder having subjected himself to the jurisdiction of the Prescribed Authority and having lead evidence in the proceeding after the matter was reopened, is not entitled to challenge the jurisdiction of the authority and, therefore, the findings arrived at by those authorities cannot be annulled at this point of time.

3. Having examined the provisions of Section 13A and Section 38B of the Act, we are of the considered opinion that under Section 13A the Prescribed Authority has the power to reo pen the matter within two years from the date of the notification under Sub-section (4) of Section 14 to rectify any apparent mistake which was there on the face of the record. That power will certainly not include the power to entertain fresh evidence and re-examine the question as to whether the two sons, namely, Hamendra and Shailendra were major or not. The power under Section 38B merely indicates that if any finding or decision was there by any ancillary forum prior to the commencement of the said Section in respect of a matter which is governed by the Ceiling Act then such findings will not operate as res judicata in a proceeding under the Act. That would not cover the case where findings have already reached its finality in the very case under the Act. In this view of the matter we have no hesitation to come to the conclusion that the Prescribed Authority had no jurisdiction to reo pen the question of majority of the two sons in purported exercise of the power under Section 13-A. If the Authority had no jurisdiction, question of waiver of jurisdiction does not arise, as contended by learned Counsel for the respondent.

4. In the aforesaid premises the impugned orders of the Prescribed Authority as well as that of the High Court are set aside and it is held that in the computation of ceiling Hamendra and Shailendra will be treated as two major sons."

7. Per contra, Shri Pranav Ojha, learned Additional Chief Standing Counsel submitted that Section 38-B as inserted by Amendment Act No.20 of 1976, (w.e.f. 10.10.1976), which provides that no finding or decision given before the commencement of this Section in any proceeding or on any issue (including order, decree or judgment) by any Court, Tribunal or Authority in respect of any matter governed by this Act shall bar the retrial of such proceedings or issue under this Act, in accordance with the provisions of the Act, therefore, the finding arrived in the earlier proceeding could not considered to be res judicata, and therefore, the finding arrived in the present proceedings by the Prescribed Authority as well as by Appellate Authority are not barred by principles of res judicata. The Prescribed

Authority has considered every aspect of the case on fact as well as on law. It is not in dispute on 15.6.1959 when the alleged family agreement took place, all six sons of tenure holder were aged between 3 years to 15 years and therefore, they were minor. There was no evidence on record about any dispute among the minor sons, which led to the family settlement in order to maintain peace between family members. Therefore, the alleged reason for the family settlement to maintain peace, was not based on any valid ground. Learned counsel further submitted that mutation which was entered in the revenue record on the basis of the alleged family settlement was set aside by the Commissioner Jhansi, Division Jhansi, by an order dated 22.10.1959 and thereafter, the tenure holder had not taken any steps to correct the entries in the revenue record, which clearly indicates that family settlement was fake and it never took place. The only reason behind the alleged family settlement was to save the land from the ceiling proceedings.

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

9. From the facts of the case, as mentioned above, undisputedly, all the three notices issued earlier were either dropped or set aside by the Prescribed Authority or by the Appellate Authority with the finding in favour of the petitioners that the family settlement was accepted and there was no issue of fraud or representation. Undisputedly, at the time when the family settlement took place, all the sons of the tenure holder were minor and further that there was no evidence on record regarding any dispute amongst the minor sons. Undisputedly, there were no revenue entries in pursuance of the said family settlement.

10. Section 38-B of 'the Act of 1960' specifically provides that there shall no bar to retrial of proceeding under the Ceiling Act and no finding or decision given before the Section 38-B came into force shall bar the retrial of proceeding or issue under the Act.

11. Now the only issue is left before this Court is to decide whether on the basis of the evidence on record, the family agreement dated dated 15.6.1959 was a genuine settlement? and whether it was executed only with the object to save the land from the ceiling proceeding? and what would be the effect of the fact that in earlier proceedings, similar notices were dropped or set aside?

12. The Prescribed Authority has held that on 15.6.1959 when the family settlement took place, the children of tenure holder were aged between 3 to 15 years and their age were 3, 5, 7, 9, 12 and 15 years. The ground for family settlement was alleged to maintain peace among the children, however, how peace was disturbed among the children of tender age, was not brought on record. This was the main ground to consider the family agreement a fraud and to pass the impugned order by the Prescribed Authority to declare certain land as surplus which was upheld by the Appellate Authority.

13. It would be relevant to consider finding given by the Authorities regarding family settlement in earlier three proceedings.

(a) First proceedings were dropped by order dated 1.5.1963 wherein the Prescribed Authority has held that family settlement took place before the due date

and the land with the tenure holder was within ceiling limit. No doubt was expressed by the Lekhpal who had deposed during proceedings.

(b) Second notice was cancelled by the Prescribed Authority by detailed and reasoned order dated 31.1.1975. It was held that family settlement took place in the year 1956 and land was divided by tenure holder between his six minor son, who were major during second proceedings and were utilizing their respective land and and the tenure holder had no interference on the use of said land. In this proceeding also, no doubt was expressed on the family settlement. The order was reviewed/recalled by an order dated 25.7.1975 (not on record) and certain land was declared surplus. The order was challenged before the Appellate Authority and the Appeal was allowed by an order dated 24.9.1975, wherein it was held that there was no reason to recall/review the earlier order as well as right of title was not determined in mutation proceedings. Issue of res judicata was also decided in favour of petitioners. These findings were undisputedly remained unchallenged.

(c) In the third proceedings, the Prescribed Authority by an order dated 23.7.1976 (not on record), whereby certain land was declared surplus. Their order was challenged before the Appellate Authority, which was allowed by order dated 27.9.1977 and it was declared that petitioners had no surplus land. It was held that there was no ground to doubt the family settlement and that land was separately in possession of all sons. The Lekhpal also conceded before the Prescribed Authority about family agreement. Family agreement was accepted in specific terms.

(d) In the proceedings carried out in pursuance of fourth notice dated 14.5.1982, the matter was examined afresh in view of Section 38-B (enforced w.e.f. 10.10.1996) of 'the Act of 1960' which provides 'bar against res judicata', however, without appreciating earlier proceedings and finding arrived in favour of family settlement, held that family settlement was a fraud as there was no reason for family settlement to divide land amongst six minor sons in order to maintain peace.

14. Section 38-B of the 'the Act of 1960' (amended) was considered by a Single Bench of this Court in **Ram Lal vs. State of U.P. and others; 1978 ALJ 1197; 1978 SCC Online All 419**, wherein it was held that :-

20. A change in law can thus affect the decision of a court only to the extent that the decision becomes contrary to law. If the change in law does not touch the question decided by the competent court, the decision is not affected, and would continue to be binding between the parties. We shall examine the provisions of Section 38-B of the Act in the light of the above discussion. Section 38-B provides as follows:

"No finding or decision given before the commencement of this Section in any proceeding or any issue (including any order, decree or judgment) by any Court, tribunal or authority in respect of any matter governed by this Act, shall bar the retrial of such proceeding or issue under this Act, in accordance with the provisions of this Act as amended from time to time."

21. This provision to our mind was introduced to achieve the object of the various amendments introduced in the principal Act and to give effect to them. Section 38-B, in our view, contemplates that if by the amendments made in the principal Act a certain findings or decisions had become contrary to law,

those findings or decisions could be reopened and the principle of res judicata would not bar a retrial of those issues in accordance with the provisions of the principal Act as amended. This provision, in our opinion, did not authorise the Ceiling authorities to ignore the decisions rendered or decrees passed by competent courts, tribunals or authorities in respect of matters which were not affected by the changes made in the principal Act. Such decisions, in our opinion, would continue to be binding on the parties and would operate as res judicata between them,see State of Uttar Pradesh Vs Nawab Hussain :(1997) 2 SCC 806.

15. The Prescribed Authority has reconsidered the issue of nature of family settlement and its effect and while considering the issue has not consider the finding given on the issue in earlier proceedings by Prescribed Authority, Appellate Authority and High Court. The Prescribed Authority gave much emphasis to nature of agreement being oral, outcome of mutation proceedings and at the time of family settlement, all sons were minor and come to conclusion that there was no valid ground for family settlement among the minor children to maintain family peace.

16. Section 38-B of *'the Act of 1960'* through provides that there will be bar against res judicata, however, it does not permit to reopen each and every issue, which has already been settled by way of multiple proceedings more so on the ground of mere assumption, without any evidence or material on record. In the present case, the Prescribed Authority has reopen the issue of family settlement only on the basis of an assumption that there was no ground to execute family settlement among minor children, without any independent evidence in this regard. The Prescribed Authority has failed to consider the observations made by this Court by the judgment and order dated 15.5.2006 and again in judgment and order dated 27.4.2009, wherein family settlement was not doubted and submission of fraud and concealment raised by Authorities was also rejected. It was also observed that mutation proceedings does not create any right of title and finding could not be disturbed on the ground that mutation was not carried out on the basis of family settlement.

17. In view of above discussion on law as well on facts, the Prescribed Authority has erred in reconsidering the issue of family settlement in absence of any material on record to support its finding that there was no reason for family settlement among minor sons. The Prescribed Authority has also failed to consider the earlier orders passed by the Authorities and by this Court on the issue of family settlement. Therefore, in the present case, Authorities have gone beyond the power under Section 38-B of 'the Act of 1960' and wrongly redetermined the issue of family settlement, without any legal and vailid ground and wrongly doubted the family settlement only on basis of an assumption. The Appellate Authority has further erred in upholding the order passed by the Prescribed Authority. It is also relevant to note here that after the amendment carried out in the year 1976, proceeding could be reopen within two years as contemplated in Section 31(b) of *'the Act of 1960'* (as amended), however, in the present case, notice was issued in the year 1982 i.e. after 6 years.

18. The petitioners have made out a case for interference and accordingly, the impugned order dated 5.3.2008 and

23.2.2010 are set aside and the writ petition is allowed.

19. Parties are directed to bear their own costs.

(2022)02ILR A453
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-C No. 22891 of 2019

Radhey Shyam ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Rakesh Kumar Srivastava, Veerendra Kumar Tiwari

Counsel for the Respondent:
C.S.C.

A. U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Clause 13(3) – Fair Price Shop licence – Cancellation – Violation of term and condition of licence – Inquiry – *Audi alteram partem* – Non-compliance of full opportunity of hearing – Effect – Claim to hold the enquiry as being held in case of disciplinary inquiry against government servants, how far acceptable – Held, full-fledged inquiry in the matter of misconduct of a licensee in distribution of scheduled commodities should be held, does not mean that full-fledged opportunity to the licensee to cross-examine the witnesses fixing, date, time and place of the inquiry etc. as provided in respect of disciplinary inquiry against Government servants – Puran Singh's case relied upon. (Para 27 and 34)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Arnesh Kumar Vs St. of Bihar; (2014) 8 SCC 273

2. Puran Singh Vs St. of U.P. & ors.; 2010 (3) ADJ 659 (FB);

3. Writ C No. 12737 of 2013; Ashok Kumar Tiwari Vs St. of U.P. & ors., decided on 28.11.2014

4. Writ C No. 3611 of 2014; Sanjay Kumar Vs St. of U.P. & ors., decided on 5.2.2016

5. Writ C No. 15420 of 2020; Najakat Ali Vs St. of U.P. & ors. decided on 22.10.2021

6. Writ C No. 58035 of 2017; Smt. Meena Devi Vs St. of U.P. & ors., decided on 30.7.2018

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

1. The present writ petition has been filed seeking quashing of the order dated 29.7.2019 passed by the Joint Commissioner (Food), Lucknow Division, Lucknow in Appeal No.01512 of 2019, which was preferred by the petitioner against the order dated 27.5.2019 passed by the District Supply Officer, Lakhimpur Kheri cancelling the license of the fair price shop of the petitioner situated in Nagar Panchayat, Dhauraha. District Lakhimpur Kheri. The order dated 27.5.2019 is also impugned in the present writ petition.

2. The petitioner was given the license to run the fair price shop relating to Nagar Panchayat, Dhauraha. The petitioner was required to distribute the scheduled commodities and Kerosene Oil to the card holders (Antyodaya and Patra Grahasti Yojana) regularly at the rate prescribed by the State Government.

3. On 6.4.2019, upon receiving information, local police caught seven bags of wheat being carried away in Nagar Panchayat, Dhauraha for black marketing. Sub-Divisional Magistrate, Dhauraha got

the inquiry conducted by the Regional Supply Inspector, who made inspection on the same day in presence of Sri Ram Narayan, local resident, Sri Anil Kumar Pandey, Sub-Inspector, Police Station Dhauraha, Sri Krishna Dutt, another local resident and Sri Suraj Gupta, son of the petitioner.

4. During the inquiry, certain discrepancies were found in the distribution of essential committees in stock register and the details recorded in E-Pos machine for distribution of the food grains. Upon comparing, the details of the food grains received by the petitioner and distributed to the card holders, shortage of 3.27 Quintals of wheat and excess of 1.27 Quintals of rice was found. Statements of 38 Antyodaya and Patra Grahasti Yojana card holders were recorded, who alleged irregularities in distribution of the essential commodities by the petitioner from the fair price shop. An FIR dated 9.4.2019 came to be registered against the petitioner under Section 3/7 of Essential Commodities Act being FIR No.0204 of 2019 after taking approval of the District Magistrate, Lakhimpur Kheri.

5. Petitioner filed Writ Petition No.10652 (MB) of 2019 before this Court challenging the FIR No.0204 of 2019 against him. The said writ petition was disposed of vide order dated 16.4.2019 granting protection to the petitioner in light of the judgment of the Supreme Court in the case of ***Arnesh Kumar Vs. State of Bihar***, (2014) 8 SCC 273.

6. On 19.4.2019, suspension order dated 15.4.2019 suspending the license of the fair price shop of the petitioner passed by the District Supply Officer, Lakhimpur Kheri was served upon the petitioner. The petitioner was issued show cause notice requiring him to submit his explanation within one week along with records relating to the distribution of the essential commodities from the fair price shop. On 30.4.2019 petitioner submitted his explanation to the show cause notice before the District Supply Officer, Lakhimpur Kheri along with relevant records and requested for revocation of the suspension order dated 15.4.2019. He also requested for distribution of the essential commodities and Kerosene Oil to the petitioner's fair price shop.

7. Thereafter, the petitioner filed Writ Petition No.14195 (MS) of 2019 assailing the suspension order dated 15.4.2019. During the pendency of the said writ petition, the District Supply Officer, Lakhimpur Kheri cancelled the license of the fair price shop of the petitioner vide order dated 27.5.2019. The aforesaid writ petition was also dismissed vide order dated 28.5.2019 granting liberty to the petitioner to assail the order dated 27.5.2019 before the appropriate authority.

8. The petitioner, thereafter, filed Writ Petition No.16885 (MS) of 2019 impugning the order dated 27.5.2019. However, the said writ petition was disposed of vide order dated 4.6.2019 with liberty to the petitioner to prefer a statutory appeal under Clause 13(3) of the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (for short "Control Order, 2016') with direction to the appellate authority to decide the appeal by a reasoned and speaking order. In pursuance to the liberty granted by this Court vide order dated 4.6.2019, petitioner filed an appeal before the appellate authority on 12.6.2019, which was dismissed by the appellate authority vide order dated 29.7.2019.

9. Sri R.K. Srivastava, learned counsel for the petitioner has submitted that along with the suspension order dated 15.4.2019, copy of the complaint and the alleged inquiry report was not furnished to the petitioner although it was mandatory and obligatory to provide copies of the same. He has further submitted that the whole basis of suspension of the license of the fair price shop vide order dated 15.4.2019 and thereafter cancellation of the license vide order dated 27.5.2019 is FIR dated 9.4.2019 registered against the petitioner under Section 3/7 of Essential Commodities Act. He has submitted that Full Bench of this Court in *Writ Petition No.8033 of 2013, Bajrangi Tiwari Vs. Commissioner Devi Patan Mandal, Gonda and others*, has held that fair price shop agreement should not be suspended/cancelled simply on the basis of the FIR registered against the fair price shop holder. The order cancelling the license of the fair price shop as well as appellate order have been passed contrary to the dictum of this Court in the case of Bajrangi Tiwari (supra).

10. Learned counsel for the petitioner has placed reliance on the Government Order dated 29.7.2004 and submitted that inquiry proceedings of the suspended fair price shop should be concluded within a period of one month by giving opportunity of hearing to the concerned fair priced shop holder. The said Government Order also provides that after completion of such inquiry proceedings within a maximum period of one month, the competent authority should take a final decision on merits by passing a speaking order. In the present case, the inquiry could not be concluded within the time span as provided in the above Government Order from the date of suspension of the license of the fair price shop i.e. on 15.4.2019. He has, therefore, submitted that on this ground also, the suspension order is liable to be quashed.

11. Learned counsel for the petitioner has also placed reliance on the Government Order dated 16.10.2014, which was issued in compliance of the order dated 15.9.2014 passed by this Court in Writ Petition No. 56415 (MS) of 2012, Smt. Lalita Devi Vs. State of U.P. and others. The said Government Order provides that in addition to the conditions as laid down in the Government Order dated 29.7.2004, while conducting inquiry, the entries made in the ration cards by the fair price shop holder are to be taken into consideration by verifying the same with the entries made in the relevant regular register. In order to ensure that the inquiry is made in a transparent manner, opportunity of cross-examination should be given while recording the statements of the concerned persons. He has also submitted that in the present case no opportunity was given to the petitioner for cross-examining the witnesses nor oral hearing was given to the petitioner during the course of inquiry.

12. Learned counsel for the petitioner has also submitted that no opportunity of hearing was given to the petitioner before cancellation order dated 27.5.2019 was passed. It is, therefore, submitted that the impugned order cancelling the fair price shop license of the petitioner is de hors the provisions of the Government Orders dated 29.7.2004 and 16.10.2014 and the same is liable to be set aside. It is further submitted that the appellate authority has not recorded reasons and all grounds and pleas taken by the petitioner and the written arguments submitted by the petitioner have not been considered. The appellate authority has not

given cogent and convincing reasons while passing the impugned order.

13. In support of his contention, learned counsel for the petitioner has placed reliance on the following judgments:-

"Puran Singh Vs. State of U.P. and others, 2010 (3) ADJ 659 (FB);

Writ-C No.12737 of 2013, Ashok Kumar Tiwari Vs. State of U.P. and others, decided on 28.11.2014;

Writ-C No.3611 of 2014, Sanjay Kumar Vs. State of U.P. and two others, decided on 5.2.2016"

14. On the other hand, Sri Saharsha, learned counsel representing the State authorities has submitted that on receiving information on 6.4.2019, local police seized seven bags of wheat being carried away in Nagar Panchayat, Dhauraha meant for distribution among the card holders from the fair price shop of the petitioner. The Sub-Divisional Magistrate, Dhauraha got the inquiry conducted by the Regional Supply Inspector, who made inspection in presence of the two local residents, Sub-Inspector of the police station concerned and the son of the petitioner. Certain discrepancies were found in the details of distribution of the essential commodities and the stock register and the details recorded in E-Pos machine. He has also submitted that 38 card holders had given statements alleging serious irregularities in distribution of the food items. The petitioner did not cross-examine any of the said witnesses, who made statements against him. He has further submitted that after the inspection was made and preliminary inquiry report was submitted regarding the irregularities, an FIR came to be registered against the petitioner on 9.4.2019 with approval of the District Magistrate, Lakhimpur Kheri. The petitioner was given full opportunity to show cause within one week against the irregularities found in the inquiry. The petitioner was also given full opportunity before cancelling the license of fair price shop vide order dated 27.5.2019. It has further been submitted that cancellation of the license of the fair price shop was in accordance with law, which was also affirmed by the appellate authority vide impugned order dated 29.7.2019.

15. Sri Saharsha has also submitted that inquiry against the petitioner started on 6.4.2019 and the same got culminated with cancellation order dated 27.5.2019. The inquiry was concluded strictly in accordance with Paragraph 8(8) of the Control Order, 2016. Under the said provision, the inquiry related to irregularity in distribution of scheduled commodities by the licensee of the fair price shop is to be concluded within a maximum period of two months.

16. Sri Saharsha has, therefore, submitted that two competent authorities on the basis of the facts, evidence and relevant provisions of the Control Order, 2016 have concluded that the petitioner had not carried out the terms and conditions of the license and he has not distributed the essential commodities properly from the fair price shop in accordance with the provisions of the terms and conditions of the license and provisions of the Control Order, 2016. It is, therefore, submitted that this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, may not interfere with the concurrent finding of fact recorded by the two competent authorities and, therefore, the writ petition is liable to be dismissed.

17. In support of his contention, Sri Saharsha, learned counsel representing the State authorities has placed reliance on the following judgments:-

"Writ-C No.15420 of 2020, Najakat Ali Vs. State of U.P. and four others, and other connected writ petitions, decided on 22.10.2021;

Writ-C No.58035 of 2017, Smt. Meena Devi Vs. State of U.P. and four others, decided on 30.7.2018."

18. I have heard the submissions advanced on behalf of the learned counsel for the petitioner as well as by the learned counsel for the opposite parties.

19. There can be no manner of doubt that a licensee of fair price shop is required to distribute the essential commodities strictly in accordance with the terms and conditions of the license and the provisions of the Control Order, 2016. If during the course of inquiry, it is found that the licensee has violated the terms and conditions of the license or the provisions of the Control Order, 2016, his license is liable to be cancelled. If in the inquiry, it is established that the licensee was not carrying out the obligations under the license as per the terms and conditions, this Court in exercising the Writ jurisdiction could be slow to interfere in the orders passed by the competent authority and the appellate authority.

20. In the case of Puran Singh (supra), the questions which were referred for decision by the Full Bench, are as under :-

"1. Whether before suspension of fair price agreement an opportunity of hearing is mandatory to be given to the fair price shop agent in violation of which the suspension order is liable to be set aside.

2. Whether the Division Bench judgments in Pramod Kumar v. State of U.P. and others, 2006 (10) ADJ 610 (DB) and Harpal v. State of U. P. and another, 2008 (3) ADJ 36 (DB) lay down the correct law that opportunity is must; or

3. Whether the Division Bench in Gopi's case lays down the correct law ?"

21. The Full Bench in the case of Puran Singh (supra) held that power of suspension is certainly vested with the licensing authority, but while exercising the power to suspend the license of fair price shop, care is to be taken that the order is speaking one. The Full Bench has specifically held that it would be incorrect to hold that when preliminary inquiry of fact finding is held without giving any opportunity, the fair price shop is not to be suspended. It was further held that if the opportunity before passing the order of suspension is held to be mandatory, then the very purpose for which the authorities have been given power i.e. to ensure the fair and smooth distribution of the food grains would stand diluted and immediate public interest would suffer. Paragraphs 35 to 50 of the aforesaid judgment are extracted herein-below:-

"35. Para 4 and 5 of the Government Order clearly permits full-fledged enquiry pursuant to the show cause notice for cancellation and then final decision in the matter. So far the order of suspension is concerned Government Order do not provide any appeal and at the same time there was no contemplation of signing an agreement as was made obligatory pursuant to Distribution Order of 2004.

36. Thus on an overall view in the matter it is clear that apart from the powers so conferred even in the Government Order dated 29.7.2004 for suspension of the license, now in terms of the agreement between the parties (para 22 of the draft agreement) and on the basis of the provisions as contained in Clause 22 of the Distribution Order, 2004 ,the safe interpretation is that authority can exercise the powers of suspension of the license, pending proceedings for cancellation which is subject to the result of the appellate authority i.e. Commissioner of the Division.

37. Besides taking the aforesaid view, this can also be added that if the grievance is about the exercise of powers on some wrong fact/premises then apart from the procedure of approaching the appellate authority as the proceedings pursuant to the action of suspension remains pending before the licensing authority, aggrieved can straightaway approach to that authority also for redressal of his grievance.

38. It is not to be emphasised that in all kind of exercise/orders on the pretext of civil consequence and effect on the rights of a claimant,affording of the opportunity is not a matter of rule, but can be a matter of need and fairness in given set of facts if the facts so warrant. Although courts are not to work on the basis of some personal knowledge about various factors but at the same time we are not to keep our eyes closed to what is happening in the society and thus to accept or to promote the technical aspect/submission unless the court is satisfied about the serious prejudice, indulgence is not required as that is to result into more injustice to the society and that too a particular class in context of which we are considering the issue.

39. These are not those kind of cases where the applicant is to claim violation of any of his rights and the exercise not permitted under the relevant provisions. Here is the case where applicant himself has signed draft agreement permitting the authority to exercise power of suspension. The suspension of license is just as interim measure,subject to final satisfaction of the licensing authority. Petitioner if is aggrieved of wrong facts/grounds on which order is passed and on that basis if he can come to this Court then why he can not approach the same authority apprising him about the mistake committed by him r immediately to the appellate authority. This Court cannot be expected and cannot be requested by the petitioner to be the fact finding enquiry/court and thus if the order of suspension is founded on incorrect facts then it is all the more reason for the applicant to apprise the concerned authority to have a fresh look into the matter in the light of the facts and details so supplied by him who can be in a better position to analyse the details so as to take the correct decision.

40. Certainly the order of the licensing authority has to be reasoned,and speaking and the charges/ground on which the order of suspension is to be passed are to be mentioned. A non speaking order, sometimes may speak of arbitrary exercise. Unless the facts/grounds and the irregularities/charges on which the order of suspension is based is mentioned in the order one may not be in a position to form any opinion and that may be argued to be unjust exercise. It is to rule out this element even the Government Order dated 29.7.2004 which has been referred in decisions relied upon by the petitioner side there is requirement as noted in proviso to clause 2(Kha).

41. If the argument of learned counsel for the petitioner of providing an opportunity before passing order of suspension is accepted to be mandatory then the very purpose for which the authorities have been given power i.e. to ensure the fair and smooth distribution of commodities will stand diluted and immediate public interest will suffer.

42. If a serious charge of malpractice, non supply, overcharging of the price, closer of the shop or the complaint of like nature having an adverse effect on the smooth and fair distribution is received and at the surprise inspection serious kind of charges are prima facie found then it will give an immediate cause/need to the authority to take action as temporary measure, with a simultaneous arrangement of distribution through another fair price shop dealer. If for a small duration applicant claim discomfort then as the interest of an individual qua public at large is to be weighed, the court will ask the applicant to wait and meet the charges with promptness. Certainly the authority can be expected to deal with the issue within shortest possible time so that on acceptance/non acceptance of the charges the result may take a final shape.

43. At this place we are to hurriedly refer to the cases on which reliance has been placed by the learned Government side.

44. So far the decision given by the Bench of this Court in the case of Gopi (Supra) we are to observe that the Bench has taken note of the provisions of the Distribution Order of 2004. By referring to various clauses of this order, Court noted the need of setting fair price shop, its running, monitoring, the condition to be observed by an agent,penalty and the provisions of the appeal. It is by referring to various provisions, this Court took the view that it will be wrong to add or read the principles of natural justice by implication at the stage of suspension of the fair price shop.

45. It has been further held by the Bench that power of suspension if exercised in public interest does not by itself cause prejudice to the licensee. These kind of licenses does not fall within a category of fundamental right to carry on their business as provided in Article19(1)(g) of the Constitution of India.

46. Observation made by the Bench in the case of Gopi (Supra) in para 25 and 26 of the judgment is quoted below:

"25. Realising the importance of the Public Distribution System, Parliament while bringing about the 73rd constitutional amendment included the Public Distribution System as one of the primary functions of the Gram Panchayat and it has been incorporated in Article 243-G of Part 9 of the Constitution. The Public Distribution System is obviously a avowed function of the State in order to ensure the distribution of essential commodities fairly. The object is clearly to provide benefit to the public at large in order to ensure supply of essential commodities which is necessary for the sustenance of daily life. The aforesaid object, therefore, has to be fulfilled keeping in view the intention of the legislature which is to promote public awareness and ensure distribution of essential commodities. In essence, the object is to provide benefit to the public at large. As a necessary corollary to the same, the object is not to set up any trade for the benefit of any individual. It may be that by virtue of this licensing system, an individual also gets the opportunity to benefit himself by setting up a fair price distribution unit. However, such a licence does not fall within the category of a fundamental right

to carry on trade and business as understood under Article 19 (1)(g) of the Constitution of India. The Government Order which has been issued under the provisions of the Essential Commodities Act, is to regulate the supply and distribution of essential essential commodities Act, is to regulate the supply and distribution of essential commodities fairly. The suspension of such a license, pending inquiry is a step in the process of eliminating any such discrepancy which affects the public at large. The authorities while proceeding to suspend a licence, have the authority to attach a fair price shop to another Agency, in order to ensure that the public at large does not suffer on account of such suspension. Thus, viewed from any dimension, the power of suspension if exercised bonafidely in public interest does not by itself cause prejudice to a licencee in as much as he has a remedy by filing an appeal against such an order and even otherwise upon the satisfaction of the authority after hearing the objections, the authority can still restore the licence subject to a satisfactory reply being submitted by the licensee.

26. In this view of the matter, the contention raised on behalf of the petitioner that suspension order without providing opportunity curtails the right of a licensee cannot be accepted. Even otherwise, since there is a remedy by way of appeal and the petitioner has aright to object to the charges on which the licence has been suspended, it is not necessary to read the principles of natural justice by implication at the stage of suspension. The order of suspension is not a final order of termination and therefore, there is no permanent cessation of the licence. The petitioner has an opportunity to contest the matter and get his licence restored in the event he is able to establish that the grounds of suspension cannot be sustained in law."

47. Similar is the position of the decision given by this Court in the case of Kallu Khan (Supra).

48. In the aforesaid decision the Bench took into account the public distribution system and its importance for which the arrangement was brought in. It was finally held that respondents cannot be held to be under an obligation to provide opportunity of hearing before passing the order of suspension.

49. In view of the aforesaid it is clear that in the Government Order dated 29.7.2004 there is no contemplation of any notice and opportunity before suspending the fair price shop, rather there is a clear stipulation that the authority can pass the order of suspension at the time of surprise inspection and otherwise also if complaint of serious irregularity is received. Opportunity will be required only before order of cancellation. This is also clearly provided in the Distribution Order, 2004, the provisions of which has an overriding effect on the Government Order dated 29.7.2004. In terms of the Distribution Order of 2004 parties are to sign draft/agreement with a clear stipulation of the power of the authority to pass the order of suspension.

50. On the basis of the above analysis we answer both the questions so referred as below :

(I) Before suspension of fair price agreement it is not mandatory to give an opportunity of hearing and thus on the plea of its violation, the order of suspension is not liable to be set aside.

(ii) Division Bench judgments in Pramod Kumar Vs. State of U.P. and others reported in 2007 (1) ALJ 407 and Harpal Vs. State of U.P. and another reported in 2008 (4) ALJ 10 holding that

opportunity is must does not lay down the correct law.
Division Bench judgment in the case of Gopi Vs. State reported in 2007 (5) ALJ 367 lays down the correct law that grant of opportunity is not necessary."

22. Thus, in view of the aforesaid, this Court does not find any substance in the contention raised by the learned counsel for the petitioner that before suspension of the fair price shop agreement, the petitioner was not given opportunity of hearing and thus, the suspension order dated 15.4.2019 was bad in law and is hereby rejected.

23. In the case of *Ashok Kumar Tiwari (supra)*, this Court while relying on the judgment of this Court in the *Puran Singh (supra)* has held that full-fledged inquiry is mandatory for cancelling the fair price shop license. Relevant paragraph of the said judgment is extracted herein-below:-

"Learned counsel for the petitioner has placed reliance upon paragraph 35 of the judgment of the Full Bench of this Court in the case of Puran Singh vs. State of U.P. and others (2010 (3) ADJ 659 (FB)) which reads as under:

"35. Para 4 and 5 of the Government Order clearly permits full-fledged enquiry pursuant to the show cause notice for cancellation and then final decision in the matter. So far the order of suspension is concerned Government Order do not provide any appeal and at the same time there was no contemplation of signing an agreement as was made obligatory pursuant to Distribution Order of 2004."

In view of the decision in Puran Singh (supra) a full-fledged enquiry is necessary before cancelling the agreement and in my view it would require service of the charges, along with material in support of each charge,upon the delinquent. The information about the place and date of enquiry to the delinquent. Recording of statements of persons on whose complaint enquiry has started or in a case of sue motu enquiry, recording of statements of the required persons as per wisdom of the enquiry officer in the presence of the delinquent. Thereafter, each charge has to be discussed and proved separately."

24. In the case of Sanjay Kumar (supra), a coordinate Bench of this Court by placing reliance on the Government Order dated 29.7.2004 has held that it is obligatory upon the authority to hold a full-fledged inquiry against the fair price shop dealer, after serving of the charge sheet with regard to the date and place where the hearing should take place and to give an opportunity of hearing. It was further held that this would be in addition to the show cause notice issued for the purposes of suspension of the license of the fair price shop. It was also held that in view of the Full Bench decision of this Court in the case of *Puran Singh (supra*), if such procedure is not followed, then it would be held that full-fledged inquiry was not conducted as provided in paragraphs 4 and 5 of the Government Order dated 29.7.2004 and the order would be bad in law.

25. It would not be out of place to mention here that the judgment in the case of *Ashok Kumar Tiwari (supra)* and *Sanjay Kumar (supra*) were rendered taking into consideration the Government Orders dated 29.7.2004 and 16.10.2014 and the latest Control Order, 2016 was not considered.

26. In the case of *Smt. Meena Devi (supra*), a coordinate Bench of this Court specifically held after considering the Full

Bench decision of this Court in the case of Puran Singh (supra) that the licensee of a fair price shop is only an agent of the Government engaged for ensuring the equitable distribution and availability of the essential commodities at fair prices. The agent having signed the license/agreement is bound by the conditions mentioned therein including all such conditions which the Government chooses to impose during the currency of such license. A need for fairness in procedure adopted for suspension and cancellation of such license/agreement would not mean that these licenses fall within the category of a fundamental right to carry on the business as provided under Article 19(i)(g) of the Constitution of India. In the said judgment, judgments passed in the case of *Ashok Kumari Tiwari (supra*) and *Sanjay Kumar* (supra) have been distinguished in paragraphs 19 to 21, which read as under:-

"19. It is this observation of the Hon'ble Full Bench regarding the "fullfledged inquiry" after suspension order and show cause notice is issued, which has been interpreted by the Co-ordinate Benches of this Court to include giving a copy of inquiry report, copies of the statements of witnesses/villagers fixing date, time and place of hearing for such cross-examination as the licensee wishes to carryout of such villagers, besides examination of documentary evidence submitted by him, before the Licensing Authority can pass the order of cancellation.

20. The judgment rendered by the Full Bench of this Court was in reference to the questions referred to it. All observations made by the Full Bench in the aforecited judgments in Puran Singh (supra) are therefore to be taken into consideration in the context in which the reference was made and decided. The Full Bench decision of this Court had examined paragraphs-4 and 5 of the government order dated 29.07.2004 in the context of the reference made to it. The language of paragraph - 4 refers to full opportunity of hearing being given to the licensee in the inquiry to be conducted after suspension order is passed. The inquiry is to be completed within a maximum period of one month necessarily. The final order was to be passed by the Licensing Authority on merits after making a clear mention therein that the concerned licensee had been given opportunity of hearing and in case he did not co-operate in the inquiry, a mention was to be made of the notices served upon him including the notice giving the final opportunity in case he avoided the inquiry.

21. The Hon'ble Full Bench had referred to the object of issuing affair price shop license and appointing agents for distribution of essential commodities and had emphasized that a license is given for the benefit of ordinary citizens, the beneficiaries of the Public Distribution System."

27. In the aforesaid case, this Court has held that observation in paragraph 35 of the judgment in the case of *Puran Singh* (supra) that a full-fledged inquiry in the matter of misconduct of a licensee in distribution of scheduled commodities should be held, does not mean that full-fledged opportunity to the licensee to cross-examine the witnesses fixing, date, time and place of the inquiry etc. as provided in respect of disciplinary inquiry against Government servants.

28. Learned Single Judge in paragraph 50 of the aforesaid judgment had held that judgments rendered by a coordinate Bench of this Court in the case

of *Gyan Singh Vs. State of U.P. and others*, decided on 12.9.2012, *Ashok Kumar Pandey Vs. State of U.P. and others*, decided on 13.12.2012 and *Abu Baker Vs. State of U.P. and others, 2010 (6) ADJ 339* were clearly per incuriam as no such provision exists in the Government Order dated 29.7.2004 for fixing date, place and time for inquiry/oral hearing and giving opportunity to the licensee to cross-examine the witnesses. Paragraphs 50 and 51 of the said judgment are extracted herein-below:-

"50. The judgment rendered by Coordinate Benches before the issuance of this order dated 16th October, 2014 Viz. ***Gyan Singh Vs. State of U.P. and others*** *decided on 12.09.2012, in* ***Ashok Kumar Pandey Vs. State of U.P. and others*** *decided on 13.12.2012 on the basis of the judgment in* ***Abu Baker Vs. State of U.P. and others****, reported in 2010 (6) ADJ 339 decided on 23rd of February, 2010,which is the first judgment wherein relying upon* ***D.K. Yadav Vs. J.M.A. Industries, (1999) 3 SCC 259*** *and* ***National Building Construction Corporation Vs. S. Raghunathan: (1998) 7 SCC 66****, the observation was made that the inquiry was vitiated because the statements of Cardholders were recorded behind the back of licensee and neither copies of the statements of the aforesaid witnesses was furnished to the petitioner nor he was given any opportunity to cross-examine the witness so examined, were clearly per incuriam as no such provision existed in the government order dated 29.07.2004 at the time for fixing date, place and time of inquiry/oral hearing and giving opportunity for the licensee to cross examine the witnesses/ complainants.*

51. This Court is of the considered opinion that a fair price shop licence is only an agent for distribution of scheduled commodities under the Public Distribution System. Such a licensee being only an agent acts for the principal i.e. the Government with a fixed rate of commission on the amount of allocation of essential commodities and their distribution by weight. The Public Distribution System has been envisaged by the government only to help the poor and needy. It is honest tax-payer's money which is used to subsidize the price of such essential commodities so that they come within the reach of poor and needy and they are able to feed themselves and their family in a respectable fashion and are not led to mendicancy and starvation. The principal remaining the State Government, and the licensee being only an agent, the principal is entitled to take away the licence in case of irregularity in distribution. Of course, there should exist valid reasons for taking away of such licence and some opportunity of hearing is required to be given to the agent in case of complaints being received against him. However, there is no fundamental right nor any Constitutional right for such a licensee akin to Article 311 of the Constitution of India. Even in the case of government servants protected under Article 311 of the Constitution of India the degree of proof required for establishment of guilt is that of "preponderance of probability."

29. In the case of Najakat Ali (supra), a coordinate Bench of this Court considered and decided the following two questions as mentioned in paragraph 23, which read as under :-

"(I) Whether after issuance of Control Order 2016, having been issued in the light of Act of 2013 and Act of 2016, the earlier

Government Order of 2004 stood superseded and repealed?

(ii) Whether any benefit can be extended to the dealers/licensee of the Government Orders dated 29.7.2004 and 16.10.2014, when their license has been cancelled under the new scheme of 2016, which provides for complete mechanism in itself?"

30. Central Government has enacted National Food Security Act, 2013 (for short "the Act of 2013') keeping in mind Article 47 of the Constitution of India, which mandates the States with duty to raise the level of nutrition and standard of living and to improve public health. Act of 2013 has been implemented with the object of providing food and nutritional security to the citizens by ensuring access to adequate quantity of food at affordable price in order to ensure life with dignity. The Government has implemented Targeted Public Distribution System under which the food-grains are provided to the "eligible household" at subsidized rates which includes people Below Poverty Line, including Antyodaya Anna Yojana and Above Poverty Line households. The State Government to implement the provisions of the Act of 2013, has framed Uttar Pradesh State Food Security Rules, 2015. The Central Government thereafter has enacted The Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

31. After the enactment of Act of 2013 and the Rules by the State Government in 2015, the State Government has issued Control Order, 2016 superseding the earlier Government Order dated 20.12.2004 as well as other Government Orders.

32. Sub-clause (7) of Clause 8 of the Control Order, 2016 provides mechanism for inquiry in case of irregularity of distribution by a fair price shop owner including the provision of suspension etc., which reads as under :-

*"8. **Operation of fair price shops**-- (1) The fair price shop owner shall disburse food grains to the ration card holders as per his entitlement under the Targeted Public Distribution System.*

(2) A ration card holder may draw his full entitlement of food grains in more than one installment.

(3) The fair price shop owner shall not retain the ration cards after the supply of the food grains.

(4) The license issued by the State Government to the fair price shop owner shall lay down the duties and responsibilities of the fair price shop owner, which shall include, inter alia, -

(i) Sale of food grains as per the entitlement of ration cardholders under the Targeted Public Distribution System at the prescribed retail issue price;

(ii) display of information on a notice board at a prominent place in the shop on daily basis regarding (a) entitlement of food grains, (b) scale of issue, (c) retail issue prices, (d)timings of opening and closing of the fair price shop including lunch break, if any, (e) stock of food grains received during the month, (f) opening and closing stock of food grains, (g) the mechanism including authority for redressal of grievances with respect to quality and quantity of food grains under the Targeted Public Distribution System and (h) toll-free helpline number;

(iii) maintenance of the records of ration card holders, e.g. stock register, issue or sale register shall be in the form prescribed by the State Government including in the electronic format in a progressive manner;

(iv) display of samples of food grains being supplied through the fair price shop;

(v) production of books and records relating to the allotment and distribution of food grains to the inspecting agency and furnishing of such information as may be called for by the designated authority;

(vi) the shop keeper shall in the end of each month submit a detailed description of receipt of food grain and other essential commodities, actual distribution during the month and remaining balance of stock to designated officer who will send a compilation of all such certificates under his area of appointment to the competent authority;

(vii) opening and closing of the fair price shop as per the prescribed timings displayed on the notice board.

(5) Any ration card holder desirous of obtaining extracts from the records of a fair price shop owner may make a written request to the owner along with the deposit of the fees specified by order by the State Government. The fair price shop owner shall provide such extracts of records to the ration card holder within fourteen days from the date of receipt of a request and the said fee:

Provided that the State Government may prescribe the period for which the records are to be kept for providing the ration cardholder by the fair price shop owner.

(6) The State Government shall prescribe the procedure to be followed by the designated authority in cases where the fair prices hop owner does not provide the records in the manner referred in sub-clause (5) to the ration card holder in the stipulated period and the designated authority in each case shall ensure that the records are provided to the ration card holder without any undue delay.

(7) The Competent Authority shall take prompt action in respect of violation of any condition of license including any irregularity committed by the fair price shop owner, which may include suspension or cancellation of the fair price shop owner's license.

An inquiry regarding irregularities in distribution by a fair price shop owner shall be conducted by the Designated officer or by the District Magistrate. After inquiry, if the license of fair price shop owner is suspended along with a show cause notice by the competent authority, then the reply/explanation of show cause notice by fair price shop owners will be examined by an officer atleast one rank above the inquiry officer. If the preliminary enquiry had been conducted by a district level officer, then the explanation by fair price shop owners shall be examined by another district level officer.

(8) The maximum period within which proceedings relating to enquiry into irregularities committed by the fair price shop owner shall be concluded, resulting in any action as under sub-clause (7) shall be two months.

(9) In case of suspension or cancellation of the agreement,the Competent Authority shall make alternative arrangements for ensuring uninterrupted supply of food grains to the eligible households:

Provided that in case of cancellation of the agreement of the fair price shop owner, new agreement shall be issued within a month of cancellation.

(10) The State Government shall furnish complete information on action taken against a fair price shop owner under this clause annually to the Central Government in the format at Annexure-V."

33. A coordinate Bench of this Court in the case of Najakat Ali (supra) has held that after issuance of the Control Order,

2016, the earlier Government Orders of 2004, 2014 and 2015 stood repealed and would not occupy the field of laying down the procedure with respect to suspension and cancellation of the fair price shop. The entire procedure has been prescribed in the Control Order, 2016. Now, the inquiry is to be conducted by the designated officer regarding irregularities/malpractices of the dealer as per the provisions of sub-clause (7) of Clause 8 of the Control Order, 2016, which provides that if the license of the fair price shop is suspended, he has to be issued show cause notice and explanation/reply of the show cause notice is to be examined by an officer one rank above the inquiry officer. It has been further held that Puran Singh's (supra) judgment was delivered considering the Government Order dated 29.7.2004, which since has been repealed. In paragraphs 94 to 96, a coordinate Bench of this Court in the aforesaid case held as under :-

"94. As the existence of agent/dealer arise from the agreement executed between them and the State, any failure on their part or term of license being violated, the matter has to be dealt with by the authority within the scope and ambit of the Act/Control Order under which the same has been executed. The argument advanced that the petitioners have vested right is not correct as the license granted to a dealer/agent does not fall within the ambit of fundamental right to carry on their business, as provided under Article 19(1)(g) of the Constitution.

95. While dealing with the matter of suspension or cancellation of a license, the authority have to confine themselves to the violation of the condition of license and sub-clause (7) of Clause 8 of Control Order, 2016 protects the interest of agent/dealer by affording an opportunity once an inquiry is conducted and any material coming on record against the term of condition of license, the same being suspended and a show cause notice is to be issued seeking reply/explanation.

96. The principle of audi alteram partem is complied once the notice is issued and an opportunity is provided to a dealer/agent to submit his reply and the same being considered by the authorities. The claim that a full fledged inquiry be conducted providing opportunity of cross-examination of witness, copy of documents, complaint and consideration of subsequent affidavits, if filed in favour of the dealer, by the authorities cannot be accepted, as it is not a departmental or regular inquiry under Article 311of the Constitution of India and is only a inquiry of summary nature where in case of violation of terms of conditions of license, action is initiated and opportunity, as provided under the Control Order, 2016, is given before the license is cancelled."

34. It has been further held that under the Control Order, 2016, specific provision having been made for consideration of reply/explanation pursuant to the suspension, the requirement of audi alteram partem having been afforded to a dealer appointed under an agreement, can not claim that a regular inquiry to be conducted giving opportunity for examination of documents, cross-examination of witnesses, providing copy of the inquiry report and taking of affidavits, as provided under the departmental inquiry.

35. Thus, this Court does not find substance in the submission of learned counsel for the petitioner that petitioner was not afforded full-fledged inquiry and opportunity of cross-examination etc. was not provided to him and, therefore, the

order passed by the licensing authority and the appellate authority are bad in law. The authorities have to act in accordance with the provisions contained in sub-clause (7) of Clause 8 of the Control Order, 2016. The dealer does not have a vested right to carry on the license of fair price shop. The licensee is an agent of the Government and the distribution of the essential commodities from the fair price shop should be strictly in accordance with the terms and conditions of the license. Any violation of conditions, would result in proceedings for suspension and revocation of such license.

36. Learned counsel for the petitioner has not been able to point out that the procedure prescribed under sub-clause (7) of Clause 8 of the Control Order, 2016 has not been followed or complied with in case of the petitioner.

37. Giving a license for a fair price shop, is a privilege conferred by the State on a person. It is a largesse, which is given of discretion vested in the authority to a person. There are serious allegations against the petitioner, which have been proved during the course of inquiry and, the petitioner was unable to produce any document or evidence in support of his defence in respect of the allegations levelled against him.

38. Two competent authorities under the relevant statute, have not found the case of the petitioner bona fide in respect of his defence regarding the serious allegations and, they have concurrently held that petitioner can not be allowed to run the fair price shop of the Village Panchayat and it has been cancelled. Petitioner does not have any fundamental right for fair price shop license. Petitioner was required to run the fair price shop in accordance with the terms and conditions of the license and the provisions of the Control Order, 2016 issued in this respect. Two competent authorities have found that petitioner was wanting in running the fair price shop and he was not carrying out the terms and conditions of the license properly, therefore, the petitioner's license has been cancelled. This Court while exercising the powers under Article 226 of the Constitution of India, can not re-appreciate the evidence, which has been considered by the two competent authorities and, therefore, this Court does not find any ground for interfering with the impugned orders.

39. Thus, writ petition lacks merit and substance, which is hereby ***dismissed***.

(2022)02ILR A467
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ-C No. 30950 of 2021
With
Writ- C No. 34056 of 2021

Adhoc C/M Sri Kashi Annapurna Vasavi Arya Vyaya Vrudhashramam & Nityanna Satram & Anr. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Vineet Kumar Singh, Sri H.N. Singh (Sr. Adv.)

Counsel for the Respondents:

C.S.C., Sri Kartikeya Saran, Sri Ujjawal Satsangi

Criminal Law - Constitution of India,1950 - Article 226 & 19 (1) (c) - Societies Registration Act, 1860 - Section 25(2) - Validity of Election of Management – no publication inviting objections before finalization of list of members of general body for election of management – Challenge as to what is the basis of finalization of the list of 286 members - impugned order appears to be arbitrary and unreasonable – it is settle by several judgments of this court that such orders which are arbitrary, illegal can always be look into in judicial review – impugned orders liable to be set aside – direction issued to the Assistant Registrar to finalize the list as per law accordingly.(Para 24, 25, 26, 327)

Ordered Accordingly. (E-11)

List of Cases cited:

1. Harshit Agarwal & ors. Vs U.O.I. & ors. (2021 vol. 2 SCC 710)

2. St. of Pun. Vs Bandeep Singh & ors. (2016 vol. 1 SCC 724)

3. Committee of Management, Arya Kanya Pathshala Inter College, Bulandshahar Vs St. of U.P. & ors. – (2011 vol. 2 ADJ 65 (DB))

4. Ratan Kumar Solanki Vs St. of U.P. & ors. (2010 vol. 1 ADJ 262 (DB))

5. Deepak Sharma Vs St. of U.P. & ors. (2002 O Supreme (All) 2628)

6. Achin Jain & ors. Vs Assistant Registrar, Firms, Societies & Chits, U.P., Moradabad & ors. (2006 vol. 3 AWC 2846)

7. Committee of Management of Krishak Sevasamiti, Ghazipur & ors. Vs St. of U.P. & ors. (2009 vol. 1 ADJ 460)

8. Basant Prasad Srivastava & ors. Vs St. of U.P. & ors. (AIR 1994 All 112)

9. Pt. Suraj Pal Sharma & ors. Vs St. of U.P. & ors. (Writ-C No. 21092/2021, decided on 21.10.2021)

10. Katar Singh Baliyan Vs St. of U.P. & ors. (Special Appeal No.355/2019, decided on 26.3.2019)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. As the basic facts, impugned order and legal aspects involved are identical in both the writ petitions, they have been clubbed and heard together and are being decided by this common judgement. The facts recorded in Writ C No. 30950 of 2021 (Adhoc C/M Sri Kashi Annapurna And Another Versus State of U.P. And 6 Others) are being treated to be the leading case.

2. Heard Mr. H.N. Singh, Senior Advocate assisted by Mr. Vineet Kumar Singh, learned counsel for the petitioners' Committee of Management, Mr. Mangala Prasad, Senior Advocate assisted by Mr. Abhishek Dwivedi, learned counsel for the petitioners, Mr. Kartikeya Saran, learned counsel for respondent nos.3 and 4, Mr. Shailendra Singh and Mr. Aseem Mukherjee, learned Standing Counsel for the State-respondents.

3. The writ petition has been filed by the petitioners with the following prayer:-

"(a) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 02.11.2021 passed by the Assistant Registrar, Firms, Societies and Chits, Varanasi so far it denied the membership to 27411 members of the Society and confined its membership to 286 only.

(b) Issue a writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the impugned order referred to above and to

stay all further proceedings consequent thereupon during the pendency of the writ petition before this Hon'ble Court.

(c) Issue a writ, order or direction in the nature of mandamus commanding the respondents to allow further 27411 members of the general body of Society namely Sri Kashi Annapurna Vasavi Arya Vyaya Vrudhashramam and Nityanna Satram,Varanasi apart from 286 members finalized by the Assistant Registrar, Firms, Societies and Chits, Varanasi in the election of the Society to be held under Section 25(2) of the Societies Registration Act, 1860."

4. Brief facts of the case are that "Sri Kashi Annapurna Vasavi Arya Vyaya Vrudhashramam and Nityanna Sataram, Varanasi (hereinafter referred to as "the Society') is a Society duly registered under the provisions of Societies Registration Act, 1860 (hereinafter referred to as the "Act, 1860'). The aforesaid society was initially registered on 10.09.1999 and has been renewed from time to time.

5. As per the bye-laws of the Society, the first Executive Committee will function for the term of five years and this period was liable to be extended for another five years. The founder Committee dated 10.09.1999 functioned for five years and its term was extended for another five years, as such, the founder Committee worked up to 10.09.1999. That as per the bye-laws of the Society amended from time to time, there is no specific provision of induction of person as member of the general body by any resolution either of managing committee, executive committee or general body.

6. Clause 5 of the bye-laws of the Society enunciates that the person, who are from Arya Vysya Community, are eligible for membership of old age home and Sataram and the founder members and any donor, who contributes Rs.25,156/- or more to any existing donations schemes or any other donations schemes, to be introduced in future, shall be a general body member, only after the full payment is realized, thus, the criteria of the membership is only donation to the Society and it is automatic subject to condition that the person is of Arya Vysya Community and has contributed Rs.25,156/- as a donation to the Society.

7. Clause 7 of the bye-laws provides that membership of the general body of the Society is hereditary and in case of death or retirement of the general body member, their legal heirs or nominees will become members, which means that the member of Arya Vysya Society, who has once donated Rs.25,156/- will be considered as member along with his legal heirs.

8. A dispute arose, as the rival set has claimed that, on the basis of alleged election held on 29.7.2012 Jakka Naag Bhushanam was elected as President, as he resigned on 27.07.2013, on the same day, the Committee of Management has co-opted Yakkali Balakrishna Murthy as President. The aforesaid dispute was raised before Assistant Registrar, Firms, Societies and Chits, Varanasi and after hearing the parties, the Assistant Registrar vide order dated 07.09.2016, holding that the term of the Committee of Management of the Society had already expired and no election of the Committee of Management was held on 29.7.2012, hence, there was no question of resignation of Jakka Naag Bhushanam and co-option of Yakkali Balakrishan Murthy. He has further directed to hold the election of the Society in question in terms

of Section 25(2) of the Act, 1860, at Hyderabad Administration office.

9. The Hon'ble Court on 02.08.2017 finally disposed off the writ petition by holding that there was no illegality in the order of the Assistant Registrar but the order dated 07.09.2016 was modified to the extent directing the Assistant Registrar to conduct the fresh election after inviting the objections of the electoral college. For managing the affairs of the Society, an Adhoc Committee was appointed in August, 2017 information of which was given to the Assistant Registrar, Firms, Societies and Chits, Varanasi by the coordinator.

10. A modification application was filed by Yakkali Balakrishna Murthy with a request to modify the order dated 02.08.2017 to the extent that the charge of the President of Committee of Management may be handed to him till the fresh elections are held. The said modification application was dismissed on 20.4.2018.

11. Against the order of the Writ Court dated 20.04.2018, Yakkali Balakrishna Murthy filed Special Appeal No. 495 of 2018 which is still pending and no interim order has been passed therein.

12. In the meantime, Dr. Raj Kumar Verma filed Writ-C No.45743 of 2017 (Dr. Raj Kumar Vemula Vs. State of U.P. and 3 Others) questioning the appointment of Adhoc Committee and the Hon'ble Court vide order dated 22.09.2017 disposed off the writ petition with direction to the Assistant Registrar to dispose off the objections filed by Dr. Raj Kumar Vemula. It was further observed that the Assistant Registrar may ensure that the parties shall not syphon the money of the Society.

13. The Special Appeal Defective No.561 of 2017 was filed against the order dated 16.11.2017, which was allowed by a Division Bench of this Court vide order dated dated 16.11.2017 and the order of the Hon'ble Single Judge, to the effect, that the parties shall not syphon the money of the Society, was set aside.

14. In compliance of the order dated 16.11.2017, the Assistant Registrar, has passed an order dated 14.01.2020 requesting the District Magistrate/Collector, Hyderabad, to nominate an appropriate Election Officer as per the exigency, to conduct the elections of the Society.

15. The aforesaid order was assailed on the ground that responsibility under the statue to determine the list of members is that of Assistant Registrar when he proceeds to exercise his power under Section 25(2) of Act, 1860. Questioning the order dated 14.01.2020 one Gande Ganganna has filed Writ-C No.8618 of 2020 which was disposed off by the judgement and order dated 06.03.2020 directing the Assistant Registrar to finalize the list of the members after obtaining the objections in the matter. A further direction was issued to the Assistant Registrar to convene the election meeting, thereafter, it would be open for him to allow any other responsible officer to preside over the meeting of the election. The Court has further observed that the Adhoc committee arrangement, which was continuing as on date, shall remain subject to fresh elections and the orders passed by the competent authority. It was also expected from the Assistant Registrar to conduct the elections within further period of six weeks, thereafter.

16. Pursuant to the direction of this Hon'ble Court, the Assistant Registrar has proceeded to finalize the list of members of general body and in continuation of the same, respondent nos. 3 to 6 with their joint signatures have submitted a list of 995 members of the general body, as is referred in the meeting of general body dated 28.4.2002. The aforesaid four persons have subsequently filed their objections before the Assistant Registrar on 12.06.2018 separately submitting that they have no objection, if the election is to be held by all founder members and members, who were the members of the Society at the time of amendment of the bye-laws in the year 2002, 2012 and 2015. Thereafter another joint application was submitted by aforesaid respondents annexing the alleged list of 286 members of the Society to which, there is no basis and relying upon the aforesaid, the Assistant Registrar has published a tentative list of 286 members of the general body vide his order dated 20/21.8.2018. An objection to the tentative list was filed by B.N. Vilas, member of Adhoc Committee pointing out that there are more than 25000 members of the Society. The Assistant Registrar fixed 08.10.2021 as the date of hearing, and on the said date, the petitioners have submitted the list of members in 14 volumes which contains the list of members since 1999 to 29.02.2020, which is total 27697 members. The Assistant Registrar has closed the oral hearing on 22.10.2021 and the petitioners have submitted written argument on 25.10.2021 again clarifying the position of the members and have also disclosed that there are total 27697 members, detailing as to how the aforesaid persons became the members of the general body of the Society as per the required bye-laws.

17. On the basis of objections filed by the petitioners as well as respondent nos. 3 to 6, the Assistant Registrar has proceeded to pass impugned order dated 02.11.2021 finalizing the list of 286 members, as was published in the tentative list, inviting objections against the tentative membership.

18. Learned counsel for the petitioners submits that the impugned order dated 02.11.2021 passed by Assistant Registrar finalizing the list of 286 members is arbitrary and wholly unjustified in the eyes of law.

19. The Hon'ble Court vide order dated 06.03.2020 had directed the Assistant Registrar to finalize the list of members after obtaining objections in the matter within a period of two months. However, there is nothing on record to show that any publication in this respect was made to invite objections, which was required to be done, as the objections were to be raised by members coming from five main States i.e. Hyderabad, Varanasi, Tirupati, Sirdi and Haridwar and no information whatsoever was given to the petitioner for filing the objections against the tentative list.

20. Learned counsel for the petitioners further submits that the Assistant Registrar, while finalizing the list of 286 members, has not disclosed as to what is the basis of accepting the claim of the respondents, when once they had initially submitted the list of general body of 995 members. The Assistant Registrar has also not taken into consideration the provisions of the bye-laws as detailed in the aforesaid paragraphs while finalizing the list of 286 members of the general body.

21. Learned counsel for the petitioners then submits that the Assistant Registrar has passed the order, without applying his mind, in an arbitrary manner, by not taking into consideration the objections raised by the petitioners, recording therein that the adhoc committee of the petitioners does not have any locus, ignoring the fact that the constitution of the adhoc Committee for looking after the affairs of the Society, has already been affirmed by various orders of this Court.

22. On the cumulative strength of the aforesaid, the learned counsel for the petitioners submits that it is within the jurisdiction of the Court under Article 226 of the Constitution of India to interfere in such orders which have been passed in an arbitrary manner or are illegal or irrational. In support of the submissions, he has placed the following judgements:-

(i). The Hon'ble Apex Court in the case of ***Harshit Agarwal and Others Vs. Union of India and Others*** reported in ***(2021) 2 SCC 710*** has held as under:-

"10. Judicial review of administrative action is permissible on grounds of illegality, irrationality and procedural impropriety. An administrative decision is flawed if it is illegal. A decision is illegal if it pursues an objective other than that for which the power to make the decision was conferred 1. There is no unfettered discretion in public law2. Discretion conferred on an authority has to be necessarily exercised only for the purpose provided in a Statute. The discretion exercised by the decision maker is subject to judicial scrutiny if a purpose other than a specified purpose is pursued. If the authority pursues unauthorized purposes his decision is rendered illegal. If irrelevant considerations are taken into account for reaching the decision or relevant considerations have been ignored, the decision stands vitiated as the decision maker has misdirected himself in law. It is useful to refer ***to R. vs. St. Pancras Vestry*** *in which it was held: -*

".....If people who have to exercise a public duty by exercising their discretion take into account maters which the Courts consider not to be proper for the exercise of their discretion, then in the eye of law they have not exercised their discretion"."

(ii). The Hon'ble Apex Court in the case of ***State of Punjab Vs. Bandeep Singh and others*** reported in ***(2016) 1 SCC 724*** also held as under:-

"4. There can be no gainsaying that every decision of an administrative or executive nature must be a composite and self sustaining one, in that it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion. It is beyond cavil that any Authority cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned action. If precedent is required for this proposition it can be found in the celebrated decision titled Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi [1978] 2 SCR 272, of which the following paragraph deserves extraction:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later

brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji [1952] 1 SCR 135:

9. .....Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of Explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older".

7. The same principle was upheld more recently in Ram Kishun Vs. State of U.P. (2012) 11 SCC 511. However, we must hasten to clarify that the Government does not have a carte blanche to take any decision it chooses to; it cannot take a capricious, arbitrary or prejudiced decision. Its decision must be informed and impregnated with reasons. This has already been discussed threadbare in several decisions of this Court, including in Sterling Computers Ltd. v. M & N Publications Ltd. (1993) 1 SCC 445, Tata Cellular v. Union of India (1994) 6 SCC 651, Air India Ltd. v. Cochin International Airport Ltd. (2000) 2 SCC 617, B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. (2006) 11 SCC 548, Jagdish Mandal v. State of Orissa (2007) 14 SCC 517."

(iii). This Court in the case of ***Committee of Management, Arya Kanya Pathshala Inter College, Bulandshahar Vs. State of U.P. and others*** reported in ***2011 (2) ADJ 65 (DB)*** has also observed as under:-

"11. The Division Bench in Rajveer Singh's case (supra) had placed reliance on another Division Bench judgment of this Court in the case of Ratan Kumar Solanki vs. State of U.P. reported in 2010(1) Additional District Judge 262 (Division Bench). The Division Bench in Ratan Kumar Solanki's case had elaborately considered the issue in question and after considering laid down that the question as to whether an individual member has locus to challenge the election depends on facts of each case and an individual member may have locus to challenge the election if he is person aggrieved. There is no such proposition that an individual member cannot, in no circumstance, challenge the election of the Committee of Management. The Division Bench in Ratan Kumar Solanki's case (supra), laid down following in paragraphs 23, 24, 25 and 26 of the judgment:-

"23. In Satya Narain Tripathi (supra) the question whether a member of the general body can challenge the election by filing a writ petition was considered by the Hon'ble Single Judge (Hon'ble Janardan Sahai, J.) and his Lordship held that participation either by contesting election or exercising right to franchise is not a fundamental right, but merely a common right originating from the statute or the rules and bye-laws of an association etc. A breach of such statutory rights or right under the rules and regulations can be redressed by the available remedy which the statute or bye-laws provide or by a civil suit where such remedy is not otherwise barred. Where the elections are held under statutory provision, the remedy of challenging the election, if provided under the statute, has to be availed as an alternative remedy which would ordinarily bar the maintainability of a writ petition. The infringement of a right under the bye-laws of the society would not make the writ petition maintainable under Article 226 but in such a case the incumbent would have to

avail remedy either by filing a civil suit or under Section 25 of the Societies Registration Act. His Lordship also observed if there is a breach of a right of a person affecting his right to form an association, which is a fundamental right under Article 19 (1) (c) of the Constitution, in that case or where there is breach of the statute, the writ petition may be maintainable subject to the Court exercising its discretion if an alternative remedy is available. The proposition, therefore, that an individual member cannot challenge an election in any circumstance is not correct. When a writ petition can be maintainable at the instance of an individual member of the general body of the society or the office bearer of the society or by the body itself is a different issue but when an election itself can be challenged is another aspect. Similarly whether a writ petition would be maintainable at the instance of an individual or the collective body and in what circumstances stands on different footings.

24. What is discernible from the above discussion is where the right of an individual is affected or infringed, and, he has no other effective remedy, if such rights of the individual concerned are borne out from the statute or the provision of bye-laws etc. having the flavour of statute, a writ petition at his instance may be maintainable subject to attracting the condition where the Court may decline to interfere namely availability of alternative remedy, delay, laches etc. but where a legal right of an individual is not directly affected, a writ petition expousing the cause of the collective body or other members of the collective body would not be maintainable at the instance of an individual who himself is not directly affected. We may add here that in a given case, if it is found that an election was held by an imposter and he is supported by District Inspector of Schools or other educational authorities, such an action of DIOS as also the election can be challenged by the individual member since it cannot be said that he is not a person aggrieved but whether a writ petition at his instance would be maintainable or he can challenge the election by filing a civil suit etc., would be a different aspect of the matter and has to be considered in each and every case considering the facts, relevant provision and other relevant aspects of the matter.

25. Now coming to the present dispute, we find that here the election was held in accordance with scheme of administration which has been prepared in accordance with 1921 Act and the Regulations framed thereunder and is duly approved by the educational authorities. The petitioner was a contestant in the election. Complaining some irregularities, he made a complaint before District Inspector of Schools who after getting a report from the Authorised Controller and prima facie getting satisfied directed for re-counting of the votes and accepted the request of the petitioner to this extent. But thereafter no re-counting took place. The elections were recognised by the education authorities without such recounting. In these circumstances, it cannot be said that the petitioner is not an aggrieved person or has no locus standi. Whether the writ petition was filed for infringement of a legal or statutory right or a right under bye-laws having force of law is not an issue raised by the respondents in the earlier petition as well as the present one but their basic objection is that the petitioner cannot be said to be an aggrieved person and thus has no locus standi. From the record of the earlier writ petition filed by the petitioner, we find that

the respondents at no point of time raised this issue since the locus standi of the petitioner appellant was writ large. It is a different aspect as to why and in what circumstances, the writ petition was dismissed as having rendered infructuous by observing that term of the Committee of Management has expired. It is the consequential order passed by the DIOS after dismissal of the first writ petition of the petitioner-appellant that he has to file the second writ petition which is concerned with the correctness of the order of DIOS, and in the above facts and circumstances, we find it difficult to subscribe the view as canvassed by the respondents that the petitioner has no locus standi to maintain the writ petition and, therefore, reject the same. We hold that the petitioner is a person aggrieved and has locus standi in the matter.

26. We again clarify that our observations are only confined for the purpose of the present case to the preliminary objection raised on behalf of the respondents that the petitioner-appellant has no locus standi i.e. he is not the person aggrieved. In respect to the wider issue as to when a writ petition can be entertained challenging the validity of an election is a different aspect of the matter and in this respect neither any objection has been raised by the respondents nor the arguments have been advanced, therefore, we are leaving this issue to be considered in some other case at appropriate time."

12. From the proposition as laid down in the above Division Bench judgments, it is clear that the question as to whether an individual member has locus to challenge the election of the Committee of Management depends on facts of each case. In the present case, the objection was raised on behalf of the present appellant, who was respondent to the writ petition, that the writ petition at the instance of respondent No.4, who is alleged to be member of general body, is not maintainable. The Hon'ble Single Judge has accepted the said objection and, in fact, has held that writ petition is not maintain been closed there and there was no occasion for issuing any direction at the instance of a person on whose instance the writ petition was held to be not maintainable. There is no appeal by the writ petitioner challenging the said view taken by the Hon'ble Single Judge. Thus it is not necessary for us to proceed to examine as to whether in the present case writ petition could have been entertained at the instance of respondent No.4 who alleged himself to be member of the general body. It is suffice to say that Hon'ble Single Judge having taken the view that the writ petition was not maintainable at the instance of respondent No.4, the matter should have been closed there and there was no occasion for issuing any direction at the instance of a person on whose instance the writ petition was held to be not maintainable."

(iv). This Court in the case of ***Ratan Kumar Solanki Vs. State of U.P.*** and others reported in ***2010 (1) ADJ 262 (DB)*** has also held as under:-

23. In Satya Narain Tripathi (supra) the question whether a member of the general body can challenge the election by filing a writ petition was considered by the Hon'ble Single Judge (Hon'ble Janardan Sahai, J.) and his Lordship held that participation either by contesting election or exercising right to franchise is not a fundamental right, but merely a common right originating from the statute or the rules and bye-laws of an association etc. A breach of such statutory rights or right under the rules and regulations can be

redressed by the available remedy which the statute or bye-laws provide or by a civil suit where such remedy is not otherwise barred. Where the elections are held under statutory provision, the remedy of challenging the election, if provided under the statute, has to be availed as an alternative remedy which would ordinarily bar the maintainability of a writ petition. The infringement of a right under the bye-laws of the society would not make the writ petition maintainable under Article 226 but in such a case the incumbent would have to avail remedy either by filing a civil suit or under Section 25 of the Societies Registration Act. His Lordship also observed if there is a breach of a right of a person affecting his right to form an association, which is a fundamental right under Article 19 (1) (c) of the Constitution, in that case or where there is breach of the statute, the writ petition may be maintainable subject to the Court exercising its discretion if an alternative remedy is available. The proposition, therefore, that an individual member cannot challenge an election in any circumstance is not correct. When a writ petition can be maintainable at the instance of an individual member of the general body of the society or the office bearer of the society or by the body itself is a different issue but when an election itself can be challenged is another aspect. Similarly whether a writ petition would be maintainable at the instance of an individual or the collective body and in what circumstances stands on different footings.

24. What is discernible from the above discussion is where the right of an individual is affected or infringed, and, he has no other effective remedy, if such rights of the individual concerned are borne out from the statute or the provision of bye-laws etc. having the flavour of statute, a writ petition at his instance may be maintainable subject to attracting the condition where the Court may decline to interfere namely availability of alternative remedy, delay, laches etc. but where a legal right of an individual is not directly affected, a writ petition expousing the cause of the collective body or other members of the collective body would not be maintainable at the instance of an individual who himself is not directly affected. We may add here that in a given case, if it is found that an election was held by an imposter and he is supported by DIOS or other educational authorities, such an action of DIOS as also the election can be challenged by the individual member since it cannot be said that he is not a person aggrieved but whether a writ petition at his instance would be maintainable or he can challenge the election by filing a civil suit etc., would be a different aspect of the matter and has to be considered in each and every case considering the facts, relevant provision and other relevant aspects of the matter."

(v). This Court in the case of ***Deepak Sharma Vs. State of U.P. and others***, reported in 2005 0 Supreme(All) 2628 has also held as under:-

"45. The parameters of the Court's power have been analyzed by the Hon'ble Supreme Court in Commissioner of Income-tax, Bombay & Ors,. Vs. Mahindra & Mahindra Ltd. & Ors., AIR 1984 SC 1182 as under-:

"By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled and it would be redundant to recapitulate the whole catena of decisions of this Court commencing from Barium Chemicals, AIR

1967 SC 295 case on the point. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. This Court in one of its later decisions in Smt. Shalini Soni Vs. Union of India, AIR 1981 SC 431, has observed thus: "It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote". Suffice it to say that the following passage appearing at pages 285-86 in Prof. de Smith's treatise "Judicial Review of Administrative Action' (4th Edn.) succinctly summarises the several principles formulated by the Courts in that behalf thus: "The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations, must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, is it possible to differentiate with precision the grounds of invalidly contained within each category".

46. In State of U.P. & Ors., Vs. Renusagar Power Co. & Ors,. AIR 1988 SC 1737 it was held that exercise of administrative power will be set aside if there is a manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary.

47. The famous "Wednesbury Case" Associated Provincial Picture Houses Ltd. Us. Wednesbury Corp. (1947) 2 All ER 680 (CA) is considered to be the landmark in so far as the basic principles relating to judicial review of administrative or statutory direction are concerned. We quote a passage from the judgment of Lord Greene which is as follows:-

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself

properly in law. He must call his own attention to the matters, which he is bound to consider. He must exclude from his consideration matters, which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority..... . In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

48. The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in Council of Civil Service Unions Vs. Minister for the Civil Service 1984 (3) Al. ER. 935, (commonly known as CCSU case) as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in this case as follows:-

"..... Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality', the second "irrationality' and the third "procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community."

Lord Diplock explained "irrationality' as follows:

"By "irrationality' I mean what can by now be succinctly referred to as "Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

49. In Union of India & Anr,. Vs. G.Ganayutham (1997) 7 SCC 463 the Supreme Court after referring to the aforesaid two cases namely Wednesbury case and CCSU case held:-

"We are of the view that even in our country-in cases not involving fundamental freedoms-the role of our courts/tribunals in administrative law is purely secondary and while applying Wednesbury and CCSU principles to test the validity of executive action or of administrative action taken in exercise of statutory powers, the courts and tribunals in our country can only go into the matter, as a secondary reviewing court to find out if the executive or the administrator in their primary roles have arrived at a reasonable decision on the material before them in the light of Wednesbury and CCSU tests. The choice of the options available is for the authority; the court/tribunal canot substitute its view as to what is reasonable."

50. In Indian Railway Construction Co. Ltd. Vs. Ajay Kumar AIR 2003 SC 1843 the Hon'ble Supreme Court held :-

"It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. .....If a power (whether legislative or

administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated."

51. In People's Union for Civil Liberties & Anr. Vs. Union of India & ors., AIR 2004 SC 456 while dealing with the same issue, the Hon'ble Supreme Court observed as under:-

"The jurisdiction of this Court in such matter is very limited. The Court will not normally exercise its power of judicial review in such matters unless it is found that formation of belief by the statutory authority suffers from mala fide, dishonesty or corrupt practice. The order can be set aside if it is held to be beyond the limits for which the power has been conferred upon the authorities by the Legislature or is based on the grounds extraneous to the legislation and if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction required thereunder."

52. In State of N.C.T. of Delhi & Anr. Vs. Sanjeev alias Bittoo (2005) 5 SCC 181 the Hon'ble Supreme Court held as follows:-

"One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality' the second "irrationality' and the third "procedural impropriety'..... The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality, and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient."

53. The principles applied in judicial review of administrative decisions have also been considered by the Hon'ble Supreme Court in Tata Cellular Vs. Union of India AIR 1996 SC 11 and the same are as follows:-

"(1) The modern 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 fairplay 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."

54. In Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal

Corporation & Ors,. AIR 2000 SC 2272 it was held by the Hon'ble Supreme Court:-

"Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide."

55. In Air India Ltd. Vs. Cochin International Airport Ltd. & Ors,. AIR 2000 SC 801 the Hon'ble Supreme Court held as follows:-

"Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

56. The decisions referred to by us clearly highlight the parameters of the Court's power of judicial review of administrative action or decision. The jurisdiction of the Courts in such a matter is very limited. The order can be set-aside if it is based on extraneous grounds or there are no grounds at all for passing it or the grounds are such that no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from mala fide, dishonesty or corrupt practice. In other words the authority must act in good faith. This apart, even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 of the Constitution with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference that the Court should intervene."

23. On the other hand, learned counsel for the respondents as well as learned Standing Counsel submit that it is well settled proposition of law that in proceeding under Article 226 of the Constitution of India Courts should not interfere with election process and finalisation of list is not amenable to challenge in writ jurisdiction. It has also been observed in various judgements of this Court that the dispute regarding correctness of such list which is highly disputed can be decided only by Civil Court. In support of the aforesaid submissions, they have relied upon the several judgements, which are as follows:-

(i). This Court in the case of ***Achin Jain and others Vs. Assistant Registrar, Firms, Societies and Chits, U.P., Moradabad and others***, reported in ***2006 (3) AWC 2846*** has held as under:-

"9. I am supported in my view by judgment of this Court in (1993) 2 UPLBEC 1333, Basant Prasad Srivastava and others Vs. State of U.P. and others, in which it has been held that where in the educational institution the election/finalisation of election process of Committee of Management is challenged under Article 226, the writ petition under Article 226 would not be maintainable and the only remedy in such cases is by filing election petition or filing civil suit. Paragraph 4 of the aforesaid judgment is quoted as under:

"The learned Single Judge has observed that it was well settled proposition of law that in proceeding under Article 226 of the Constitution Courts should not interfere with election process and finalisation of list is not amenable to challenge in writ jurisdiction. It has also been observed that dispute regarding correctness of voters list is a highly disputed question of fact which can be decided only by Civil Court. With these observations the learned Single Judge directed that the result of the be declared forthwith and further steps be taken in accordance with law."

(ii). This Court in the case of ***Committee of Management of Krishak Sevasamiti, Ghazipur and Ors. Vs. State of U.P. and Ors***., reported in ***2009 (1) ADJ 460*** has also held as under:-

"17. Contrary to it, Sri P.N. Saxena, learned counsel appearing for respondent no.5 has tried to justify the impugned order dated 27.10.2008 passed by the Prescribed Authority in exercise of powers under Section 25(1) of Societies Registration Act, 1860. Before making submission on merits Sri Saxena has raised preliminary objection about the maintainability of writ petition. He submitted that by impugned order the Prescribed Authority has decided the dispute of members of general body of society and directed to hold fresh election on the basis of valid members of society. The nature of dispute raised in the writ petition involves factual question which requires appreciation on the basis of material evidence on record. Therefore, under Article 226 of the Constitution of India this Court cannot go into factual dispute and take different view in the matter than that of taken by the Prescribed Authority on the question of validity of members of general body of society, which constitutes electoral college for holding election of governing body of society, therefore, the writ petition filed by the petitioners is liable to be dismissed on this ground alone and for adjudication of the question in controversy involved in the case the only course open to the petitioners is to take re-course of civil suit before competent court having jurisdiction to decide such civil suit. The submissions of Sri P.N. Saxena, learned counsel for respondent no.5 appears to have substance and deserves to be accepted."

(iii). This Court in the case of ***Basant Prasad Srivastava and Ors. Vs. State of U.P. and Ors***., reported in ***AIR 1994 All 112*** has also held as under:-

"4. .....in proceeding under Art. 226 of the Constitution Courts should not interfere with election process and finalisation of list is not amenable to challenge in writ jurisdiction. It has also been observed that dispute regarding correctness of voters' list is a highly disputed question of fact which can be decided only by Civil Court."

(iv). This Court in the case of ***Pt. Suraj Pal Sharma And 3 Others Vs. State of U.P. And 2 Others***, decided on 21.10.2021 in Writ-C No. 21092 of 2021 has held as under:-

"15. This Court finds that no interference can be made in a writ petition for contesting the validity of the claim of members and the electoral college finalised by Assistant Registrar and the remedy open for petitioners is either for filing a civil suit or election petition."

(v). In the case of ***Katar Singh Baliyan Vs. State of U.P. And 6 Others***, decided on 26.3.2019 in Special Appeal No.355 of 2019, this Court has held as under:-

" .....Assistant Registrar was not competent enough to go into the question of

determination of membership of the Society again when this Court had specifically directed that in the event of any dispute subsisting after finalization of the list by the Assistant registrar, the parties would take recourse to the proceedings of a civil suit."

24. The Court finds that there is no publication inviting objections before finalizing the list of members of general body and the order has been passed without taking into consideration the objections as filed by the petitioners and it has also not been disclosed as to what is the basis of finalizing the list of 286 members, hence, the orders appears to be arbitrary and unreasonable.

25. With respect to the power of this Court regarding judicial review of such order, it has already been held in several judgements of this Court that such order which are arbitrary, illegal can always be looked into.

26. In such facts and circumstances of the case, the impugned order dated 02.11.2021 is set aside. It is directed that the Assistant Registrar may after inviting objections and considering the same finalize the list of members of general body in accordance with law, within a period of three months from the date of certified copy of this order.

27. It is made clear that the Court has not looked into the maintainability of the writ filed by Yerra Prakash Gupta and others in Writ-C No.34056 of 2021

Ref.:-Civil Misc. Correction Application

1. Heard the learned counsel for the parties.

2. This application has been filed for seeking correction in the order dated 22nd December, 2021.

3. Learned counsel for the applicant submits that inadvertently, the name of the States, as occurring in the second and third lines of nineteenth paragraph of internal page nos. 5 and 6 of the order dated 22nd December, 2021, have wrongly been transcribed as "Hyderabad, Varanasi, Tirupati, Sirdi and Haridwar", whereas the correct name of the States as "**Andhra Pradesh, Telangana, Karnataka, Tamil Nadu and Maharashtra**". He, therefore, submits that the aforesaid mistake occurring in the order dated 4th January, 2022 be corrected accordingly.

4. Prayer made for is bona fide. Accordingly, the same is allowed.

5. The full name of the States, as occurring in the second and third lines of nineteenth paragraph of internal page nos. 5 and 6 of the order dated 22nd December, 2021, shall be read as "**Andhra Pradesh, Telangana, Karnataka, Tamil Nadu and Maharashtra**" in place of "Hyderabad, Varanasi, Tirupati, Sirdi and Haridwar".

6. This correction shall form part of the earlier order dated 22nd December, 2021.

7. With the aforesaid directions, the present correction application stands finally disposed of.

(2022)02ILR A482
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2021

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-C No. 33258 of 2016

Acharya Narendradeo Smarak Samiti & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajesh Kumar Singh, Sri R.K. Ojha

Counsel for the Respondents:
C.S.C., Sri G.K. Singh, Sri Santosh Kumar Singh Paliwal, Sri V.K. Singh, Sri Hritudhwaj Pratap Sahi

क. भारतीय संविधान – अनुच्छेद 226 – रिट (आज्ञापत्र) याचिका – पोशणीयता – संस्थागत विवाद – केवल किसी एक सदस्य द्वारा आज्ञापत्र याचिका दाखिल – प्रभाव – कब केवल किसी एक सदस्य द्वारा चुनाव प्रक्रिया को चुनौती दी जा सकती है – सिद्धान्त प्रतिपादित – अभिनिर्धारित किया गया, सामान्य रुप से किसी समिति के चुनाव को किसी एक सदस्य द्वारा आज्ञापत्र याचिका के माध्यम से चुनौती नही दी जा सकती है, परन्तु यदि उस सदस्य का कोई अधिकार प्रभावित हुआ है या उसके अधिकार का उल्लंघन हुआ है और उसके पास कोई प्रभाव ाली उपचार नहीं है, तो ऐसे सदस्य द्वारा दाखिल चुनाव प्रक्रिया को चुनौती देने वाली आज्ञापत्र याचिका पोशणीय हो सकती है। (पैरा 5.2)

ख. सोसाइटी रजिस्ट्रे ान अधिनियम, 1860 – धारा 25 (1) – सदस्यता विवाद – पूर्व में उच्च न्यायालय ने सहायक निबन्धक द्वारा जारी सूची निरस्त किया था और विहित प्राधिकारी को गुण–दोश पर नवीन आदे ा पारित करने का निर्दे ा जारी की गयी थी – सदस्य की वैधता के सवाल पर कोई विवेचना एवं निश्कर्श नहीं – प्रभाव – अभिनिर्धारित किया गया, सदस्य की वैधता का गुण–दोश पर विवेचना, प्रकरण के गुण–दोश पर निस्तारण के लिए आव यक – सदस्यों की संख्या बढ़ाने और जोड़ने की कार्यवाही का न तो उल्लेख किया गया है, न ही कोई विवेचना और न ही कोई निश्कर्श दिया गया है – विहित प्राधिकारी द्वारा उच्च न्यायालय की टिप्पणी को ध्यान में रखकर विधिसंगत निर्णय लेना चाहिए था, किन्तु आक्षेपित आदे ा में ऐसा नहीं किया गया है – उच्च न्यायालय ने आक्षेपित आदे ा को विधि विरुद्ध घोशित किया। (पैरा 5.3, 6.4, 7 एवं 8)

रिट याचिका अनुज्ञात (एलाउड) (E-1)

<u>उल्लेखित पूर्व निर्णयों की सूची:–</u>

1. कमेटी ऑफ मैनेजमेण्ट, आर्य कन्या पाठ ााला इण्टर कालेज, बुलन्द ाहर बनाम उत्तर प्रदे ा राज्य एवं अन्य; 2011 (2) ए.डी.जे. 65 द्विन्यायाधी ा पीठ

2. राम प्यारे लाल बनाम उत्तर प्रदे ा राज्य एवं अन्य; 2015 (3) ए.डब्लू.सी. 3140

3. बनवारी लाल कंचल बनाम डॉ0 भारतेन्दु अग्रवाल एवं अन्य; 2019 (12) ए.डी.जे. 235 द्विन्यायाधी ा पीठ

4. कमेटी ऑफ मैनेजमेण्ट, श्री कच्चा बाबा इण्टर कालेज, वाराणसी एवं अन्य बनाम रीजनल कमेटी, पंचम मण्डल, वाराणसी एवं अन्य; 2007 (4) इ.एस.सी. 2500

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

आक्षेपित आदेश

1. वर्तमान आज्ञापत्र याचिका, प्रार्थी द्वारा उप-जिलाधिकारी सदर, आज़मगढ़ द्वारा धारा 25(1) सोसाइटी रजिस्ट्रीकरण अधिनियम, 1860 (आगे संक्षेप में अधिनियम 1860' को उल्लेखित किया जायेगा।) के अन्तर्गत पारित आदेश, दिनांक 30.06.2016 से व्यथित होकर दायर की गई है, जिसके द्वारा निम्न आदेश पारित किया गया है:-

"अतः उपरोक्त विवेचना के आधार पर संस्था के प्रबन्धकारिणी समिति का निर्वाचन जिसमें लालती देवी को प्रबन्धक तथा राजेश सिंह को संस्था का अध्यक्ष निर्वाचित किया गया, सर्वथा सही एवं विधि सम्मत है। मा0 उच्च न्यायालय के आदेश दिनांक 18.8.2015 के अनुक्रम में उपरोक्त सन्दर्भ निस्तारित किया जाता है तथा आदेश दिया जाता है कि प्रथम पक्ष लालती देवी द्वारा प्रस्तुत सामान्य साधारण सदस्यों की सूची व निर्वाचित प्रबन्धकारिणी समिति की सूची के अनुरुप पंजीयन कार्यवाही की जाये। आदेश की प्रति के साथ पत्रावली अनुपालन हेतु सहायक निबन्धक फर्म्स सोसायटी एवं चिट्स आज़मगढ़ को भेजी जाय। बाद अनुपालन इस न्यायालय की पत्रावली संचित अभिलेखागार की जाय।"

<u>प्रकरण के तथ्य:-</u>

2.1 आचार्य नरेन्द्र देव स्मारक समिति, बरहलगंज अधिनियम, 1860 के धारा 21 के

अन्तर्गत एक पंजीकृत संस्था है, जो एक गैर वित्तीय प्राप्त शिक्षा संस्थान चलाती है। समिति की एक नियमावली है तथा आचार्य नरेन्द्र देव स्मारक विद्या मन्दिर बरहलगंज, आज़मगढ़ की एक प्रशासन योजना भी है।

2.2 समिति का अन्तिम चुनाव अविवादित रुप से 01.12.1999 को 5 वर्ष के लिए हुआ था। श्री रन्जीत सिंह प्रबन्धक, श्री जय प्रकाश उप प्रबन्धक एवं अमला सिंह अध्यक्ष के पद पर निर्वाचित हुए थे। प्रार्थी संख्या 2 (श्री गिरजा प्रसाद) का चुनाव एक सदस्य के पद पर हुआ था।

2.3 श्री रन्जीत सिंह का निधन 02.11.2002 को हुआ, तब तक वो प्रबंधक के पद पर कार्य करते रहे। तद्पश्चात् श्री जय प्रकाश को कथित रुप से उप प्रबंधक का कार्य करना चाहिए था, परन्तु श्रीमती ललिता देवी (पत्नी स्वर्गीय श्री रन्जीत सिंह) कथित व अप्रत्यक्ष रुप से प्रबंधक का कार्य करती रही। उन्होने अपने नाम से प्रबंधक के रुप में सदस्यों की सूची सहायक निबन्धक को प्रेषित करी जो 2013-2014 के लिये सूचीबद्ध भी हो गयी। उसमें उपरान्त सदस्यों की सूची में फेर बदल भी हुआ। जिस पर सहायक निबन्धक ने एक सूचना पत्र (नोटिस) डा0 रामाश्रय प्रसाद गुप्ता व श्री उदा शर्मा दिनांक 14.02.2014 को प्रेषित किया जिसका विवरण निम्न है:

"उपर्युक्त विषयक नामक समिति में श्रीमती लालती देवी ने प्रबन्धक/मंत्री की हैसियत से प्रपत्र प्रस्तुत करते हुए प्रबन्धकारिणी समिति की सूची वर्ष 2013-14 के कोषाध्यक्ष पद एवं प्रबन्धकारिणी तथा श्री उदा शर्मा को सदस्य पद एवं प्रबन्धकारिणी से हटा दिया गया है।

अतः उक्त निष्कासन के सम्बन्ध में आप लोगों को किसी प्रकार की कोई आपत्ति हो तो अधोहस्ताक्षरी के कार्यालय में दिनांक 21.02.2014 तक अपनी आपत्ति प्रस्तुत कर सकते हैं। अन्यथा पत्रावली में प्राप्त प्रपत्रों के आधार पर अग्रिम कार्यवाही सम्पन्न कर ली जायेगी।"

2.4 उपरोक्त सूचना पत्र (नोटिस) का कोई उत्तर न मिलने के कारण सदस्यों की सूची के फेर बदल को पंजीकृत कर लिया गया। इसके उपरान्त पुनः सदस्य सूची में फेर बदल को निबन्धक के समक्ष 05.06.2014 को एक आवेदन के साथ संलग्नन श्रीमति ललिता देवी के द्वारा प्रेषित किया गया, जिस पर पुनः एक सूचना पत्र (नोटिस) दिनांक 06.06.2014 अमला सिंह व दीना नाथ ज़िनके नाम हटाये गये थे, को प्रेषित किया गया, परन्तु प्रतिवेदन, किसी उत्तर की अनुपस्थिति के कारण मान्य कर लिया गया।

2.5 अमला सिंह जो एक आजीवन सदस्य थी, उन्होंने उनके व दीना नाथ, राम आश्रय सिंह, कपिल देव सिंह व उदा शर्मा, सदस्यों के नामों को सदस्यता सूची से कथित रुप से गलत तथ्यों के आधार पर हटाने के विरुद्ध, एक आवेदन 14.07.2014 को सहायक निबन्धक के समक्ष प्रस्तुत करा। इसके उपरान्त अन्य निवेदन दिनांक 06.08.2014, 20.08.2014, 08.09.2014, 06.02.2015 को पुनः प्रस्तुत करे। सहायक निबन्धक ने आदेश दिनांक 02.06.2015 के अंतर्गत समिति को चुनाव कराने का आदेश पारित किया तथा आपत्ति भी आमंत्रित करी गयी। तद्उपरान्त सहायक निबन्धक ने आदेश दिनांक 03.08.2015 द्वारा 14 वैध एवं अर्ह सदस्यों की विधि मान्य सदस्यता सूची का निर्धारण किया गया तथा निर्वाचन कार्यवाही कराने का आदेश पारित किया।

2.6 उपरोक्त आदेश दिनांक 03.08.2015 के विरुद्ध एक आज्ञापत्र याचिका सं0 44623/2015 श्रीमती ललिता देवी व अन्य द्वारा, इस न्यायालय में दायर की गयी, जो आदेश दिनांक 18.08.2015 द्वारा निस्तारित की गयी तथा आदेश दिनांक 02.06.2015 व 03.08.2015 निरस्त किये गये तथा प्रकरण, विहित प्राधिकारी

के समक्ष समस्त पक्षों को सुनकर उचित निर्णय पारित करने के लिये प्रति प्रेषित कर दिया गया।

2.7 इसी दौरान अमला सिंह का निधन 13.12.2015 को हो गया। मृत्यु पूर्व अमला सिंह ने कथित रुप से एक नोटरी द्वारा सत्यापित हल्फनामा द्वारा गिरजा प्रसाद (आवेदक सं0 2) को सभी विधिक कार्यवाही की पैरवी के लिये नियुक्त कर दिया था।

2.8 विहित प्राधिकारी ने सभी पक्षों को सुनकर आक्षेपित आदेश दिनांक 30.06.2016 द्वारा आदेशित किया कि -

"संस्था के प्रबन्धकारिणी समिति का निर्वाचन जिसमें लालती देवी को प्रबन्धक तथा राजेश सिंह को संस्था का अध्यक्ष निर्वाचित किया गया, सर्वथा सही एवं विधि सम्मत है।"

आवेदक का पक्ष

3.1 श्री राजेश कुमार सिंह, आवेदक के विद्वान अधिवक्ता ने आवेदक का पक्ष प्रबल पूर्वक इस न्यायालय के समक्ष प्रस्तुत किया। उनके अनुसार आक्षेपित आदेश सरसरी तौर पर, मनमाने ढंग से आवेदक के द्वारा पेश की गयी आपत्ति पर बिना ध्यान दिये पारित किया गया है, अतः निरस्त करने योग्य है।

3.2 आक्षेपित आदेश में ललिता देवी (विपक्षी सं0-5) की सदस्यता की वैधता/अवैधता पर कोई विचार नहीं किया गया है कि, कैसे वो रन्जीत कुमार (पति) की मृत्यु के बाद, समिति की सदस्य न होते हुए भी, समिति के समस्त कार्यों का निर्वाहन करती रही।

3.3 आक्षेपित आदेश, समिति की नियमावली पर बिना विचार किये हुए पारित किया गया है और न ही रन्जीत कुमार प्रबन्धक की मृत्यु के उपरान्त जय प्रकाश जो उस समय उप प्रबन्धक थे, उनको प्रबन्धक का कार्यभार न देने के विषय पर विचार किया गया न ही कोई संदर्भित आदेश पारित किया गया।

3.4 आक्षेपित आदेश में इस तथ्य पर भी ध्यान नहीं दिया गया है, कि दिसम्बर 2004 में समिति का कार्यकाल समाप्त हो चुका था तथा उसके उपरान्त कथित नवीन चुनाव 01.12.2006 को सम्पन्न हुआ था। अतः इस समय अंतराल में कोई समिति कार्यरत नहीं रही थी। आक्षेपित आदेश में इस तथ्य का संज्ञान नहीं लिया गया है।

3.5 आक्षेपित आदेश पारित करते समय, विहित प्राधिकारी ने उच्च न्यायालय के आदेश दिनांक 18.08.2015 में उल्लेखित टिप्पणियों का सम्यक परिक्षण नहीं करा तथा उसमें उठाये गये प्रश्नों का निस्तारण भी नहीं किया।

3.6 आवेदक सं0 2 के पक्ष में अमला सिंह द्वारा मृत्यु पूर्व किया गया नोटरी हल्फनामा, जिसके द्वारा आवेदक सं0 2 को पैरवी का अधिकार दिया गया था, का भी विहित प्राधिकारी ने उचित रुप से संज्ञान नहीं लिया तथा उसके द्वारा दाखिल आपत्तियां भी विचार न करके न्याय विरुद्ध कार्य किया है।

विपक्षी का पक्ष

4.1 श्री वी0के0 सिंह, वरिष्ठ अधिवक्ता अपने सहयोगी अधिवक्ता श्री एस.के. सिंह पालीवाल के साथ उपरोक्त बहस का विरोध करते हुए कथन किया कि, समिति के एक सदस्य द्वारा समिति के चुनाव को चुनौति, आज्ञा पत्र याचिका के माध्यम से नहीं दी जा सकती है, इसलिये वर्तमान याचिका पोषणीय नहीं है। इस सम्बन्ध में निम्न निर्णयों का उल्लेख किया गया: **कमेटी ऑफ मेनेजमेण्ट आर्य कन्या पाठशाला इण्टर कॉलेज, बुलन्दशहर बनाम उत्तर प्रदेश राज्य एवं अन्य, 2011 (2) ADJ 65 DB; राम प्यारे पाल बनाम उत्तर प्रदेश राज्य एवं अन्य, 2015 (3) AWC 3140; बनवारी लाल कञ्चल बनाम डॉ0 भारतेन्दु अग्रवाल एवं अन्य, 2019 (12) ADJ 235(DB); कमेटी ऑफ मेनेजमेण्ट, श्री कच्चा बाबा इण्टर कॉलेज, वाराणसी एवं अन्य**

बनाम रीजनल कमेटी, पंचम मण्डल, वाराणसी एवं अन्य, 2007(4) ESC 2500।

4.2 आवेदक द्वारा आज्ञापत्र याचिका में आपेक्षित आदेश को चुनौती देने का कोई भी आधार वर्णित नहीं किया है और न ही आक्षेपित आदेश को किन कारणों पर चुनौति दी गयी है, ये वर्णित किया गया है। आक्षेपित आदेश में सभी प्रकरणों पर उचित विवेचना की गयी है तथा निर्णय न्यायोचित व न्याय संगत है।

विश्लेषण व निष्कर्ष

आज्ञापत्र याचिका पोषणीय है या नहीं?

5.1 वर्तमान याचिका, आवेदक द्वारा समिति के एक सदस्य के रुप में दाखिल की गयी है। सदस्यता का कोई विवाद नहीं है। इसके अतिरिक्त अमला सिंह ने एक हल्फनामें के द्वारा जो मृत्युपूर्व नोटरी से सत्यापित हो चुका था, आवेदक को समिति के लिए पैरवी करने का अधिकार प्रदान किया गया था। उपरोक्त हल्फनामें का उल्लेख आक्षेपित आदेश में नहीं किया गया है। आक्षेपित आदेश के अन्तर्गत समस्त कार्यवाही अमला सिंह के द्वारा उनकी मृत्यु पूर्व दी गयी आपत्ति को ध्यान में रखते हुए करी गयी है तथा आवेदक व अन्य को आपत्ति देने के अधिकार से वंचित रखा गया है।

5.2 विपक्ष की ओर से पेश किये सभी विधि दृष्टांगत का सार यह है कि सामान्य रुप से किसी समिति के चुनाव को चुनौति, समिति के केवल एक सदस्य द्वारा आज्ञापत्र याचिका के माध्यम से नहीं दी जा सकती है परन्तु अगर उस सदस्य का कोई अधिकार प्रभावित या उसका उल्लंघन होता है व उसके पास कोई अन्य प्रभावी निदान उपलब्ध न हो तो ऐसे सदस्य द्वारा दाखिल चुनाव प्रक्रिया को चुनौति देने वाली आज्ञापत्र याचिका भी पोषणीय हो सकती है।

5.3 वर्तमान प्रकरण में आक्षेपित आदेश इस न्यायालय द्वारा पारित आदेश दिनांक 18.08.2015 के परिपालन में पारित किया गया है। अमला सिंह व अन्य के आवेदन पर ही 03.08.2015 को सहायक निबन्धक के 14 वैध व अर्ह सदस्यों की सूची घोषित करी थी जो उच्च न्यायालय द्वारा निरस्त कर दी गयी व विहित प्राधिकारी को गुण-दोष पर नवीन आदेश पारित करने के लिए आदेशित किया गया। विहित प्राधिकारी के समक्ष कार्यवाही लंबित होने के दौरान अमला सिंह की मृत्यु हो गयी। मृत्यु पूर्व ही अमला सिंह ने एक हल्फनामे के जरिये आवेदक को पैरवी करने के अधिकार प्रदान कर दिये थे जिसकी सत्यता व प्रमाणिकता पर अभी तक कोई प्रश्न नहीं किया गया है और आवेदक ने अपना पक्ष विहित प्रधिकारी के समक्ष रखा भी परन्तु उस पर विचार नहीं किया गया अतः आवेदक के पास इस उच्च न्यायालय के समक्ष आज्ञापत्र याचिका दाखिल करने के अतिरिक्त और कोई विकल्प नहीं रह जाता है। अतः उपरोक्त निर्णयों के परिपेक्ष में भी वर्तमान याचिका पोषणनीय है।

आक्षेपित आदेश में उच्च न्यायालय द्वारा रेखांकित विषयों का निस्तारण किया गया है या नहीं:-

6.1 उच्च न्यायालय ने आदेश दिनांक 18.08.2015 के द्वारा विहित प्राधिकारी को गुण दोष पर आदेश पारित करते हुए कुछ विषयों पर टिप्पणी की थी वो है:- ललिता देवी की सदस्यता पर प्रश्नचिह्न, 2006 से 2014 तक समिति की कार्यवाही की वैधता, ललिता देवी की सदस्यता पर संदेह होते हुए भी उनका अर्ह सदस्यों की सूची में होना आदि। आक्षेपित आदेश के परिशीलन से यह विदित होता है कि, उपरोक्त विषयों में से कुछ विषयों पर ही विवेचना की गयी है तथा निर्णय दिया गया है। अब प्रश्न यह है कि क्या उपरोक्त कुछ विषयों पर निर्णय सभी पहलूओं व पत्रावली का सम्यक अध्ययन के उपरान्त दिया गया है या नहीं तथा जिन विषयों

पर निर्णय नहीं दिया गया है, उसका क्या परिणाम हो सकता है। इन विषयों पर विवेचना निम्न है।

6.2 विहित प्राधिकारी ने आक्षेपित आदेश के द्वारा ललिता देवी की सदस्यता की वैधता की पुष्टि केवल उनके वर्ष 2006 व 2009 में प्रबन्धक के पद पर निर्वाचन के समय, अमला सिंह अध्यक्ष थे, इस आधार पर की गयी है। इस संदर्भ में आक्षेपित आदेश का प्रासंगिक अंश का उल्लेख करना आवश्यक है कि-

"लालती देवी को संस्था उपरोक्त के प्रबन्धकारिणी समिति के निर्वाचन में प्रबन्धक पद पर निर्वाचन किया गया व उक्त चुनाव दिनांक 01.12.2006 में उक्त अमला सिंह भी अध्यक्ष थे। अमला सिंह की अध्यक्षता में भी पुनः लालती देवी का वर्ष 2009 में प्रबन्धक पद पर निर्वाचन हुआ। इस प्रकार यह कथन लालती देवी सामान्य साधारण सभा की सदस्य नहीं थी, सर्वथा गलत है।"

विहित प्राधिकारी ने ललिता देवी के सदस्य बनने के सम्बन्ध में लिये गये प्रस्ताव का न तो अवलोकन ही किया है न ही उसके विषय में कोई विवेचना या टिप्पणी ही की है, जबकि सदस्य की वैधता पर गुण-दोष पर विवेचना, प्रकरण को गुण-दोष पर निस्तारण करने के लिये अतिआवश्यक थी।

6.3 आक्षेपित आदेश के परिशीलन से यह भी विदित नहीं होता है कि विपक्षी द्वारा वर्तमान प्रकरण में प्रति उत्तर के साथ संलग्न 'प्रतिलिपि कार्यवाही साधारण सभा', विहित प्राधिकारी के समक्ष भी प्रस्तुत करी थी व उनकी प्रमाणिकता का क्या आधार है। ऐसा प्रतीत होता है कि, विहित प्राधिकारी ने समस्त कार्यवाही सरसरी तौर पर, अपने अनुमान व कल्पना के आधार पर निस्तारित की है।

6.4 विहित प्राधिकारी ने साधारण सभा की कार्यवाही में सदस्यों की संख्या बढ़ाने और कई सदस्यों को सूची में जोड़ने की कार्यवाही का न तो कोई उल्लेख किया है, न ही कोई विवेचना और न ही कोई निष्कर्ष ही दिया है। इसी प्रकार प्रबन्धक की कार्य काल के दौरान मृत्यु होने पर उप प्रबन्धक द्वारा प्रबन्धक की दायित्व न संभालने देने पर व सदस्यों की सूची में सदस्यों को जोड़ने व घटाने के विषय का कोई संज्ञान ही लिया गया है।

7. विहित प्राधिकारी को प्रकरण पर विवेचना करते समय, उच्च न्यायालय द्वारा की गयी टिप्पणियों व प्रकरण के तथ्यों के आधार पर यह निर्धारित करना चाहिये था कि वो कौन से विषय है, जिन पर उसे निर्णय लेना है तथा उस पर पत्रावली पर सम्यक विचार व विवेचना करके उचित व विधि संगत निर्णय लेना चाहिये था, जो आक्षेपित आदेश के परिशीलन से विदित नहीं होता है। किसी भी विहित प्राधिकारी से यह अपेक्षा रहती है कि उसके द्वारा लिया गया निर्णय, सभी पक्षों को सुनकर, पत्रावली के सम्यक परिशीलन का प्रकरण के संबंधित नियमों को ध्यान में रखते हुए पारित किया जायेगा, परन्तु वर्तमान आक्षेपित आदेश से ऐसा परिलक्षित नहीं होता है। ऐसे आदेशों के कारण न्यायालयों में वाद की संख्या अकारण बढ़ती है तथा न्यायालय का बहुमूल्य समय की हानि होती है।

8. उपरोक्त विवेचना व विश्लेषण से यह स्पष्ट है कि आक्षेपित आदेश पारित समय विहित प्राधिकारी ने प्रकरण के तथ्यों का, उच्च न्यायालय के आदेश के संदर्भ में सम्यक विवेचना न करके व प्रकरण के प्रासंगिक व उचित बिन्दूओं पर पत्रावली का पूर्ण परिशीलन न करके विधिक त्रुटि कारित की है। जिसके कारण आक्षेपित आदेश न्याय संगत न रहकर विधि विरुद्ध हो जाता है। अतः निरस्त करने योग्य है।

9. अतः आक्षेपित आदेश निरस्त किया जाता है। वर्तमान आज्ञापत्र याचिका अनुज्ञात (अलाउड) की जाती है तथा प्रकरण पुनः विहित

प्राधिकारी को इस निर्देश के साथ प्रतिप्रेषित किया जाता है कि वो पूर्व में उल्लेख किये गये विवरण को ध्यान में रखकर प्रकरण के तथ्यों के परिपेक्ष में सभी संदर्भित व प्रासंगिक विषयों पर सभी दस्तावेजों के सम्यक परिशीलन व विवेचना, सभी पक्षों को सुनवाई का मौका प्रदान कर आज से 2 माह के अन्दर गुण-दोष पर सकारण आदेश पारित कर निस्तारण करेंगे।

(2022)02ILR A488
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-C No. 1002680 of 2015

Dinesh Kumar Tiwari ...Petitioner
Versus
Bank of Baroda A Body Corporate & Ors. ...Respondents

Counsel for the Petitioner:
Rakesh K. Chaudhary, Ashutosh Shukla, Shreya Chaudhary

Counsel for the Respondents:
Prashant K. Srivastava, Amar Singh, Avishesh Kumar Singh, Pradeep Dwivedi, Vaibhav Srivastava, Vishal Agarwal

Criminal Law - Constitution of India - Article 226 - Income Tax (Certificate Proceedings) Rules, 1962 – Rule 60 of the 2nd Scheduled of the Income Tax Act, 1961 - The Recovery of Debts due to Banks and Financial Institutions Act, 1993 – Section 30, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Section 13: - Enforcement of Security Interest – Auction of mortgaged property – before confirmation of sale – challenged – Bank inform to recovery officer not to proceed with confirmation of sale as entire dues were paid by the borrower- defy to this - Recovery officer confirm the auction sale – confirmation of sale found unjust – writ petition disposed of – with direction to expedite the statutory appeal – interim protection granted in favour of the borrower confirm till the disposal of appeal by the Debts Recovery Tribunal. (Para – 24, 25, 26)

WP Disposed of. (E-11)

List of Cases cited:

1. Aniruddha Vs The Divisional Jt. Registrar Cooperative Societies & ors. (2019 Vol. 2 Mh. L.J.)

2. Ram Barai Prasad Vs St.of U.P. & ors., (2007 SCC OnLine All 557 = 2008 Vol. 1 All LJ 376)

3. Vasant Mahadev Chavan Vs St. of Goa & ors. (2021 SCC OnLine Bom 4132)

4. Jadeja Jitendrasingh Chandrasingh Vs Tax Recovery Officer (2012 SCC OnLine Guj 4975).

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

1. Heard Ms. Shreya Chaudhary, learned counsel for the petitioner, Mr. Prashant Kumar Srivastava, learned counsel for respondent no. 1-Bank of Baroda (for short "BOB"), as well as Mr. Vishal Agarwal, learned counsel representing respondent no. 3, and gone through the record.

2. The present petition has been filed, invoking extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India for quashing of the order dated 12.05.2005 passed by the Debts Recovery Tribunal, Lucknow (for short "the Tribunal") whereby the Recovery Officer has ordered for taking forcible possession from the petitioner of the mortgaged property, being building constructed over

land measuring 5000.00 sq. ft. of Khasra No.797/01, Bhillawan, Ward Geetapalli, Alambagh, Lucknow.

2. The petitioner had taken a loan of Rs. 12 lakhs for business purposes from the BOB on 06.11.2004 and mortgaged the property, being building constructed over land measuring 5000.00 sq. ft. of Khasra No.797/01, Bhillawan, Ward Geetapalli, Alambagh, Lucknow.

3. The BOB had filed Original Application No. 154 of 2010 before the Tribunal for recovery of a sum of Rs. 14,34,234=00 against the petitioner.

4. The Original Application No. 154 of 2010 was decided ex-parte vide order dated 17.09.2010.

5. The petitioner came to know about the said order dated 17.09.2010 in the year 2011 and, he filed Appeal No.96 of 2011, which was dismissed vide order dated 18.01.2012.

6. In the meantime, the BOB had proposed to auction the mortgaged property and, the mortgaged property was auctioned in favour of respondent no. 3- on 31.01.2013.

7. The respondent no. 3 had deposited some token amount with the BOB. The petitioner filed statutory objection against the auction proceedings on 28.02.2013.

8. Ms. Shreya Chaudhaya, learned counsel for the petitioner, has submitted that before the confirmation of the sale, the petitioner had deposited the entire amount with up-to date interest with the BOB i.e. Rs. 19,50,000=00 through Bank Draft No.119413 dated 03.05.2003 issued by the Corporation Bank, Gomti Nagar, Lucknow and, the said bank draft was accepted by the BOB towards the full and final settlement of the loan amount.

9. The BOB had issued 'no dues certificate' to the petitioner and, also written letter dated 07.05.2013 to the Recovery Officer of the Tribunal to the said effect.

10. An affidavit dated 10.05.2013 was also filed by the BOB before the Recovery Officer. The BOB had requested the Recovery Officer that prior to confirmation of the sale, the petitioner had deposited the entire amount with up-to date interest amount to Rs. 19,50,000=00 and, no other loan amount remained unpaid.

11. In view of above, the BOB had requested the Recovery Officer to drop the proceedings pursuant to auction sale. However, the Recovery Officer, who heard the matter on 17.05.2013, vide order dated 28.06.2013 passed in DRC No. 556 of 2010 rejected the request of the BOB for dropping the proceedings and ordered the BOB to refund Rs.19,50,000=00 to the petitioner. The Recovery Officer, thereafter, on the same day, confirmed the sale in favour of respondent no. 3.

12. The petitioner had filed Writ Petition No. 4407 (M/S) of 2013 against the order dated 28.06.2013, which was dismissed by this Court on 11.07.2013 with liberty to the petitioner for filing appeal under Section-30 of The Recovery of Debts Due to Bank and Financial Institutions Act, 1993 (for short "the Act, 1993").

13. The petitioner, thereafter, had filed an appeal before the Tribunal, which was numbered as Appeal No.05 of 2013.

14. During the pendency of the said appeal, the respondent no. 3 had moved an application in Case No. DRC 556 of 2010 before the Recovery Officer and the Recovery Officer passed the order dated 24.03.2014 for providing police protection to the respondent no. 3 for taking over possession of the mortgaged property.

15. The petitioner had filed an application for recalling the order dated 24.03.2014 before the Recovery Officer inasmuch as against the order dated 28.06.2013 Appeal No.05 of 2013 was pending. The Recovery Officer, thereafter, passed order dated 25.05.2014 and recalled the earlier order dated 24.03.2014.

16. Though Appeal No.05 of 2013 remained pending before the Tribunal, the Recovery Officer had passed another order on 12.05.2015, directed the Senior Superintendent of Police, Lucknow for providing police protection to the respondent no.3 for taking forcible possession of the mortgaged property. Though earlier the Recovery Officer had passed the order dated 25.04.2014, recalling the order dated 24.03.2014 passed for taking over forcible posses ion of the property in question on the ground that till the pendency of the appeal before the Presiding Officer of the Tribunal, it was not proper to take possession of the property in question.

17. This Court, on 19.05.2015, noted the fact that the sole purpose of the Act, 1993 and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act, 2002") is to ensure that the Bank, which offers loan to persons or institutions, are secured and the money so given by them is recovered by the Bank/institutions, as the case may be, being the public money. This Court, had noticed the facts that the petitioner had deposited the entire amount along with interest due up-to date with the BOB on 03.05.2013, the BOB had accepted the amount and written letter dated 07.05.2013 to the Tribunal. The BOB clearly informed the Recovery Officer that the petitioner repaid the entire loan amount along with interest, however, the Recovery Officer, instead of stopping the wheels of process of confirmation, rejected the application of the BOB and, proceeded to confirm the auction on 28.06.2013. This Court, therefore, ordered that the possession of the property in question should not be taken from the petitioner.

18. Ms. Shreya Chaudhay, learned counsel for the petitioner, has further submitted that if borrower repays the loan amount with interest and settles the account before confirmation of the sale, the sale should not have been confirmed. It has been further submitted that the order dated 28.06.2013 passed by the Recovery Officer, confirming the sale process, is wholly illegal and the said action is against the several judgments passed by the various High Courts. In support of her submissions, learned counsel for the petitioner has placed reliance upon following judgments:-

i. Aniruddha v/s The Divisional Joint Registrar Co-operative Societies, Amravati & Others 2019 (2) Mh. L.J.;

ii. Ram Barai Prasad Vs. State of U.P. and others, 2007 SCC OnLine All 557; equivalent (2008) 1 All LJ 376;

iii. Vasant Mahadev Chavan Vs. State of Goa, through the Chief Secretary and Others 2021 SCC OnLine Bom 4132; and

iv. Jadeja Jitendrasingh Chandrasinh Vs. Tax Recovery Officer 2012 SCC Online Guj 4975;

19. Ms. Shreya Chaudhary, learned counsel for the petitioner has further submitted that in the year 2012, a settlement was arrived at between the petitioner and the BOB. The petitioner settled the amount as Rs.14,50,000/- for full and final settlement in respect of the loan taken by him. In pursuance of the said settlement, the petitioner had paid Rs. 4,00,000=00 on 08.05.2012, Rs. 1,50,000=00 on 02.07.2012 and Rs. 1,00,000=00 on 31.08.2012.

20. On the other hand, Mr. Prashant Kumar Srivastava, learned counsel for the BOB, has submitted that the writ petition is not maintainable inasmuch as the statutory appeal under Section-30 of the Act, 1993 is pending before the Tribunal against the order passed by the Recovery Officer and, instead of pressing the appeal, the petitioner has rushed before this Court. It has been further submitted that after receiving the amount of Rs.19,50,000=00 from the petitioner (total outstanding dues), the Recovery Officer was only informed and no request was made for dropping the proceedings. It has been further submitted that the auction was held on 31.03.2013. In proceedings of DRC No.556 of 2010, the petitioner had deposited Rs. 19,50,000=00 only on 03.05.2013 i.e. after more than two moths from the date when the property was put to auction on 31.03.2013. It has been further submitted that after the sale was confirmed on 28.06.2013, the petitioner had accepted the residual amount of Rs.10,73,391=00 and, therefore, the writ petition is not maintainable. It has been further submitted that the provisions of 2nd and 3rd Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 as in force from time to time shall, as far as possible, apply with necessary modifications. Rule-60 of the 2nd Scheduled of the Income Tax Act, 1961 provides that where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within 30 days from the date of sale, apply to the Tax Recovery Officer to set-aside the sale, on his depositing the outstanding amount specified in proclamation of sale as that for the recovery of which the sale was ordered with interest thereon along with 5% purchase money. It has been further submitted that in the case in hands the petitioner had applied after two months i.e. beyond 30 days as prescribed under the Rules. It has been further submitted that since the petitioner has deposited the amount in question after more than two months of sale confirmation, the writ petition is even otherwise liable to be dismissed on merit.

21. Mr. Vishal Agrawal, learned counsel for the respondent no. 3, has submitted that the respondent no. 3 is a bona-fide purchaser, who had deposited the entire sale consideration, but he has not got the fruit of his money, rather he has been dragged in litigation.

22. Ms. Shreya Chaudhary, in rejoinder, has submitted that the petitioner had accepted the residual amount of Rs.10,73,391=00, after the Recovery Officer confirmed the sale of the property in favour of respondent no. 3, having no other option, but the same would not dis-entitle the petitioner to challenge the confirmation of sale in favour of respondent no. 3. It has been further

submitted that the petitioner is ready/willing to refund Rs.10,73,391=00, the residual amount, to the BOB with interest.

23. I have considered the submissions made by the learned counsels for the parties.

24. The Recovery Officer was required to act in accordance with law to recover the dues of the BOB and, when the BOB had written to the Recovery Officer that he should not proceed further with the auction-sale, the Recovery Officer had no right to reject such request of the BOB and, proceed for confirmation of the sale. Rule-60 of the 2nd Scheduled of the Income Tax Act, 1961, relied on by respondent no. 2, would mean that before 30 days, from the date of the auction-sale, the sale should not be confirmed and, if the debtor deposits the dues as provided under the Rules, then sale would not be confirmed and property would be released in favour of the debtor. However, even after 30 days before confirmation, if the defaulter/debtor pays the entire dues, and the Bank issues no dues certificate and writes to the Recovery Officer not to proceed further with the auction to confirm the sale in favour of such purchaser, the Recovery Officer would be required to cancel the auction proceedings inasmuch as the Recovery Officer acts only for realizing the dues of the Bank/financial institution. In case Bank/financial institution is satisfied that its dues are paid before auction sale is confirmed, then the Recovery Officer would be required to cancel the auction sale, otherwise it would be travesty of justice to complete the sale of property of the borrower despite payment of entire dues and having been issued no dues certificate by Bank/financial institution.

25. In the present case, the BOB itself had written to the Recovery Officer not to proceed with the confirmation of sale as its entire dues were paid by the petitioner. The Recovery Officer had no right to ignore such a request of the BOB. It is also well settled that the auction purchaser has no right, title or interest over the immovable property till confirmation of sale of the said immovable property in his favour. The title of property passes to the auction purchaser with effect from the date of confirmation and not before confirmation of sale.

26. In the present case, the borrower had paid the entire amount of Rs. 19,50,000=00 to the BOB before the sale was confirmed and, the BOB had issued 'no dues certificate' to the borrower and, filed an application before the Recovery Officer for cancelling the auction process, but the Recovery Officer had gone ahead to confirm the sale and rejected the application. The auction purchaser could claim refund of his money from the BOB with interest, but he did not have any right over the property before the sale was confirmed inasmuch as Recovery Officer had no right to confirm the sale after BOB wrote to him for cancelling the auction. The BOB had already received the entire amount and, written an application to the Recovery Officer for cancellation of the sale process, but despite that the Recovery Officer had proceeded to confirm the sale wholly illegally and unauthorizedly.

27. In view thereof, the present petition is **disposed of** with a direction to the Tribunal to decide the appeal filed by the petitioner expeditiously in accordance with law, preferably within a period of one

month and, till the appeal is decided by the Tribunal, the interim order passed by this Court on 19.05.2015 shall remain in operation.

(2022)02ILR A493
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-C No. 3000001 of 1995

Suresh Chandra Tewari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
D. C. Mukherji, Mohammad Aslam Khan

Counsel for the Respondents:
A.B. Misra, C.S.C.

Criminal Law - Constitution of India, 1950 - U.P. Imposition of Ceiling on Land Holdings Act, 1960 - Section - 9, 10 (1) (2), 11 & 13 - U.P. Imposition of Ceiling on Land Holdings Rules, 1961 – Rule 8 – Declaration of surplus land – Rules mandates issuance of notice to be served upon every such tenure holders to show cause – but notice was issued only to the petitioner's father instead of issuing notices to each of tenure holders of his family whose names were mutated by the prescribed authority prior to the cut-off date in the revenue record on the basis of a family settlement - order passed in proceedings against their father would not be operate as 'constructive res judicata' against the petitioners' – order passed by the Additional Commissioner (Judicial), whereby learned Additional Commissioner has allowed appeal filed by State against order passed by prescribed authority liable to be quashed.(Para 24, 29, 31, 32)

Writ petition allowed. (E-11)

List of Cases cited:

1. Kale & ors. Vs DDC & ors. (1976 Vol. 3 SCC 119)

2. Dilbagh Singh Vs The St. of UP & anr. (1978 All.L.J. 717)

3. Shantanu Kumar Vs St. of UP & ors. (1979 All. L.J. 1174 FB)

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

1. The present writ petition has been filed, seeking quashing of the order dated 18.10.1994 passed by Additional Commissioner (Judicial), Lucknow Division, Lucknow whereby learned Additional Commissioner has allowed the appeal filed by the State against the order dated 23.09.1985 passed by the prescribed authority under the provisions of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as 'the Act, 1960').

2. Notice under Section 10(2) of the Act, 1960 was issued on 16.03.1974 against the father of the petitioners, Hari Shankar Tiwari since dead who was impleaded as respondent No.3 in this writ petition by the Prescribed Authority. Father of the petitioners filed his objection to the said notice on 20.04.1974. In the said objection, Late Hari Shankar, father of the petitioners said that a family settlement was arrived at between the parties in the year 1967 and, according to the said family settlement, shares of all the family members were determined. This settlement was reduced in writing in the year 1969 and in the year 1970, petitioner No.1, one of the sons of Late Hari Shankar, instituted a suit in the Court of Munsif in respect of non agricultural properties which were also

included in the said memorandum of family settlement. Said suit was decreed on 02.11.1970 on the basis of family settlement and memorandum dated 09.11.1969. On 29.01.1971, a suit for permanent injunction for restraining Late Hari Shankar Tiwari, father of the petitioners was instituted by petitioner No.1 in respect of agricultural land and on the basis of said family settlement, suit was decreed on 09.08.1971. It was said that land of Village Bojhwar in Gata Nos.125, 127, 157, 166, 270, 278, 159, 168 and land of Village Bahshar of Gata No.492, land of Village Alhar in Gata No.1168 and land of Village Roshanpur in Gata Nos.436, half of 484, 355, 356, 357, 358 and half of 361 was his land. It was further said that land of village Birauri in Gata No.1353 was also his land.

3. In CLH Form 3 annexed with the notice issued to respondent No.3 under Section 10(2) of the Act, 1960 should not have included the land of the petitioner as mentioned above. Prescribed authority on 21.12.1974 adjudicated the notice dated 20.04.1974 and vide order dated 21.12.1974 declared 37 Bigha 5 Biswa 17.8 Biswansi land of respondent No.3, father of the petitioners as surplus under the provisions of Act, 1960.

4. Against the said order dated 21.12.1974, respondent No.3 preferred an appeal before the District Judge Hardoi. IIIrd Additional District Judge, Hardoi vide order dated 24.09.1975 partly allowed the said appeal and as a result of which the surplus area was reduced to 33 Bigha 8 Biswa 14.8 Biswansi in form of irrigated land as surplus.

5. Against the said judgment and order dated 24.09.1975 passed by the appellate authority, father of the petitioners filed Writ Petition No.2336(SS) of 1975, which was dismissed vide order dated 07.08.1978. This court held that parties to the deed of settlement had only declared their respective shares in the properties, which were subject matter of the deed. No partition was effected by metes and bounds and the parties were not put in possession of their respective shares in the properties. It was further held that the suit for partition was filed after the crucial date 24.01.1971. The suit was decided on the basis of a compromise and decree was passed for partition after due date. This Court was of the view that the said decree was liable to be ignored and the family settlement purported to have been made between the father of the petitioners and his sons was of no avail to him. This Court did not find any error of law in the orders passed by the prescribed authority and appellate authority and thus, the writ petition was dismissed.

6. Against the said judgment and order passed by this Court, father of the petitioners i.e. respondent No.3 preferred an S.L.P. before the Supreme Court, which was subsequently withdrawn. Father of the petitioners gave his option on 23.07.1981, which was accepted by the prescribed authority to declare surplus area of 33 Biswa 8 Bigha and 14.8 Biswansi as surplus area out of Plot No.1353 as surplus area.

7. In the meantime, the petitioners, who are sons of Late Hari Shankar Tiwari, moved an application on 23.04.1981 purporting to be an application under Section 11 of the Act, 1960 stating therein that they were joint tenure-holders of the land and they were not given any notice by the prescribed authority. It was said that the order passed by the prescribed authority on

21.09.1974 should be cancelled/recalled. However, the objection filed by the petitioners was rejected by the prescribed authority vide order dated 14.09.1981.

8. The petitioners aggrieved by the said order of the prescribed authority filed an appeal in the court of IVth Additional District Judge, Hardoi. IVth Additional District Judge/Appellate authority vide order dated 16.11.1981 accepted the appeal and set aside the order dated 14.09.1981. The matter was remanded back to the prescribed authority to decide the objection afresh after giving opportunity of hearing to the petitioners.

9. On remand, the prescribed authority issued notice under Section 10(2) of the Act, 1960 and thereafter passed the order dated 23.09.1985 holding that prior to cut off date, entire land shown in the notice belonged to Joint Hindu Family which was partitioned through private family arrangement arrived at in the year 1967, which was reduced in writing in the memo in the year 1969. Through the said family settlement the entire Joint Hindu Family, agricultural and non agricultural land and property was divided by metes and bounds and since then each of the members of the erstwhile joint family had got separated from each other and each one had entered into actual exclusive possession over the property allotted to each of them.

10. Against the above mentioned judgment and order of the prescribed authority, the State filed an appeal under Section 13 of the Act, 1960 before the District Judge, Hardoi which on account of the amendment made in the Act was transferred to the Court of Additional Commissioner (Judicial), Lucknow Division, Lucknow for hearing and decision.

11. Learned Additional Commissioner (Judicial) vide his impugned order dated 18.10.1994 had allowed the said appeal and set aside the order passed by the prescribed authority and ordered for declaration of surplus area 33 Bigha 8 Biswa 14.8 Biswansi in terms of irrigated land as was originally declared in adjudication proceedings pursuance to the notice dated 16.03.1974 issued to the late father of the petitioners.

12. Learned Additional Commissioner allowed the appeal on the ground that since respondent No.3 i.e. father of the petitioners had claimed benefit of the said family settlement as being claimed by the petitioners, which was not accepted in the writ petition by this Court and, therefore, issuing fresh notice to the petitioners separately under Section 10(2) of the Act, 1960 by the prescribed authority was illegal and the prescribed authority had no jurisdiction to give different finding what was given by this Court in respect of the family settlement.

13. Mr. Mohd. Arif Khan, learned Senior Advocate, assisted by Mr. Mohd. Aslam Khan, representing the petitioners, has submitted that the learned Additional Commissioner did not consider the merits of the case, as was set up by the petitioners, nor did consider the provisions of Section-11 of the Act, 1960; the learned Additional Commissioner had also not taken into consideration the judgment and order dated 16.11.1981 passed by the IV Additional Judge, Hardoi, which had attained finality between the parties inasmuch as the State Authorities did not challenge the said

judgment and order of the learned IV Additional Judge. Hardoi; every tenure-holder is entitled to get a separate notice under Section 10(2) of the Act, 1960 and, the Prescribed Authority is duty-bound to issue such notice to each and every tenure-holder and, afford them proper and reasonable opportunity of producing their evidence before passing any order, declaring any land as surplus in accordance with the provisions of Rule-10 of U.P. Imposition of Ceiling on Land Holdings Rules, 1961 (for short "the Rules, 1961"); the learned Additional Commissioner (Judicial) had ignored the most important fact that on the application, moved by the petitioners under Section 11(2) of the Act, 1960, the Prescribed Authority had passed order dated 14.09.1981, rejected the petitioners' application and, it was only in appeal that the claim of the petitioners was accepted by the IV Additional Judge and, vide order dated 16.11.1981 and the appeal was allowed and, the matter was remanded back with a direction to the Prescribed Authority for issuing separate notice to the petitioners, who were recorded as co-tenure-holders.

14. On behalf of the petitioners, the learned Senior Advocate has further submitted that it was in compliance of the said order passed in appeal that the Prescribed Authority issued separate notice under Section 10(2) of the Act, 1960 to the petitioners; once the Appellate Authority had directed the Prescribed Authority to issue notice and decide the case in accordance with law, the observation of the learned Additional Commissioner (Judicial) that since the proceedings in respect of the notice issued to father of the petitioners had attained finality upto the High Court, it was not open to the Prescribed Authority to give his finding regarding family settlement is wholly unjust and improper; the original memorandum of family settlement dated 09.11.1969, certified copies of plaint of Regular Suit Nos. 70 of 1970 and 33 of 1971 were filed by the petitioners before the Munsif, Hardoi and, the certified copy of the judgment and decrees dated 02.11.1970 and 09.08.1971 respectively in the said suits were brought on record by the petitioners; besides above, Khataunis, showing names of the petitioners, being recorded over the land, which was allotted to them in different lots in the family settlement/arrangement were also brought on record; the copy of the Registered Tabdilate, effecting the mutation in the names of the petitioners, on the basis of the said family settlement, was also filed.

15. On behalf of the petitioners, learned Senior Advocate has also submitted that Khataunis of 1386 to 1391 Fasali filed before the Prescribed Authority would show that the petitioners' names were recorded in the revenue record; names of the petitioners had already been recorded prior to issuance of notice under Section 10(2) of the Act, 1960 to their late father, Hari Shanker Tiwari; besides, bringing on record the aforesaid documentary evidence, the petitioners also produced oral evidence by examining Ram Krishna, Dirgaj Prasad, the then Lekhpal of Village Birauri, Zahir Ali, the scribe of the memorandum of family settlement, Wasit Husain, Sahdeo Prasad, Lekhpal and petitioner no. 1, Suresh Chandra Tiwari; all the witnesses had proved the fact that family settlement took place in the family of the petitioners; recording of the memorandum of family settlement and, delivery of possession to each of the petitioners over the lots allotted to them, affecting partition by metes and bounds; the State Authorities did not produce any documentary evidence, but

only Lekhpal, Pratap Narain was examined and, his statement was recorded on the part of the State Authorities; Lekhpal, Pratap Narain, in his cross-examination, had admitted the actual and exclusive possession of each of the petitioners over the respective lots allotted to them.

16. On behalf of the petitioners, learned Senior Advocate has also submitted that the Prescribed Authority, on the basis of the documentary and oral evidence, found the family settlement genuine and, on that basis, each of the petitioners had entered in actual and exclusive possession over the lots of land allotted to each of them in the said family settlement; all these took place before the cut-of-date and, therefore, the Prescribed Authority could not ignore the family settlement. Learned Senior Advocate has further submitted that earlier proceedings, against late father of the petitioners, would not be binding on the petitioners inasmuch as they were not party in the said proceedings and, once the application under Section-11 of the Act, 1960 filed by the petitioners was allowed by the Appellate Authority. The Prescribed Authority was not barred to decide the objections of the petitioners in view of the orders passed in proceedings against, Late Hari Shanker Tiwari, late father of the petitioners, in respect of petitioners' land. The petitioners' objection was required to be decided independently of the previous proceedings. It has been submitted that the impugned order, passed by the respondent no. 1, learned Additional Commissioner, is wholly illegal and is liable to be set-aside.

17. On the other hand, Mr. J.P. Maurya, learned Additional Chief Standing Counsel, representing respondents-State, has submitted that the decree passed in the partition suit by the Munsif Magistrate, on the basis of alleged memorandum was after the due date i.e. 24.04.1971 and, therefore, the Appellate Authority has rightly observed that such family settlement was entered and obtained with the sole purpose of saving the land of the joint family during ceiling proceedings. It has been further submitted that the entire land is a joint Hindu family property. It has been further submitted that the State was not the party in the injunction suit filed by petitioner no.1 on 29.01.1971 against his father and, therefore, the decree dated 09.08.1971 is not binding on the State. It has been further stated that sole purpose of alleged family settlement and the decree was to save the land from ceiling proceedings.

18. Learned Additional Chief Standing Counsel has further submitted that once the family settlement was not believed by this Court, while passing the judgment and order dated 07.08.1978 in Writ Petition No.2236 of 1975, the Prescribed Authority could not have considered the said family settlement as genuine and, binding on the State Authorities. In respect of family settlement, when the proceedings had got completed upto High Court, in subsequent proceedings filed by the sons of respondent no. 3, Late Hari Shanker Tiwari, said family settlement could not have been believed and, the same was barred by constructive res judicata. It has been further submitted that that the IV Additional Judge, Hardoi in judgment and order dated 16.11.1981 had only directed the Prescribed Authority to decide objections of the petitioners in accordance with law, however, no findings on merit were given by the learned IV Additional Judge, Hardoi. It was the duty of the Prescribed Authority to consider the judgment and order dated 07.08.1978 passed by this Court In Writ Petition No. 2236 of 1975,

filed by father of the petitioners, in its correct perspective and, it was not open to the Prescribed Authority to hold that the family settlement was genuine and bona fide otherwise the petitioners' names could not have been in the land holdings of their father i.e. respondent no. 3 (now dead). The findings recorded by the Prescribed Authority are wholly erroneous, illegal and against the judgment and order of this Court dated 07.08.1978 passed in Writ Petition No. 2236 of 1975.

19. Learned Additional Chief Standing Counsel has further submitted that the Appellate Authority i.e. the Additional Commissioner (Judicial) has passed the impugned order, taking into consideration the judgment and order passed by this Court on 07.08.1978 and, there is no illegality in the impugned order. It has been further submitted that the petitioners' names were not recorded in the revenue record on 24.01.1971, the due date and, therefore, the notice was issued only to their father, in whose name, the land was recorded and, therefore, the writ petition is liable to be dismissed.

20. The questions, which arise for consideration in this writ petition, are as under:-

I). whether, when the petitioners were not given notice by the Prescribed Authority and, notice was issued to their father only, the judgment and orders passed in proceedings against their father would operate as constructive res judicata against the petitioners?; and

ii). whether the petitioners were entitled to receive separate notice inasmuch as their names were recorded in the revenue record against the land in question in 1378 to 1380 Fasali (1971 to 1973), whereas the notice was issued to their father only on 16.03.1974?

21. The Act, 1960 is a confiscatory legislate and, therefore, its provisions are to be strictly construed and, no liberal interpretation should be given to the provisions of the Act,1960 inasmuch as the person would get divested of his land holding to the extent of surplus land declared under the provisions of the Act, 1960. Under Section 9 of the Act, 1960, the Prescribed Authority was required to issue general notice after enforcement of the Act and call upon every tenure holder, holding land in excess of the ceiling area applicable to him on the date of enforcement of this Act to submit within 30 days from the date of publication of notice a statement in respect of all his holding, giving particulars thereof. Under Section 10 of the Act, 1960 in case where a tenure holder did not submit a statement or submit an incomplete or incorrect statement, required to be submitted under Section 9 of the Act, 1960, the Prescribed Authority would, after making inquiry, prepare a statement containing particulars of the land and, thereupon would issue notice to every such tenure holder together with a copy of the statement prepared that why the statement be not taken as correct. Section-10 of the Act, 1960 is produced hereunder:-

"10. Notice to tenure-holders failing to submit a statement or submitting an incomplete or incorrect statement. *- (1) In every case where a tenure-holder fails to submit a statement or submits an incomplete or incorrect statement, required to be submitted under Section 9, the Prescribed Authority shall, after making such enquiry as he may consider necessary either by himself or by any person subordinate to him, cause to be prepared a*

statement containing such particulars as may be prescribed. The statement shall in particular indicate the, land, if any, exempted [under Section 6] and the plot or plots proposed to be declared as surplus land.

(2) The Prescribed Authority shall thereupon cause to be served upon every such tenure-holder in such manner as may be prescribed, a notice together with a copy of the statement prepared under sub-section (1) calling upon him to show cause within a period specified in the notice, why the statement be not taken as correct. The period specified shall not be less than ten days from the date of service of the notice."

22. Thus, under Section 10 of the Act, 1960 notice is to be given to every tenure holder, who does not file the statement or files incorrect statement regarding his land holding, as prescribed under Section 9 of the Act, 1960. Section 11 of the Act, 1960 provides that where the statement submitted by a tenure holder, in pursuance of the notice issued under Section 9, is accepted by the Prescribed Authority or where the statement prepared by the Prescribed Authority under Section 10 of the Act, 1960 is not disputed within the specified period, the Prescribed Authority would, accordingly, determine the surplus land of the tenure holder. However, sub-section (2) of Section 11 of the Act, 1960 provides that on application made within 30 days from the date of the order passed, declaring surplus land of a tenure holder under sub-section (1), the tenure holder aggrieved by such order passed in his absence and on sufficient cause being shown for his absence would set-aside the order and allow such tenure holder to file objection against the statement prepared under Section 10 and the Prescribed Authority would proceed to decide the same in accordance with the provisions of Section 12 of the Act, 1960.

23. Section 12 of the Act, 1960 provides determination of the surplus land by the Prescribed Authority where an objection is filed under sub-section (2) of Section 10 or under sub-section (2) of Section 11 of the Act, 1960. The Prescribed Authority would, after affording the parties reasonable opportunity for producing evidence, decide the objections after recording the reasons of determining the surplus land. Thus, Sections 11 and 12 of the Act, 1960 read as under:-

11. Determination of surplus land where no objection is filed. *- (1) Where the statement submitted by a tenure-holder in pursuance of the notice published under Section 9, is accepted by the Prescribed Authority or where the statement prepared by the Prescribed Authority under Section 10 is not disputed within the specified period, the Prescribed Authority shall accordingly, determine the surplus land of the tenure-holder.*

(2) The Prescribed Authority shall, on application made within thirty days from the date of the order under sub-section (1) by a tenure-holder aggrieved by such order passed in his absence and on sufficient cause being shown for his absence set aside the order and allow such tenure-holder to file objection against the statement prepared under Section 10 and proceed to decide the same in accordance with the provisions of Section 12.

(3) Subject to the provisions of sub-section (2) and Section 13, the order of the Prescribed Authority shall be final and conclusive and be not questioned in any Court of law.

12. Determination of the surplus land by the Prescribed Authority where an

objection is filed. *- (1) Where an objection has been filed under sub-section (2) of Section 10 or under sub-section (2) of Section 11, or because of any appellate order under Section 13, the Prescribed Authority shall, after affording the parties reasonable opportunity of being heard and of producing evidence, decide the objections after recording his reasons, and determine the surplus land.*

(2) Subject to any appellate order under Section 13, the order of the Prescribed Authority under sub-section (1) shall be final and conclusive and be not questioned in any Court of law.

[12A*. In determining the surplus land under Section 11 or Section 12, the Prescribed Authority shall, as far as possible, accept the choice indicated by the tenure-holder to the plot or plots which he and other members of his family, if any, would like to retain as part of the ceiling area applicable to him or them under the provisions of this Act, whether indicated by him in his statement under Section 9 or in any subsequent proceedings :*

Provided that -

(a) the Prescribed Authority shall have regard to the compactness of the land to be included in the ceiling area applicable to the tenure-holder;

(b) where the tenure-holder's wife holds any land which is aggregated with the land held by the tenure-holder for purposes of determination of the ceiling area, and his wife has not consented to the choice indicated by the tenure-holder as to the plot or plots to be retained as part of the ceiling area applicable to them, then the Prescribed Authority shall, as far as possible, declare the surplus laird in such manner that the area taken out of the land held by the tenure-holder's wife bears to the total surplus area the same proportion as the area originally held by her bore to the total land held by the family;

(c) where any person holds land in excess of the ceiling area including any land mortgaged to the State Government or to a [bank as defined in clause (c) of Section 2 of the Uttar Pradesh Agricultural Credit Act, 1973] or to a co-operative land development bank or other co-operative society or to the Corporation or to a Government Company, the surplus land to be determined shall, as far as possible, be land other than that so mortgaged;

(d) where any person holds land in excess of the ceiling area including land which is the subject of any transfer or partition referred to in sub-section (6) or sub-section (7) of Section 5, the surplus land determined shall, as far as possible, be land other than land which is the subject of such transfer or partition, and if the surplus land includes any land which is the subject of such transfer a partition, the transfer or partition shall, insofar as it relates to the land included in the surplus land, be deemed to be and always to have been void, and -

(i) it shall be open to the transferee to claim refund of the proportionate amount of consideration, if any, advance by him to the transferor, and such amount shall be charge on the [amount] payable to the transferor under Section 17 and also on any land retained by the transferor within the ceiling area, which shall be liable to be sold in satisfaction of the charge, notwithstanding anything contained in, Section 153 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950;

(ii) any party to the partition (other than the tenure-holder in respect of whom the surplus land has been determined) whose land is included in surplus land of

the said tenure-holder shall be entitled to have the partition re-opened.]

24. Thus from the reading of Sections 9 to 12 of the Act, 1960, it is evident that every tenure holder is required to be issued notice for determining surplus land. In case the order is passed in his absence, declaring tenure holder's land as surplus, he has an opportunity to file objection under Section 11(2) of the Act, 1960. The Prescribed Authority is required to adjudicate the objections, giving full opportunity of hearing and opportunity of leading evidence by the tenure holder. There cannot be any dispute that the petitioners' names were recorded in the revenue record when notice was issued to their father, therefore, the petitioners were required to be issued notice under Section 10(2) of the Act, 1960 separately than their father. The petitioners were not party in the earlier proceedings instituted against their father and, therefore, the judgment and order passed against their father would not be binding upon them and would not operate res judicata in subsequent proceedings initiated by the petitioners by filing objections under Section 11(2) of the Act, 1960.

25. The Supreme Court had an occasion to consider the nature, object, effect and value of the family arrangement, if there was no fraud in arriving at the family settlement/arrangement. In ***(1976) 3 SCC 119 (Kale and others Vs. Deputy Director of Consolidation and others),*** it has been held that by virtue of a family settlement/arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes settle and resolve their conflicting claims or disputed title once for all in order to buy peace of mind and, bring about complete harmony and goodwill in the family. Family settlement/arrangements are enforceable, if honestly made. The object of the family arrangement is to protect the family from long-drawn litigation and, to avoid hatred and bad blood between the various members of the family. Courts lean in favour of family arrangements and, technical or trivial grounds are to be overlooked. It has also been held that memorandum prepared after the family arrangement for the purpose of record of for information of the Court for making necessary mutation is not compulsorily required to be registered. Paragraphs 10 and 20 of the said judgment, which are relevant, read as under:-

*"**10.** In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:*

"(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for

information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

***20**. A Full Bench of the Allahabad High Court in Ramgopal v. Tulshi Ram [AIR 1928 All 641, 649 : 26 ALJ 952] has also taken the view that a family arrangement could be oral and if it is followed by a petition in court containing a reference to the arrangement and if the purpose was merely to inform the court regarding the arrangement, no registration was necessary. In this connection the Full Bench adumbrated the following propositions in answering the reference:*

"We would, therefore, return the reference with a statement of the following general propositions:

With reference to the first question:

(1) A family arrangement can be made orally.

(2) If made orally, there being no document, no question of registration arises.

With reference to the second question:

(3) If though it could have been made orally, it was in fact reduced to the form of a "document", registration (when the value is Rs 100 and upwards) is necessary.

(4) Whether the terms have been "reduced to the form of a document' is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

(5) If the terms were not "reduced to the form of a document', registration was not necessary (even though the value is Rs 100 or upwards); and while the writing cannot be used as a piece of evidence for what it may be worth, e.g. as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

(6) If the terms were "reduced to the form of a document' and, though the value was Rs 100 or upwards, it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document."

26. Section 11(2) of the Act, 1960 permits tenure holders to file objections. Such tenure holders may be those who have been served with a notice and the statement under Section 10(2) of the Act, 1960 and include those who have not been given or served with any such notice or statement. Section 11(2) of the Act, 1960 embraces persons who claim to be tenure holders and who having come to know of the declaration of their land as surplus land of some other person, wish to challenge that declaration or notification thereof in the gezette under Section 14 of the Act, 1960.

Thus, tenure holders are entitled to file an objection under Section 11(2) of the Act, 1960 and get an adjudication thereon, as required by Section 12 of the Act, 1969.

27. This Court, in ***1978 All. L.J. 717 (Dilbagh Singh Vs. The State of U.P. and another)***, while dealing with the scheme of the Act, 1960, as provided under Section 9, 10, 11, 12, 13 and 14 of the Act, 1960, in paragraphs 23, 24 and 25, has held as under:-

*" **23**. Sections 11(2) and 11(3) of the Act provide--*

"(2) The Prescribed Authority shall, on application made within thirty days from the date of the order under sub-sec. (1) by a tenure-holder aggrieved by such order passed in his absence and on sufficient cause being shown for his absence set aside the order and allow such tenure-holder to file objection against the statement prepared under S. 10 and proceed to decide the same in accordance with the provisions of S. 12.

*(3) Subject to the provisions of sub-sec. (2) and S. 13, the order of the Prescribed Authority shall be final and conclusive and be not questioned in any court of law." **24.** Dealing with sub-sec. (2) the Full Bench in para. 27 held that there appears to be no valid reason why the benefit of S. 11(2) may not be available to every tenure-holder and why S. 11(2) should be regarded as limited to those tenure-holders only who have been served with a notice under S. 10(2). It went on to hold (at p. 566 of All LJ):--*

"In my opinion, the words "a tenure-holder aggrieved by such order' embrace even those tenure-holders who have not been served with a notice under S. 10(2) and their scope is in no manner curtailed by the words "passed in his absence and on sufficient cause being shown for his absence'. A tenure-holder who has not been served with a notice and has also not been made a party would be treated as having been absent and the fact that he was not a party would itself sufficiently account for his absence. Section 11(2) should not, to my mind, be interpreted as withholding its benefit from a person who has committed no default at all while extending it to a person who has committed a default but furnishes sufficient cause for it"

***25.** It is thus evident that S. 11(2) permits tenure-holders to file objections. Such tenure-holders may be those who have been served with a notice and the statement under S. 10(2). It also includes tenure-holders who have not been given or served with any such notice or statement. The construction put by the Full Bench on S. 11(2) embraces persons who claim to be tenure-holders and who having come to know of the declaration of their land as surplus land of some other person, wish to challenge that declaration or notification thereof in the gazette under S. 14. They are all entitled to file an objection under S. 11(2) and get an adjudication thereon as required by S. 12.*

28. The Full Bench of this Court, in ***1979 All. L.J. 1174 (Shantanu Kumar Vs. State of U.P. and others)*** has held that where a notice of the proceedings for declaration of surplus land of a tenure holder was not served on transferee from the tenure holder and the land transferred was included in C.L.H. Form 3 and transferee's name was recorded in the revenue papers over the land transferred, the proceedings were without jurisdiction. In such a case, the transferee could have filed objection under Section 11(2) of the Act, 1960. It was held that mere a fact that the transferee could not file objection under

Section 11 of the Act, 1960 would not validate dead proceedings against him.

29. Rule-8 of the Rules, 1961 provides that notice shall be served upon every tenure holder to show-cause within a period of 15 days from the date of service of notice why the statement prepared by the Prescribed Authority under sub-Section (1) of Section 10 of the Act, 1960 be not taken as correct . Proviso to said rule reads as under:-

"Provided that where the statement in CLH Form 3 also includes land ostensibly held in the name of any other person, the Prescribed Authority shall caused to be served upon such other person a notice in C.L.H. Form 4 together with a copy of the statement in CLH Form 3 calling upon him to show cause within a period of fifteen days from the date of service of the notice why the statement be not taken as correct.....".

30. It was held that service of such notice is preliminary to the acquisition of jurisdiction to proceed in the matter and, decide whether the land ostensibly held in the name of the tenure holder could be declared as surplus land in the hands of the other person. If no notice is served, the proceedings against such tenure holder would result in nullity against the such tenure holder. Paragraphs 8 to 12 of Shantanu Kumar Vs. State of U.P. and others (supra) read as under:-

8. It is thus evident that the notice requiring the tenure-holder to show cause why the statement prepared by the Prescribed Authority be not taken as correct is to be issued to the tenure-holder in respect of whose holding the statement has been prepared. Under the proviso, the Prescribed Authority shall cause to be served a notice to the person in whose name the land included in C.L.H. Form 3 is ostensibly held. The Prescribed Authority prepares the statement on the basis of revenue records. If from the revenue records or other information, the Prescribed Authority comes to know that the land included in the statement in C.L.H. Form 3 includes land ostensibly held in the name of any other person, the Prescribed Authority is bound to serve notice on such person. The phrase used is "shall cause to be served.'

9. The petitioner claimed under a sale deed. It is not disputed that the petitioner's I name was recorded in the revenue papers lover the land which was transferred to him. It is admitted that the statement in C.L.H. Form 3 included the land held by the petitioner. He was hence a person in whose name some part of the land mentioned in the statement was believed by the Prescribed Authority to be ostensibly held. In this situation, it was incumbent upon the Prescribed Authority to serve upon the petitioner the requisite notice together with a copy of the statement and call upon him to show cause why that statement be not taken as correct.

10. It is obvious that service of such a notice is preliminary to the acquisition of jurisdiction to proceed in the matter and decide whether the land ostensibly held in the name of the petitioner could be declared as surplus land in the hands of Bhupendra Singh. In the premises, the proceedings were without jurisdiction and void. Learned Standing Counsel submitted that the petitioner had knowledge and he should have filed an objection under Section 11(2) of the Act as has been held by a Division Bench of this Court in Dilbagh Singh v. State of U.P. (1978 All LJ 717). The existence of another remedy under the Act cannot validate the proceedings which are void for lack of jurisdiction and which have resulted in the declaration as surplus land of an area which a person other than

the tenure-holder who has been heard, claims. The fact that the petitioner could have filed an objection under Section 11(2) will not breathe life into or validate these dead proceedings.

11. It was urged that since the petitioner knew of these proceedings he kept silent all this while, this Court need not interfere in exercise of its discretionary jurisdiction under Article 226 of the Constitution. It is well settled that an objection to lack of jurisdiction can be taken at any stage of the proceedings and even in collateral proceedings (See Kiran Singh v. Chaman Paswan (AIR 1954 SC 340)). Consent or waiver cannot be a ground for refusing to entertain such an objection. We hence cannot deny relief to the petitioner on the ground of alternative remedy. It is equally settled that existence of jurisdiction cannot be conferred by consent or waiver. This plea is only relevant to the exercise of jurisdiction. Here there was lack of jurisdiction by reason of non-compliance of the first proviso to Rule 8.

12. It was also urged that the petitioner's father took all possible pleas and the petitioner has no bona fide case. The petitioner has alleged that the sale deed in his favour was bona fide and for adequate consideration. It was not a Benami transaction and was not for the immediate or deferred benefit of the tenure-holder or other members of his family. No such plea was taken by the petitioner's father. If the petitioner is successful in establishing this plea his land may be liable to be exempted. The proviso to sub-section (6) of Section 5 exempts land covered by--

"a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transaction or for the immediate or deferred benefit of the tenure-holders or other members of his family."

31. Admittedly, the petitioners' names were recorded on the date when the notice was issued. Rule 8 of the Rules, 1961 mandates issuance of notice to every such tenure holder and no notice was issued to the petitioners by the Prescribed Authority and notice was issued only to their father on 16.03.1974, therefore, the proceedings, culminated in respect of notice issued to the father of the petitioners, would not bind the petitioners. The Prescribed Authority, on remand from the Appellate Authority, had adjudicated the objections filed by the petitioners after taking into consideration the evidence, oral and documentary, and found that on the basis of the memorandum of family settlement of 1969, the petitioners' names got mutated in the revenue record and, they were put in possession of respective shares. Such a finding of the Prescribed Authority cannot be said to be incorrect or illegal.

32. In view thereof, the writ petition is **allowed**. The impugned order dated 18.10.1994 passed by the Additional Commissioner, Lucknow Division (Judicial), copy of which is contained in Annexure-1 to the petition, is quashed.

(2022)02ILR A505
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 1160 of 2021

M/s G.P. Engineering Works Kachhwa, Mirzapur & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shakeel Ahmad

Counsel for the Respondents:
Sri Gaurav Mahajan

(A) Income Tax Act, 1961, S. 279 (2) - Compouding of offence - As per sub-section (2) of Section 279, any offence under Chapter XXII of the Act, 1961 may be compounded by the authorized officer either before or after the institution of the proceedings - Limitation & delay - No limitation for submission or consideration of compounding application has been provided under sub-section (2) of Section 279 of the Act, 1961 – However CBDT by a circular dated 14.06.2019, provided compounding guidelines "No application of compounding can be filed after the end of 12 months from the end of the month in which prosecution complaint, if any, has been filed in the court of law - specific limitation has been provided in the compounding guidelines - *Held* - CBDT by a circular, issued in purported exercise of power under second Explanation to Section 279(2), can neither provide limitation for the purposes of sub-section (2) nor can restrict the operation of sub-section (2) of Section 279 of the Act, 1961 - Circular cannot prescribe a period of limitation where none has been provided by either the Act, 1961 or the Rules - Board has sought to introduce the provision of limitation by means of circular that is not contemplated by the second Explanation - second Explanation to Section 279(2) of the Act, 1961 merely enables the Board to issue instructions or directions to other Income Tax authorities for the proper composition of offences under that Section. (Para 9, 11)

Interpretation of Statues - Circular - A circular is subordinate to the principle Act or Rules, it cannot override or restrict the application of specific provision enacted by legislature - A circular cannot travel beyond the scope of the powers conferred by the Act or the Rules - Circulars containing instructions or directions cannot curtail a statutory provision - Board has sought to introduce the provision of limitation by means of circular that is not contemplated by the second Explanation (Para 10, 11)

Interpretation of Statues - Explanation to a statutory provision - Object - Explanation merely explains the main section and is not meant to carve out a particular exception to the contents of the main section – Explanation explain the meaning and intendment of the Act itself, where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve, to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful - an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment - Explanation cannot take away a statutory right with which any person under a statute has been clothed (Para 10)

Interpretation of Statues -Instruction or directions -Income tax Act, Section 279(2), second Explanation- second Explanation merely enables the Board to issue instructions or directions to other Income Tax authorities for the proper composition of offences under that Section - instructions or directions may prescribe the methodology and manner of composition of offences to clarify any obscurity or vagueness in the main provisions to make it consistent with the dominant object of bringing closure to such cases which may be pending interminably in our Court system - Such instructions or directions that are prescribed by the Explanation cannot take away a statutory right with which an assessee has been clothed, or set at naught the working of the provision of compounding of offences (Para 13)

On 29.03.2000, prosecution launched against petitioner u/s 276C(1) of the I.T. Act for wilful attempt to evade tax relating to A.Y. 1990-91 – After delay of more than 20 years, petitioner filed an application for compounding of the offences on 23.4.2021 - Chief Commissioner of Income Tax issued a show cause notice dated 16.11.2021 to show cause why compounding application may not be rejected - Held - compounding application of the petitioner cannot be rejected by the Income Tax Authority concerned on the ground of delay in filing the application (Para 14)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. &
Hon'ble Jayant Banerji, J.)

1. Heard Shri Shakeel Ahmad, learned counsel for the petitioner and Shri Gaurav Mahajan, learned counsel for the Income Tax Department.

2. This writ petition has been filed praying for the following relief:

"I. Issue a writ order or direction in the nature of certiorari quashing the show cause notice dated 16.11.2021 (Annexure No. 4) issued by respondent no. 2 and direct the respondent no. 2 to compound the case of the Petitioner.

II. Issue a writ order or direction in the nature of mandamus directing the respondent no. 2 to compound the case of the Petitioner."

3. Briefly stated facts of the present case are that a criminal case no. 193 of 2000 (Union of India Vs. M/S G.P. Engineering Works Mirzapur and three others) was filed in the Court of Special C.J.M., Varanasi under Section 276C(1) read with Section 277 and 278B of the Income Tax Act, 1961 against the petitioner on 29.3.2000 praying that the accused opposite parties may be summoned, tried and punished in accordance with law.

4. The petitioner filed an application for compounding of the offences which was received in the Office of the Chief Commissioner, Income Tax on 23.4.2021. The Chief Commissioner of Income Tax Allahabad issued a show cause notice dated 16.11.2021 which is reproduced below:

"F.No.-CCIT/Alld./ITO(Hq.-Tech.)/Compounding(Pros.)/2021-22/3081
Date-
16.11.2021

To,
M/s G.P. Engineering Works
R/o Kachhwa
P.S. Kachhwa, Mirzapur

Sir,

Sub- Application for compounding of prosecution u/s 276C(1) of the I.T. Act in the case of M/s G.P. Engineering Works R/o Kachhwa, P.S. Kachhwa, Mirzapur relating to A.Y. 1990-91 for willful attempt to evade tax in accordance with the section 139(1) of the Income Tax Act, 1961-Regarding-

Kindly refer to your application dated 22/04/2021 received in this office on 23/04/2021 on the subject mentioned above, for compounding of offence willful attempt to evade tax for A.Y. 1990-91.

2. After perusal of your aforesaid application, I am directed to state that it is noticed that prosecution was launched in your above mentioned case on 29.03.2000 and your application has been received on 23.04.2021 in this office. Thus you have filed compounding application after a delay of more than 20 years from the end of month in which complaint was filed. As per

para 7(ii) of the compounding guidelines circulated vide F.No.285/08/2014-IT(Inv.V)/147 dated 14.06.2019 of CBDT *"No application of compounding can be filed after the end of 12 months from the end of the month in which prosecution complaint, if any, has been filed in the court of law."*

A relaxation had been provided by CBDT's circular 25/2019 circulated vide letter F.No.285/08/2014-IT(Inv.V)/350 dated 09.09.2019 as a one time measure, through which the condition that compounding application shall be filed within 12 months was relaxed till 31.12.2019 and further extended till 31.01.2020 vide circular no. 1/2020 dated 03.01.2020. However, your above mentioned application does not fall in effective time duration of circular 25/2019 and circular 01/2020.

3. Accordingly, in view of the above, I am further directed to require you to show cause as to why your application for compounding of offence dated 23.04.2021 may not be rejected. Your reply must reach this office latest by 29.11.2021, failure to which it will be considered that you don't have to say anything in this regard and decision will be taken on the material available on record.

Yours faithfully,
(S.K. Singh)
Income Tax Officer (Hq.)/(Tech.)
O/o Chief Commissioner of Income Tax,
Allahabad"

5. Learned counsel for the petitioner submits that the impugned show cause notice relying upon the circular dated 14.6.2019 is wholly illegal and without authority of law to the extent it intends to reject the compounding application on the ground of delay. He, therefore, submits that since the circular dated 14.6.2019 of CBDT is binding on the Income Tax Authority, therefore, submission of reply before the concerned Tax Authority shall be an empty formality.

6. Learned counsel for the respondent submits that the present writ petition has been filed merely against a show cause notice, therefore, it is not maintainable.

7. We have carefully considered the submission of the learned counsel for the parties.

8. Section 279 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act, 1961'), provides as under:

"279. Prosecution to be at instance of [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner. - [(1) A person shall not be proceeded against for an offence under section 275-A, [section 275-B], section 276, section 276A, section 276B, section 276BB, section 276C, section 276CC, section 276D, section 277, [section 277A] or section 278 except with the previous sanction of the [Principal Commissioner or] Commissioner or Commissioner (Appeals) or the appropriate authority:

Provided that the [Principal Commissioner or] Chief Commissioner or, as the case may be, [Principal Director General or] Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of proceedings under this sub-section.

Explanation.- For the purposes of this section, "appropriate authority" shall have the same meaning as in clause (c) of section 269-UA.]

[(1A) A person shall not be proceeded against for an offence under section 276C or section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him [section 270A or] under clause (iii) of sub-section (1) of section 271 has been reduced or waived by an order under section 273A.]

[(2) Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the [Principal Chief Commissioner or] Chief Commissioner or a [Principal Director General or] Director General.]

[(3) Where any proceeding has been taken against any person under sub-section (1), any statement made or account or other document produced by such person before any of the income-tax authorities specified in [clauses (a) to (g)] of section 116 shall not be inadmissible as evidence for the purpose of such proceedings merely on the ground that such statement was made or such account or other document was produced in the belief that the penalty imposable would be reduced or waived, [under section 273A] or that the offence in respect of which such proceeding was taken would be compounded.]

[Explanation. - For the removal of doubts, it is hereby declared that the power of the Board to issue orders, instructions, or directions under this Act shall include and shall be deemed always to have included the power to issue instructions or directions (including instructions or directions to obtain the previous approval of the Board) to other income-tax authorities for the proper composition of offences under this section.]"

9. From a bare perusal of sub-section (2) of Section 279, it is evident that any offence under Chapter XXII of the Act, 1961 may be compounded by the authorized officer either before or after the institution of the proceedings. No limitation for submission or consideration of compounding application has been provided under sub-section (2) of Section 279 of the Act, 1961. Therefore, the Central Board of Direct Taxes by a circular can neither provide limitation for the purposes of sub-section (2) nor can restrict the operation of sub-section (2) of Section 279 of the Act, 1961, in purported exercise of its power to issue circular under the second Explanation appended to Section 279 of the Act, 1961. It has not been disputed before us by the learned counsel for the respondent or in the impugned show cause notice that the criminal case in question is still pending.

10. A circular is subordinate to the principle Act or Rules, it cannot override or restrict the application of specific provision enacted by legislature. A circular cannot travel beyond the scope of the powers conferred by the Act or the Rules. Circulars containing instructions or directions cannot curtail a statutory provision as aforesaid by prescribing a period of limitation where none has been provided by either the Act, 1961 or the Rules. The authority to issue instructions or directions by the Board stems from the second Explanation appended to Section 279 of the Act, 1961. It is well settled that the Explanation merely explains the main section and is not meant to carve out a particular exception to the contents of the main section (***Sonia Bhatia Vs. State of U.P., (1981) 2 SCC 585 at page 597***). The object of an Explanation to a statutory provision was elaborated by the Supreme Court in ***S. Sundaram Pillai Vs. V.R. Pattabiraman, (1985) 1 SCC 591***, in which it was held as follows:

"53. Thus, from a conspectus of the authorities referred to above, it is manifest

that the object of an Explanation to a statutory provision is-

"(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

11. By means of para 7(ii) of the compounding guidelines circulated by F.No.285/08/2014-IT(Inv.V)/147 dated 14.06.2019, that has been quoted in the impugned notice dated 16.11.2021 the period for filing an application for compounding has been restricted to 12 months from the end of the month in which the prosecution complaint has been filed in the court of law. Given the interpretation of the Supreme Court regarding the object of an Explanation to a statutory provision, the Board has sought to introduce the provision of limitation by means of circular that is not contemplated by the second Explanation.

12. In the case of ***Vikram Singh Vs. Union of India & Ors. in W.P. (C) 6825 of 2016*** decided on 11.4.2017 by a Division Bench of the Delhi High Court (enclosed as Annexure No.5 to the writ petition), in response to the petitioner's application for compounding of offences under Section 279(2) of the Act, 1961, he was sent a communication informing him the total compounding charges payable in his case which he was required to pay even for his application to be considered. This was purportedly in terms of a circular dated 23.12.2013 issued by the Board containing guidelines for compounding of offence under Clause 11(v). A writ petition was filed seeking quashing of the circular dated 23.12.2014 particularly the paragraph which set out the fee for compounding. In the reply filed to the writ petition, the Department, inter alia, stated that the compounding application under consideration was filed by the accused after about 10 years of filing the prosecution complaint; that para 8(vii) of the revised guidelines for compounding dated 23.12.2014 provides that offences committed by a person for which prosecution complaint was filed by the Department with the competent court 12 months prior to receipt of the compounding application are generally not to be compounded. With that reply, the Department had also filed an order dated 3.11.2016 passed by the Chief Commissioner of Income Tax on the ground that there was inordinate delay of 9 years in filing of the application for compounding of offences by the assessee. While referring to para 8(vii) of the circular dated 23.12.2014, the Court observed that it did not stipulate a limitation period for filing the application for compounding. It gave a discretion to the competent authority to reject an application for compounding on certain grounds. Thus, the Court held that resort cannot be had to para 8 of the

circular to prescribe a period of limitation for filing an application for compounding. The Court accordingly held as follows:

"14. The Court finds nothing in Section 279 of the Act or the Explanation thereunder to permit the CBDT to prescribe such an onerous and irrational procedure which runs contrary to the very object of Section 279 of the Act. The CBDT cannot arrogate to itself, on the strength of Section 279 of the Act or the Explanation thereunder, the power to insist on a 'pre-deposit' of sorts of the compounding fee even without considering the application for compounding. Indeed Mr Kaushik was unable to deny the possibility, even if theoretical, of the application for compounding being rejected despite the compounding fee being deposited in advance. If that is the understanding of para 11(v) of the above Circular by the Department, then certainly it is undoubtedly ultra vires Section 279 of the Act. The Court, accordingly, clarifies that the Department cannot on the strength of para 11(v) of the Circular dated 23rd December 2014 of the CBDT reject an application for compounding either on the ground of limitation or on the ground that such application was not accompanied by the compounding fee or that the compounding fee was not paid prior to the application being considered on merits."

13. However, in the present case a specific limitation has been provided by para 7(ii) of the compounding guidelines contained in the circular dated 14.6.2019 in purported exercise of power under the second Explanation to Section 279(2) of the Act, 1961. The second Explanation merely enables the Board to issue instructions or directions to other Income Tax authorities for the proper composition of offences under that Section. That is to say the instructions or directions may prescribe the methodology and manner of composition of offences to clarify any obscurity or vagueness in the main provisions to make it consistent with the dominant object of bringing closure to such cases which may be pending interminably in our Court system. Such instructions or directions that are prescribed by the Explanation cannot take away a statutory right with which an assessee has been clothed, or set at naught the working of the provision of compounding of offences.

14. Considering the facts and circumstances of the case and the provisions of sub-section (2) of Section 279 of the Act, 1961, the writ petition is **allowed** to the extent that compounding application of the petitioner cannot be rejected by the Income Tax Authority concerned on the ground of delay in filing the application. Accordingly, we also direct that compounding application of the petitioner shall be considered by the Income Tax Authority concerned in accordance with law.

(2022)02ILR A511
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.01.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Application U/S 482 No.175 of 2022

Pankaj Singh @ Ajay Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Dr. Pooja Singh

Counsel for the Opposite Parties:
G.A.

A. Code of Criminal Procedure, 1973 – Section 82 - Requirement of filing affidavit by I.O. for issuance of proclamation u/S 82 Cr.P.C. not mandatory- Upon Perusal of the provisions of Section 82 Cr.P.C. the court is of considered opinion that submission of an affidavit by the I.O. at the time of making of an application for issuance of process u/S 82 Cr.P.C. cannot be a mandatory provision in as much as there is no such provision u/S 82 Cr.P.C. requiring the I.O. to submit an affidavit along with the application. Such a provision may be required when orders are being passed simultaneously u/Ss 82 and 83 Cr.P.C. The law as laid down in Kunwar Mahendra Pratap Singh v St.of U.P. & ors., 482 No. 2261 of 2021, is not in accordance with provisions of Section 82 Cr.P.C. and hence distinguished.

B. The court has a bounden duty to indicate the factors for which it has reason to believe that the person concerned has absconded or is not cooperating for the purposes of service of warrant. Such a procedure is compulsorily required to be undertaken by the court concerned in view of the provisions of Section 82 Cr.P.C. St.Through CBI v Dawood Ibrahim Kakkar(sic Kaskar) & ors. (2000)10 SCC 438 followed.

Application allowed. Matter remanded. (E-12)

List of Cases cited:-

1. St.Through CBI Vs Dawood Ibrahim Kaskar & ors. (2000)10 SCC 438

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

1. Heard Mr. Siddharth Luthra learned Senior Counsel assisted by Ms. Shakshi Kakkar and Mr. Shakti Singh learned counsel for petitioner and learned A.G.A. appearing on behalf of opposite parties 1 to 3. In view of order being passed, notices to opposite party No.4 stand dispensed with.

2. Petition under Section 482 Cr.P.C. has been filed challenging the order dated 31st August, 2021 and 15th September, 2021 passed passed by Chief Judicial Magistrate, Pratapgarh initiating proceedings under Section 82(3) Cr.P.C.

3. Learned counsel for petitioner submits that petitioner was the first informant in the incident that has taken place with regard to case crime No. 407 of 2020 under Sections 147, 148, 149, 307 and 302 IPC in Police Station Kotwali Nagar, District Pratapgarh. It is submitted that petitioner was not initially named in the first information report and his name has been included only during investigation after one year after lodging of the first information report. It is submitted that an application for issuance of non bailable warrant against the petitioner was filed by the investigating officer in which non bailable warrant was issued. It is however submitted that the petitioner was not made aware of the proceedings prior to the issuance of the said warrant since his name was not included in the first information report. It is submitted that the entire proceedings as well as the impugned order have been passed behind the back of petitioner.

4. It has been further submitted that a co-accused Anurag Dubey had filed writ petition No.22124 (M/S) of 2021 challenging the order dated 15th September, 2021 under Section 82 Cr.P.C. and the said writ petition was allowed by means of judgment and order dated 28th October, 2021 quashing the order passed under Section 82 Cr.P.C. It is submitted that petitioner's case is relative to the said case.

5. Learned Senior Counsel has further more submitted that the impugned order is not in consonance with provision of Section 82 Cr.P.C. inasmuch as there is no subjective satisfaction recorded by the court with regard to petitioner not cooperating in the investigation or evading arrest. Reliance has been placed upon judgment of Hon'ble Supreme Court in the case of **State through C.B.I. versus Dawood Ibrahim Kakkar reported in (2000)10 SCC 438** as well as judgment of this Court in the case of **Kunwar Mahendra Pratap Singh versus State of U.P. and others, petition under Section 482 No. 2261 of 2021.**

6. It has been further submitted that prior to issuance of the order under section 82 Cr.P.C., the investigating officer was required to furnish an affidavit as per judgment of this court in the case of Kunwar Mahendra Pratap Singh (supra). That having not been done, the impugned order even otherwise is unsustainable particularly since affidavit by the investigating officer was submitted subsequent to the impugned order dated 31st August, 2021 and therefore there was no material before the court concerned at the time of passing of the impugned order for recording subjective satisfaction regarding evasion of petitioner or his non cooperation during investigation.

7. Learned A.G.A. appearing on behalf of opposite parties opposed has opposed the petition with the submission that the order impugned is perfectly cogent and reasonable and in accordance with provisions of Section 82 Cr.P.,C., which therefore does not require any interference. It is submitted that the court concerned in the impugned order has clearly recorded the fact that the petitioner is not cooperating in the investigation and is evading arrest due to which order under Section 82 Cr.P.C. was required to be passed.

8. Having considered submissions advanced by learned counsel for parties and upon perusal of material on record, it appears that initially an application was filed by the investigating officer for issuance of non bailable warrant against the petitioner whereafter non bailable warrants were issued and subsequently the order impugned has been passed under section 82 Cr.P.C. It is not denied that the petitioner was initially not named in the first information report.

9. From a perusal of the impugned order, it appears that the court concerned has passed orders under section 82 Cr.P. after examining the case diary and upon the plea raised by the investigating officer regarding non cooperation of petitioner in the investigations being carried out. However it is also evident that a number of accused have been named in the first information report but only a general allegation has been recorded in the order impugned with regard to non cooperation in the investigation proceedings. The court concerned has not bothered to indicate on which dates the petitioner was made aware with regard to issuance of any letter by the investigating officer for seeking cooperation in the investigation or even the date on which the non bailable warrant was served upon the petitioner. There is only a bland assertion recorded in the impugned order that the petitioner is evading arrest.

10. Section 82 Cr.P.C. pertains to proclamation for person absconding and for provisions of attachment. It clearly states that the court has to record a reason to

believe if any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant can not be executed then such court may publish a written proclamation requiring him to appear at specified place and at a specified time not less than 30 days from the date of publishing such proclamation.

11. Upon perusal of provision of Section 82 Cr.P.C., it is evident that prior to issuance of any order under the said provision, the court has to record a reason that the person against whom warrant has been issued has specifically absconded or has concealed himself so that such a warrant can not be executed. As such from reading of the aforesaid provision, it is a mandatory duty cast upon the court concerned to record as to how and when the person concerned has absconded or has concealed himself so that the warrant can not be executed. For such purpose, it is the duty of the court concerned to indicate that the person was aware of the proceedings against him particularly also the investigation being conducted against him. Unless and until such a subjective satisfaction is recorded by the court concerned, provisions of Section 82 Cr.P.C. can not be invoked by the court concerned.

12. In the case of Dawood Ibrahim (supra), Hon'ble Supreme Court has referred to provisions of section 73 which may be read in the context of Section 82 Cr.P.C. in the following manner:-

"24. Now that we have found that Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and is evading arrest, we need answer the related question as to whether such issuance of warrant can be for his production before the police in aid of investigation. It cannot be gainsaid that a Magistrate plays, not infrequently, a role during investigation, in that, on the prayer of the Investigating Agency he holds a test identification parade, records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen handwritings etc. However, in performing such or similar functions the Magistrate does not exercise judicial discretion like while dealing with an accused of a non-bailable offence who is produced before him pursuant to a warrant of arrest issued under Section 73. On such production, the Court may either release him on bail under Section 439 or authorise his detention in custody (either police or judicial) under Section 167 of the Code. Whether the Magistrate, on being moved by the Investigating Agency, will entertain its prayer for police custody will be at his sole discretion which has to be judicially exercised in accordance with Section 167(3) of the Code. Since warrant is and can be issued for appearance before the Court only and not before the police and since authorization for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him, Mr Desai was not absolutely right in his submission that warrant of arrest under Section 73 of the Code could be issued by the courts solely for the production of the accused before the police in aid of investigation."

13. The aforesaid judgment clearly indicates that for exercise of powers by the magistrate concerned, orders are not to be passed as a matter of course on a mere

asking of police but only after exercise of judicial discretion based on material placed before him particularly since provisions of Section 82 Cr.P.C. are stringent in nature and may entail loss of liberty and property.

14. In the present case, merely a bland advertment to the case diary would not be enough , the court has a bounden duty to indicate the factors for which it has reason to believe that the person concerned has absconded or is not cooperating for the purposes of service of warrant. Such a procedure is compulsorily required to be undertaken by the court concerned in view of the provisions of Section 82 Cr.P.C.

15. Learned counsel for petitioner has also referred to judgment of this Court in the case of Kunwar Mahendra Pratap Singh (supra) with the submission that prior to issuance of any order under Section 82 Cr.P.C., it is compulsory that the magistrate should consider the application of the investigating officer which should be supported by affidavit stating the reasons why non bailable warrant and proclamation under Section 82 Cr.P.C. is required since the issue relates to personal liberty of a person guaranteed under Article 21 of the Constitution of India.

16. Upon perusal of the aforesaid judgment, juxtaposed with the provisions of Section 82 Cr.P.C., it is the considered opinion of this Court that submission of an affidavit by the investigating officer at the time of making of application for issuance of process under Section 82 Cr.P.C. can not be a mandatory provision. There is no such provision under Section 82 Cr.P.C. requiring the investigating officer to submit an affidavit along with the application. Such a provision may be required when orders are being passed simultaneously under Sections 82 and 83 Cr.P.C., but can not be considered to be mandatory at the time of consideration of an application filed only under section 82 Cr.P.C. It is trite that casus omissus can not be supplied by the court particularly when there is no confusion with regard to the provisions of statute. As such and also upon reading of the judgment of this Court in the case of Kunwar Mahendra Pratap Singh (supra), it is evident that the requirement of affidavit to be filed by the investigating officer while seeking an application for issuance of proceedings under Section 82 Cr.P.C. is merely directory and not mandatory and may be insisted upon the court concerned in specific cases for reasons to be recorded.

17. Considering the aforesaid factors, it is evident that the impugned orders not being in consonance with the provisions of Section 82 Cr.P.C. are therefore unsustainable. Consequently the impugned orders dated 31st August, 2021 and 15th September, 2021 passed passed by Chief Judicial Magistrate, Pratapgarh with regard to case crime No. 407 of 2020 under Sections 147, 148, 149, 307 and 302 IPC in Police Station Kotwali Nagar, District Pratapgarh quashed and resultantly the petition is a allowed. Liberty however is granted to the court concerned for passing fresh orders in case it is necessary to do so but only in accordance with provisions of Section 82 Cr.P.C. as indicated herein above.

(2022)02ILR A515
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.02.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No.479 of 2021

Rama Shankar Mishra ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Piyush Kumar

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law-FIR-Applicant was in-charge of Paddy Purchase Centre-duty to not purchase more than 100 quintals paddy-Petitioner violated mandate of purchase policy-amounts to dereliction of duty-departmental/administrative action can be initiated-no criminal offence u/s 405 IPC-proceedings quashed.

Application allowed. (E-9)

List of Cases cited:-

1. Shafiya Khan alias Shakuntala Prajapati Vs St. of U.P. & anr. passed in Criminal Appeal No(s). 200 of 2022 on 10.02.2022

2. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. AIR 2021 SC 1918

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

1. Heard learned counsel for petitioner and learned A.G.A. for the State and perused the material available on record.

2. By means of this petition under Section 482 Cr.P.C. the petitioner has prayed for a writ of certiorari quashing the summoning order dated 10.11.2020 passed by learned Judicial Magistrate, Kheri in Case No. 1998 of 2020 arising out of Case Crime No. 63 of 2020, under Section 406 IPC, Police Station Phoolbehad, District Kheri as well as charge sheet no. 182 of 2020 dated 07.06.2020 submitted by the police in the aforesaid case.

3. Learned counsel for petitioner has submitted that a false and frivolous FIR under Section 406 IPC was registered by the Assistant Development Officer (Cooperative) Block Phoolbehad, Kheri on 22.02.2020 with the allegation that the petitioner being In-charge of Paddy Purchase Centre, FSS Servayant Maineha and the petitioner purchased more than 100 quintal paddy from farmers in violation of purchase policy of paddy in purchase year 2019-20. After loding of the FIR, the Investigating Officer after completing the formalities of investigation filed charge sheet against the petitioner under Section 406 IPC.

4. Further submission is that no disclosed offence under Section 406 IPC is made out against the petitioner as the petitioner never entrusted in any manner any property nor he misappropriated any property nor converted to his own use. It is further submitted that if the prosecution story is accepted in toto then only the allegation against the petitioner is for violating the government purchase policy. The petitioner in violation of purchase policy purchased more than 100 quintals paddy. Further submission is that in this case five farmers sold more than 100 quintals paddy. During investigation, this fact is clearly established that the purchase price is totally paid to the farmers.

5. Even if the irregularity has been committed by the petitioner then in such circumstances, no criminal offence is made out against the petitioner. If the petitioner purchased paddy in violation of purchase policy, then only administrative or departmental action could be initiated against him. Thus the charge sheet as well as entire proceedings initiated against the petitioner is liable to be set aside.

6. Learned A.G.A. for the State has submitted that after investigation, charge

sheet has been submitted against the petitioner and consequently cognizance order has been passed as such, prima facie offence is made out against the petitioner.

7. This Court perused the entire record. Perusal of FIR shows that the petitioner was the In-charge of Paddy Purchase Centre. As per purchase policy, it was the duty of the petitioner not to purchase more than 100 quintal. As per allegation made in the FIR it transpires that the petitioner purchased more than 100 quintals paddy. The petitioner violated the clear mandate of purchase policy of the government. Therefore, the petitioner has committed irregularity for purchase of paddy crops from agriculturists. Thus it amounts to dereliction of duty on the part of the petitioner. In this regard, departmental/ administrative action can be initiated against the petitioner.

8. The criminal breach of trust has been defined under Section 405 IPC, which reads as under:-

405.Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

A careful reading of Section 405 shows that the ingredients of a criminal breach of trust are as follows:-

i) A person should have been entrusted with property, or entrusted with dominion over property;

ii) That person should dishonestly misappropriate or convert to their own use that property, or dishonestly use or dispose of that property or willfully suffer any other person t do so; and

iii) That such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such.

Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code-

Section 406. Punishment for criminal breach of trust.-

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

9. Perusal of the definition under Section 405 IPC shows that entrustment of the property as well as if the property is converted to his own use then the offence under Section 406 IPC is made out.

10. This Court in exercise of its jurisdiction under Section 482 Cr.P.C. is to examine whether the averments in the complaint constitute the ingredients

necessary for an offence alleged under the Penal Code. If the averments taken on their face do not constitute the ingredients necessary for the offence, the criminal proceedings may be quashed under Section 482. A criminal proceeding can be quashed where the allegations made in the complaint do not disclose the commission of an offence under the penal Code. The complaint must be examined as a whole, without evaluating the merit of the allegations. Though the law does not require that the complaint reproduce the legal ingredients of the offence verbatim, the complaint must contain the basic facts necessary for making out an offence under the Penal Code.

11. Inherent power u/s 482 Cr.P.C. include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effet to any order under this Code, depending upon the facts of a given case. Court can always take note of any miscarriage of justice and prevent the same by exercising its powers u/s 482 of Cr.P.C. These powers are neither limited nor curtailed by any other provisions of the Code. However, such inherent powers are to be exercised sparingly and with caution.

12. It is well settled that the inherent powers under section 482 Cr.P.C. can be exercised only when no other remedy is available to the litigant and Not where a specific remedy is provided by the statute. If an effective alternative remedy is available, the High Court will not exercise its powers under this section, especially when the applicant may not have availed of that remedy.

13. The case of the petitioner is squarely covered by the judgment of Hon'ble Apex Court in the case of ***Shafiya Khan alias Shakuntala Prajapati Vs. State of U.P. and Anr.*** passed in ***Criminal Appeal No(s). 200 of 2022 on 10.02.2022,*** wherein Hon'ble Apex Court in paragraph nos. 15 to 17 has held as under:-

15. The exposition of law on the subject relating to the exercise of the extra-ordinary power under Article 226 of the Constitution or the inherent power under Section 482 Cr.PC are well settled and to the possible extent, this Court has defined sufficiently channelized guidelines, to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. This Court has held in para 102 in State of Haryana v. Bhajan Lal (supra) as under:

"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 under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a noncognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

16. The principles laid down by this Court have consistently been followed, as well as in the recent judgment of three Judge judgment of this Court in ***Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and others AIR 2021 SC 1918.***

17. It is no doubt true that the power of quashing of criminal proceedings should be exercised very sparingly and with circumspection and that too in rarest of the rare cases and it was not justified for the Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whims and fancies."

14. In the given circumstances and going through the complaint on the basis of which FIR was registered and other material placed on record, we are of the considered view that no offence of any kind as has been alleged in the FIR, has been made out against the appellant and if we allow the criminal proceedings to continue, it will be nothing but a clear abuse of the process of law and will be a mental trauma to the appellant.

15. Consequently, petition under Section 482 Cr.P.C. is allowed. The criminal proceedings initiated against the

petitioner in reference to FIR No. 63 of 2020, under Section 406 IPC, Polcie Station Phoolbehad, District Kheri are hereby quashed and set aside.

(2022)02ILR A520
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.02.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Application U/S 482 No. 633 of 2020

Suneel Kumar Yadav ...Applicants
Versus
C.B.I./A.C.B./Lucknow ...Opposite Party

Counsel for the Applicants:
Kuldeep Srivastava, Smt. Padma Verma

Counsel for the Opposite Party:
A.S.G., Anurag Kumar Singh

(A) Criminal Law-Amendment-Prevention of Corruption Act-section 13 (1) (d) substituted by section 7 of 1988 Act-FIR, Chargesheet and charges were framed much prior to amendment in Act-not provided whether amendment retrospective-if retrospective effect not provided-provision of amendment will be prospective-Petition dismissed. (E-9)

List of Cases cited:-

1. T. Barai Vs Henry Ah Hoe & anr., reported in 1983 CRI.L.J. 164 SC

2. St. of Telang. Vs Managipet alias Mangipet Sarveshwar Reddy reported in (2019) 19 SCC 87

3. St. of Raj. Vs Tejmal Choudhary passed in Criminal Appeal No. 1647 of 2021

4. Akram Ansari Vs Chief Election Officer [(2008) 2 SCC 95];

5. K.R. Ramesh Vs C.B.I. & anr. [(2020) SCC Online Kerala 2529].

6. G J Raja Vs Tejraj Surana [(2019) 19 SCC 469]

7. Hitendra Vishnu Thakur Vs St. of Mah. & ors. [(1994) 4 SCC 602]

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

1. Instant petition under Section 482 of the Cr.P.C. has been preferred by the petitioner for quashing of the impugned order dated 20.01.2020 passed by the learned court of Special Judge, Anti Corruption, West, UP., Lucknow initiated in case no. 2 of 2015 arising out of crime no. RC006/2015/A/0002 under Sections 7 & 13(2) r/w 13 (1)(d) of Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act 1988').

2. Learned counsel for the petitioner has submitted that the impugned order was passed without considering the submissions raised on behalf of the petitioner. It is further submitted that the Prevention of Corruption Act has lastly been amended w.e.f. 26.07.2018 and Section 13(1)(d) of the Act 1988 has been substituted by Section 7 of the Act 1988. In Section 13(1)(d), the punishment provided was not less than four years but which may extend to ten years and shall also be liable to fine, whereas by making an amendment, the punishment which has been provided under Section 7 of the Act 1988 is less than three years but which may extend to seven years and shall also be liable to fine. After the amendment in the Act, the applicant has moved an application for alteration of charge in the light of Amendment Act, 1988 since Section 13(1)(d) of the Act 1988 has been omitted and prayed for dropping of the charge under Section

13(1)(d) of the Act 1988. In support of his submission, learned counsel for the petitioner has relied upon the judgment in the case of ***T. Barai v. Henry Ah Hoe and another*** reported in ***1983 CRI.L.J. 164 SC*** on the issue if the punishment has been made lesser in the subsequent statute, the same will be applicable in the pending cases.

3. On the other hand, learned counsel for the CBI has submitted that there is no illegality in the order passed by the Special Judge, Anti-Corruption and has submitted that the amendment has been made vide notification dated 26.07.2018 and the same is not retrospective. In the present case, the FIR was lodged against the petitioner on 05.02.2015; the charge-sheet was filed on 20.03.2015 and the charges were framed on 08.08.2016, whereas the notification of amendment has come into effect on 26.07.2018 and the amendment has not been given retrospective effect and hence the case of the present petitioner is governed by the provisions of the Act, which was in force prior to the amendment. In support of his submission, learned counsel has relied upon the judgment of the Apex Court in the case of State of ***Telangana v. Managipet alias Mangipet Sarveshwar Reddy*** reported in ***(2019) 19 SCC 87.***

4. After hearing the learned counsels for the respective parties, it is found that the judgment relied by learned counsel for the applicant is not applicable in the present case. The facts of that case were different and the issue before the Apex Court was with regard to the repugnancy between the State law and the Union law and the question to be decided was which law will prevail and the provisions of the Prevention of Food Adultration Act was under challenge whereas the judgment relied by learned counsel for the respondent in the case of ***State of Telangana v. Managipet alias Mangipet Sarveshwar Reddy (supra)*** is on the issue which is on a point which is under consideration in the present case and the Apex Court in paragraph 37 has held as under:-

"37. Mr. Guru Krishna Kumar further refers to a Single Bench judgment of the Madras High Court in M. Soundararajan v. State through the Deputy Superintendent of Police, Vigilance and Anti Corruption, Ramanathapuram20 to contend that amended provisions of the Act as amended by Act XVI of 2018 would be applicable as the Amending Act came into force before filing of the charge sheet. We do not find any merit in the said argument. In the aforesaid case, the learned trial court applied amended provisions in the Act which came into force on 26 th July, 2018 and acquitted both the accused from charge under Section 13(1)(d) read with 13(2) of the Act. The High Court found that the order of the trial court to apply the amended provisions of the Act was not justified and remanded the matter back observing that the offences were committed prior to the amendments being carried out. In the present case, the FIR was registered on 9th November, 2011 much before the Act was amended in the year 2018. Whether any offence has been committed or not has to be examined in the light of the provisions of the statute as it existed prior to the amendment carried out on 26.7.2018."

5. The Apex Court in the case of ***State of Rajasthan vs. Tejmal Choudhary*** passed in Criminal Appeal No. 1647 of 2021 vide its judgment dated 16.12.2021, where the fact of the case was that the FIR was lodged on

01.01.2018 against the respondents under Section 13(1)(g) and 13(2) of the Prevention of Corruption Act, 1988 read with provisions of IPC and by amendment in the year 2018, Section 17A has been inserted which provides for previous approval for initiation of any proceedings and investigations against a public servant in discharge of official functions. The Apex Court has held that it is a cardinal principal of construction that every statute is prospective, unless it is expressly or by necessary implication made to have retrospective operation and has relied upon the judgments in the case of ***Akram Ansari vs. Chief Election Officer [(2008) 2 SCC 95]; K.R. Ramesh vs. Central Bureau of Investigation and another [(2020) SCC Online Kerala 2529].*** The judgment in the case of ***G J Raja vs. Tejraj Surana [(2019) 19 SCC 469]*** where the Apex Court followed the judgment of ***Hitendra Vishnu Thakur vs. State of Maharashtra and Ors. [(1994) 4 SCC 602]*** and held that a statute which affect substantive rights is presumed to be prospective in operation unless made retrospective. The relevant paragraph of the judgment in the case of ***State of Rajasthan vs. Tejmal Choudhary (supra***) is reproduced hereinbelow:-

"11. It is a well settled principle of interpretation that the legislative intent in the enactment of a statute is to be gathered from the express words used in the statue unless the plain words literally construed give rise to absurd results. This Court has to go by the plain words of the statute to construe the legislative intent, as very rightly argued by Mr. Roy. It could not possibly have been the intent of the legislature that all pending investigations upto July, 2018 should be rendered infructuous. Such an interpretation could not possibly have been intended."

6. It is an undisputed fact in the present case is that the FIR was lodged against the petitioner on 05.02.2015; the charge-sheet was filed on 20.03.2015 and the charges were framed on 08.08.2016 that is much prior to the amendment in the Act which has came into effect since 26.07.2018. In the present case, the proceedings uptil the framing of charges was prior to the amendment and it is not provided in the amendment which is retrospective in effect and as per the law laid down by the Apex Court in catena of judgments as discussed above that if it is not expressly provided that the provisions of the amended Act will have retrospective effect, the same shall be applicable prospectively and the pending cases shall proceed as per the pre-amended law as existed when the offence is said to have been committed.

7. In so far as the present case is concerned, the amendment does not help the petitioner in any manner, which may entitle him for grant of prayer i.e. dropping of the charge under Section 13(1)(d) of the Act 1988. The petition lacks merit. Hence, this Court finds no illegality in the order passed by the learned Special Judge, Anti Corruption, West, UP., Lucknow and no interference is required in the present petition under Section 482 Cr.P.C.

8. Petition is **dismissed** accordingly.

(2022)02ILR A522
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2021

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Application U/S 482 Cr.P.C. No.1081 of 2007

Mayank Agarwal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Seema Agarwal, Sri Saroj Giri

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

(A) Criminal Law-No judicial mind applied while issuance of process-no offence u/s 379 IPC made out-admittedly possession of outhouse was not with complainant-ingredient of section 379 IPC not made out of moving it out of possession dishonestly and without consent-no case of theft made out-proceeding quashed.

Application allowed. (E-9)

List of Cases cited:-

1. St. of Har. & ors. Vs Bhajan Lal & ors., reported in 1992 Supp (1) SCC 335

2. St. of Andhra Pradesh Vs Golconda Linga Swamy & anr., (2004) 6 SCC 522

3. Zandu Pharmaceutical Works Ltd. Vs Mohd. Sharaful Haque, reported in 2005(1) SCC 122

4. Hira Lal Vs St. of U.P., [2009 (11) SCC 673]

5. Manoj Mahavir Prasad Khaitan Vs Ram Gopal Poddar & anr., [(2010) 10 Supreme Court Cases 673]

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

1. Heard the learned counsel for the applicants and the learned AGA for the State. No one has appeared on behalf of the opposite party no. 2.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the entire proceedings of Complaint Case No. 32253 of 2005 (Gopal versus Mahesh Chandra Agarwal and another) under Section 379 IPC, pending before the Chief Judicial Magistrate, Allahabad.

3. The aforesaid complaint case was registered pursuant to the order of the Chief Judicial Magistrate, Allahabad vide order dated 5.12.2005 (Annexure-5 to the affidavit filed in support of the application under Section 482 Cr.P.C.). The opposite party No. 2 Gopal son of late Ram Jani on 29.11.2005 filed an application under Section 156 (3) Cr.P.C. impleading the applicants and alleging inter alia that he is employed as a "Bandi Rakshak" in Pratapgarh District Jail and his permanent address is 13/15 Clive Road, Allahabad. He has been residing at their address since his childhood and has undergone schooling from the said address. The Bungalow No. 13/15 Clive Road, Civil Lines, Allahabad belonged to an Englishman W.H. Tuck and his father and mother late Ram Jani and late Shanti Devi worked for him and resided in a quarter of the bungalow. One Ravi Kumar, nephew, who was a student of Allahabad University also used to reside with them. The application under Section 156 (3) Cr.P.C. further stated that he was employed at Pratapgarh District Jail, but used to visit Allahabad on holidays and reside in the quarter along with his family. A lot of household goods were kept in the quarter at Allahabad. On 20.10.2005 the nephew of the opposite party no. 2 was residing alone in the quarter and he locked the quarter and went to attend to his friend who was hospitalized and returned in the morning of 21.10.2005 at 7:00 AM only to find that the lock had been broken and his neighbours informed him that the applicants who were the owners of the bungalow had broken the lock and carried away all the household articles of the opposite party no. 2 and put their lock. A police report was tried to be lodged by the nephew, but the same was not registered whereafter information was sent by registered post to the police authorities, but

the same also did not bear any fruits. Help was also sought from the Akhil Bhartiya Sri Balmiki Navyuvak Sangh which also did not bear any fruits and meanwhile the applicants demolished three rooms of the quarter. After not receiving any response from the authorities, the opposite party no. 2 is constrained to approach the Chief Judicial Magistrate, Allahabad by preferring the application under Section 156 (3) Cr.P.C.

4. The application under Section 156 (3) Cr.P.C. was taken up by the learned Chief Judicial Magistrate on 5.12.2005 and after recording the absence of the opposite party no. 2 opined that it was not a fit case to direct the police to register a case and investigate, but directed the case to proceed as a complaint case and fixed a date for recording of the statements of complainant (opposite party no. 2). Thereafter the statements of the complainant (opposite party no. 2) was got recorded under Section 200 Cr.P.C. and the statements of the witnesses Dinesh Kumar son of late Nankoo and Ravi Kumar son of Sri Kali Charan were got recorded under Section 202 Cr.P.C. and the learned C.J.M. vide order dated 25.8.2006 took cognizance of the complaint and summoned the applicants under Section 379 I.P.C.

5. Aggrieved the applicants have sought quashing of the entire proceedings of the complaint case.

6. It is vehemently contended on behalf of the applicants that the complaint has been filed on incorrect facts with mala fide intentions and oblique motive simply to harass and victimize them. The opposite party no. 2 has lodged the complaint consequent to the refusal of the applicants to give the outhouse to the nephew of the opposite party no. 2. He submits that the bungalow No. 13/15, Clive Road, Civil Lines, Allahabad belonged to one Mr. W.H. Tuck. The father of the opposite party no. 2 late Ram Jani was residing in an outhouse of the aforesaid bungalow in the capacity of a servant. However, later on Mr. W.H. Tuck vacated the bungalow sometime in the year 1975, but his servant Ram Jani continued to occupy the outhouse. The bungalow was occupied by the applicant no. 2 and Ram Jani and his wife Smt. Shanti Devi began to work as servants of the applicant no. 2. Ram Jani had three sons i.e. Kamta Prasad, Ashok Kumar and Gopal (opposite party no.2). After death of Ram Jani and Kamta Prasad, Smt. Shanti Devi and her two sons Ashok Kumar and Gopal continued to occupy the outhouse with the permission of the applicant no. 2. However, later on the opposite party no. 2 was employed as "Bandi Rakshak" in Pratapgarh District Jail and shifted to Pratapgarh with his wife and children and began to live in a quarter allotted to him by the jail authorities. Ashok Kumar employed as clerk in Central Excise Department, Allahabad got constructed a house in Patrakar Colony and started to live there. He had handed over the vacant possession of the outhouse to the applicant no. 2 Ashok Kumar vide letter dated 20.10.2005 (Annexure-1 to the affidavit filed in support of the application under Section 482 Cr.P.C.) and requested the applicant no. 2 to permit the son of his sister i.e. Ravi Kumar to reside in the outhouse as he was pursuing his BA-IInd year course. The applicant no. 2 refused the permission whereafter Ravi Kumar along with his friends entered the campus of bungalow No. 13/15, Clive Road, and misbehaved with the applicants. He, however, apologized for the incident later on. The applicant refused to give the

accommodation to the said Ravi Kumar. The complaint under Section 156 (3) Cr.P.C. is the outcome of the said refusal.

7. The learned counsel for the applicants further submits that the applicants are practicing advocate of Allahabad High Court and respectable persons of the society. The allegations levelled against the applicants in the complaint are absurd and improbable as no prudent person can steal household goods of their servants residing in their outhouse. The statement of Ravi Kumar recorded under Section 202 Cr.P.C. cannot be relied upon as it runs contrary to the letter dated 20.10.2005. The statement of Ashok Kumar elder brother of the opposite party no. 2 has not been got recorded which casts a shadow of doubt upon the allegations levelled in the complaint. The learned Magistrate has not applied his judicial mind before issuing the process under Section 404 Cr.P.C. and the summoning order has been issued in a mechanical manner which cannot be sustained. No offence under Section 379 IPC. can be said to be made out against the applicants and as such, the entire proceedings of the Complaint Case No. 32253 of 2005 are liable to be quashed.

8. The learned AGA has opposed the petition and submits that the learned Chief Judicial Magistrate has committed no error in registering the case against the applicants and summoning them to face the trial. The allegations in the complaint discloses the offence of theft against the applicants and the petition deserves to be rejected.

9. In order to appreciate the submissions of the learned counsel for the applicants it would be appropriate to analyze the provisions of Section 378 and 379 IPC. Section 378 IPC defines Theft while Section 379 IPC provides for Punishment of Theft. The provisions are quoted hereunder:-

"378. Theft.?*Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.*

Explanation 1.?*A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.*

Explanation 2.*?A moving effected by the same act which affects the severance may be a theft.*

Explanation 3.*?A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.*

Explanation 4.*?A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.*

Explanation 5*.?The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.*

Illustrations

(a) A cuts down a tree on Z's ground, with the intention of dishonestly

taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent. A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(d) A, being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of the warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the highroad, not in the possession of any person. A by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, in as much as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, in as much as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property in as much as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives a valuable property, which A knows to belong to her husband Z, and to be such property as she has no authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

*379. **Punishment for theft.**?Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."*

10. From the above, it is clear that Section 378 IPC define "Theft" as the dishonest removal of movable property out of the possession of any person without the consent of that person. "Theft" has the following ingredients, namely, (i) dishonest intention to take property; (ii) the property must be movable; (iii) it should be taken out of the possession of another person; (iv) it should be taken without the consent of that person; and (v) there must be some moving of the property in order to accomplish the taking of it.

11. To bring home an offence under Section 378 IPC, the prosecution is to prove (a) that there was a movable property; (b) that the said movable property was in possession of person other than the accused; (c) that the accused took it out as moved it out of the possession of the said person; (d) that the accused did it dishonestly i.e. with intention to cause wrongful gain to himself or wrongful loss to another; (e) that the accused took the movable property or moved it without the consent of the possessor of the movable property.

12. A Court while dealing with a plea of theft is not required to adjudicate on rival claims of title claimed by the parties. All that the Court has to decide is whether at the time of the alleged incident the property which is the subject matter of theft was in the possession of the complainant and whether it was taken out of the possession of the complainant with a dishonest intention. "Possession" referred to in Section 378 IPC is actual, physical possession and not merely possession in law.

13. Now, having regard to the facts and circumstances of the case, the Court is of the opinion that no case under Section 379 IPC can be said to be made out against the applicants from the allegations set out in the criminal complaint lodged against them. The reasons for the same are as under:

(i) The complainant/opposite party Gopal son of late Ram Jani used to

reside in the outhouse of the bungalow No. 13/15 Clive Road, Civil Lines, Allahabad along with his brother Ashok Kumar. However, Gopal along with his family shifted to Pratapgarh on his being appointed as "Bandi Rakshak" in Pratapgarh District Jail. Ashok Kumar shifted to his newly constructed house in Patrakar Colony, Allahabad and handed over the possession of the outhouse to the applicant no. 2 as is evident from the letter dated 20.10.2005 of Ashok Kumar filed as Annexure-1 to the affidavit filed in support of the application under Section 482 Cr.P.C.

(ii) The factum that vacant possession of the outhouse had been handed over to the applicant no. 2 is also apparent from the letter dated 20.10.2005 (Annexure-3 to the affidavit) of Ravi Kumar, the nephew of the opposite party no. 2 Gopal wherein he has requested the applicant no. 2 to permit him to live in the outhouse wherefrom he can complete his studies.

(iii) The report of the Police Station Civil Lines, Allahabad clearly reveals that the factum of theft is not established and that the application under Section 156 (3) Cr.P.C. has been filed on exaggerated facts.

(iv) Since admittedly the possession of the outhouse was not with the complainant/opposite party no. 2, the allegations set out in the complaint fall flat. The ingredients necessary to constitute an offence of theft i.e. movable property being in the possession of the complainant/opposite party no. 2 in the outhouse, the applicants having moved it out of the possession of the opposite party no. 2 dishonestly and without the consent of the opposite party no. 2 are not present.

(v) The complaint appears to have been instituted on the refusal of the applicant no. 2 to give the outhouse to the nephew of the opposite party No. 2. The action on the part of the complainant/opposite party No. 2 appears to be mala fide.

(vi) The allegations in the complaint appear to be covered by illustration (e) to the Section 378 IPC. No case of theft against the applicants can be said to be made out.

14. The Apex Court in the case of ***State of Haryana and others Vs. Bhajan Lal and others,*** reported in ***1992 Supp (1) SCC 335*** held as under:-

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 under Section 156(1)The Code of Criminal Procedure 1973; Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2)The Code of Criminal Procedure 1973; Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the 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.

15. The law laid down in the case of **Bhajan Lal (Supra)** was reiterated in the case of ***State of Andhra Pradesh Vs. Golconda Linga Swamy and another, (2004) 6 SCC 522*** wherein the Apex Court has observed as under:-

"5. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the Section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or

criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alique concedit, conceditur et id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the Section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the Section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercises of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

6. In R.P. Kapur v. State of Punjab (AIR 1960 SC 866), *this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.*

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

7. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the Section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden

death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) SCC 335) A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows: (SCC pp.378-79 para 102)

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a Police Officer without an order of a Magistrate as contemplated under S. 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.

8. As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its

extraordinary jurisdiction of quashing the proceeding at any stage. (See : The Janata Dal etc. v. H.S. Chowdhary and others, etc. (AIR 1993 SC 892), Dr. Raghubir Saran v. State of Bihar and another (AIR 1964 SC 1)). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint/F.I.R. has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant or disclosed in the F.I.R. that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint/F.I.R. is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceeding. (See : Mrs. Dhanalakshmi v. R. Prasanna Kumar and others (AIR 1990 SC 494), State of Bihar and another v. P. P. Sharma, I.A.S. and another (1992 Suppl (1) SCC 222), Rupan Deol Bajaj (Mrs.) and another v. Kanwar Pal Singh Gill and another (1995 (6) SCC 194), State of Kerala and others v. O.C. Kuttan and others (1999 (2) SCC 651), State of U.P. v. O. P. Sharma (1996 (7) SCC 705), Rashmi Kumar (Smt.) v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) and another (1999 (8) SCC 728), Rajesh Bajaj v. State NCT of Delhi and others AIR 1999 SC 1216), State of Karnataka v. M. Devendrappa and another (2002 (3) SCC 89)."

16. Yet again the Apex Court in the case of ***Zandu Pharmaceutical Works Ltd. Vs. Mohd. Sharaful Haque,*** reported in ***2005(1) SCC 122*** observed as under:-

"11. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows: (SCC pp.378-79, para 102)

"102(1) Where the allegations made in the first information report or the

complaint, even if they are taken at their value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: Janata Dal v. H.S. Chowdhary (1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set

out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi vs. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P.P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O.C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O.P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi."

17. In ***Hira Lal versus State of U.P., [2009 (11) SCC 673]*** the Apex Court held as under:

"10. The parameters of interference with a criminal proceeding by the High Court in exercise of its jurisdiction under Section 482 of the Code are well known. One of the grounds on which such interference is permissible is that the allegations contained in the complaint petition even if given face value and taken to be correct in their entirety, commission of an offence is not disclosed. The High Court may also interfere where the action on the part of the complainant is mala fide."

18. Again the Apex Court in ***Manoj Mahavir Prasad Khaitan versus Ram Gopal Poddar and another, [(2010) 10 Supreme Court Cases 673]*** has observed as under:

"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."

19. In view of the above and for the reasons stated above, the Court is of the considered opinion that the continuation of the criminal proceedings against the applicants is an abuse of the process of the

Court and ends of justice requires that the said proceedings be quashed.

20. Consequently, invoking the inherent powers under Section 482 Cr.P.C., the entire criminal proceedings of Complaint Case No. 32253 of 2005 (Gopal versus Mahesh Chandra Agarwal and another) under Section 379 IPC pending before Chief Judicial Magistrate, Allahabad is hereby quashed.

21. The application stands ***allowed.***

(2022)02ILR A535
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Application U/S 482/378/407 No. 1213 of 2018

Dr. Ravendra Prasad ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Mahmood Alam, Gaurav Maheshwari, Gayasudden, Ishraq Farooqui, Sunil Kumar Yadav

Counsel for the Opposite Parties:
G.A., Azad Khan, Mamta Pandey

(A) Cruelty - Indian Penal Code, S. 498-A - Cruelty - Criminal Procedure Code, S. 468, S. 472, S. 473 - Cognizance - cognizance of offence u/s 498-A, may be taken even after the limitation period i.e. even after three years, if court is satisfied that the delay has been properly explained or that it is necessary so to do in the interests of justice

(B) Indian Penal Code, S. 498-A - Cruelty - Maximum Punishment is of three years - Code of Criminal Procedure - S. 468, Period of limitation to take cognizance - Period of limitation is three years - Continuing Offence - As per S. 472 CrPC, in case of a continuing offence, a fresh period of limitation begin to run at every moment of the time during which the offence continues - Extension of period of limitation - S. 473 CrPC provides that any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice - Held - Cruelty is a continuing offence - on each occasion on which wife is subjected to cruelty she would have a new starting point of limitation - In complaints under Section 498A the wife will invariably be oppressed & interest of justice demands that the Court should protect the oppressed wife and punish the oppressor/offender - It is appropriate for Court in the case of delayed complaint to construe liberally Section 473 Cr.P.C. in favour of a wife who is subjected to cruelty more so when the conduct of the accused is such that applying the rule of limitation will give an unfair advantage to him or result in miscarriage of justice (Para 25)

Petitioner and the opposite party no.3 got married in 1999 - they started living separately in 2010 - FIR was lodged in August, 2016 after 17 years of marriage – alleged last act of cruelty was committed against wife on 13.10.1988 when she was forced to leave the matrimonial home - period of limitation ended on 12.10.1991 (after three years) but charge sheet was filed on 22.12.1995 - Petitioner challenged cognizance order and the summoning order on the ground that cognizance was taken much beyond the limitation period - Held - It is evident from a perusal of the FIR, Charge Sheet, statements given by the complainant that the complainant –wife even after leaving the matrimonial home was not allowed to live peacefully by the husband or concentrate on her job - petitioner has been constantly harassing her - No case made out to show interference - petition rejected (Para 26, 26, 28, 29)

Application dismissed. (E-5)

List of Cases cited :-

1. M. Saravana Porselvi Vs A.R. Chandrashekar @ Parthiban & ors (2008) 11 SCC 520

2. Sirajul & ors. Vs St. of U.P. & anr. (2015) 9 SCC 201

3. Kamlesh Kalra Vs Shilpika Kalra & ors. Criminal Appeal No. 416 of 2020 decided on 24.04.2020 Manu/SC/0812/2020

4. Preeti Gupta & ors. Vs St. of Jhar. & ors. Criminal Appeal No. 1512 of 2010 decided on 13.08.2010

5. Joseph Salvaraj A. Vs St. of Guj. & ors. AIR 2010 Supreme Court 3363

6. Y. Abraham Ajith & ors. Vs Inspector of Police, Chennai & anr. (2004) 8 SCC 100

7. M. Saravana Porselvi Vs A.R. Chandrashekar @ Parthiban & ors. (2008) 11 SCC 520

8. Vanka Radhamanohari Vs Vanka Venkata Reddy (1993) 3 SCC 4

9. Arun Vyas Vs Anita Vyas (1999) 4 SCC 690

10. Asha Ahuja Vs Rajesh Ahuja Manu/DE/0380/2003

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

1. Learned counsel for the petitioner, Sri Mahmood Alam, had prayed for adjournment today as he says that the name of the petitioner has been wrongly mentioned in the Charge-Sheet as Dr. Ravindra Pasad Nigam while the petition has been filed in the name of Dr. Ravindra Prasad and therefore, he may be given time to add Sir-name **"Nigam"** to the name of the petitioner as mentioned in the array of parties.

2. Smt. Mamta Pandey, on the other hand, has vehemently opposed such request for adjournment. She says that this petition has been filed three years ago and this is a deliberate intention to avoid disposal of this case and keep it pending as the petitioner is enjoying an interim order in his favour since 08.03.2018.

3. Pleadings have been exchanged between the parties and the matter is ripe for hearing. Since there is a opposition to the prayer for adjournment today, the matter is being heard on its merit.

4. Learned counsel for the petitioner shall make necessary correction in the name of the petitioner during the course of the day.

5. Heard the learned counsel for the petitioner and Smt. Mamta Pandey, learned counsel for the opposite party no.2 and 3 and Sri S. P. Tiwari, learned counsel for the State.

6. This petition has been filed challenging the proceedings arising out of Case Crime No. 194 of 2016 under Sections 498-A, 323, 504, 506 IPC Police Station Talkatora, District Lucknow and the charge sheet filed in Criminal Case No. 66608 of 2017, and the cognizance taken on 20.02.2017.

7. It has been submitted by the learned counsel for the petitioner that the FIR lodged by the opposite party no.3, his estranged wife was based upon false and concocted story that the petitioner had tortured her in the lust for dowry. As per the FIR, it is evident that opposite party no.3 was living separately from the petitioner since 2010 and working as Medical Officer in Hardoi. The facts of the case were that the opposite party no.3 was married to the petitioner on 06.05.1999.

Both the petitioner and opposite party no.3 are Doctors and it was a love marriage without any dowry. Out of the wedlock two sons were born. The petitioner purchased two plots of land in the name of the opposite party no.3 also sometime in the year 2007, since the petitioner was busy as a Doctor, the opposite party no.3 developed illicit relationship with a male nurse arrayed as opposite party no.4 in this petition. She also left the matrimonial house on 22.10.2012 alongwith the sons of the petitioner in order to enjoy live-in relationship with the said opposite party no.4. The opposite party no.3 filed a Regular Suit No. 2504 of 2012 under Section 13(1A), (1B) of the Hindu Marriage Act, which is pending before the Principal Judge, Family Court, Lucknow praying for divorce. The opposite party no.3 also tried to sell off the land which has been bought by the petitioner in her name, and to stop the opposite party no. 3 from doing so, the petitioner filed a civil suit registered as Regular Suit No. 289 of 2013 and Regular Suit NO. 970 of 2013, which is pending before the Court of Civil Judge, Mohanlal Ganj(Junior Division), Lucknow. The opposite party no. 3 being annoyed filed a Criminal Misc. Case No. 7712 of 2012 under Section 12 of the Domestic Violence Act 2005, before the Additional Chief Judicial Magistrate-VII, Lucknow in which an application under Section 23 was rejected by the Prescribed Authority on 09.12.2014. The entire complaint was thereafter rejected on 12.08.2015. The opposite party no.3 being unhappy with the same cooked up a story which was narrated in the FIR with regard to the two incidents that took place on 26.05.2016 and 11.06.2016.

8. After the lodging of the FIR by the opposite party no.3 on 13.08.2003, the parties were sent for mediation to settle their disputes amicably, but the opposite party no.3 refused to compromise. The report was submitted of failure of mediation. The Investigating Officer, thereafter, recorded the statement of the father of the complainant, the mother of the complainant, the sons of the complainant and the petitioner and concluded the investigation and filed the charge sheet on which cognizance has been taken without application of judicial mind by the learned trial court.

9. It has been submitted that the petitioner and the opposite party no.3 got married in 1999, but they started living separately in 2010. The FIR was lodged in August, 2016 after 17 years of marriage and if the petitioner was really harassing her always, why she continued to keep quite. The story set up is quite improbable.

10. It has been submitted by the learned counsel for the petitioner that under Section 498-A of the Indian Penal Code, if the offence is proved, the punishment is of three years. As per Section 468 of the Cr.P.C. limitation is in prescribed of taking cognizance and Sub-Section mentions a limitation of three years. The cognizance was taken much beyond the limitation period, and therefore, cognizance order and the summoning order should be set aside.

11. Learned AGA for the State has pointed that the incident in question were of May and June, 2016, the FIR was lodged in August, 2016 and cognizance was taken by the learned trial court at in December, 2017 very much within the limitation period as prescribed under Section 468 of the Cr.P.C.

12. Learned counsel for the petitioner has placed reliance upon the several

judgements of the Hon'ble Supreme Court, namely:-

(i) M. Saravana Porselvi vs. A.R. Chandrashekar @ Parthiban and Others (2008) 11 SCC 520

(ii) Sirajul and Others vs. State of U.P. and Another (2015) 9 SCC 201

(iii) Kamlesh Kalra vs. Shilpika Kalra and Others Criminal Appeal No. 416 of 2020 decided on 24.04.2020 Manu/SC/0812/2020

(iv) Preeti Gupta and Others vs. State of Jharkhand and Others Criminal Appeal No. 1512 of 2010 decided on 13.08.2010

(v) Joseph Salvaraj A. Vs. State of Gujarat and Others ***AIR 2010 Supreme Court 3363***

13. Learned counsel for the State has referred to her counter affidavit filed in March, 2020, wherein it has been stated that the parents of the opposite party no. 3, late Umakant Nigam and Dr. Swapna Nigam purchased two properties one in locality Sarswa, Krishna Vihar Colony, Tehsil Sarojini Nagar, District Lucknow and second in Village Chandsarai, Tehsil Mohanlal Ganj, District Lucknow in the year 2007, and the petitioner is falsely claiming that the same was bought by him in the name of his wife. The opposite party no.3 has filed documentary evidence in the form of Statement of Account which was held jointly in the name of the petitioner and the opposite party no. 3 in Dena Bank, and also the Statement during cross-examination of the petitioner in an application under Section 125 Cr.P.C. before the learned Principal Judge, Family Court, where he admitted that he had no fixed source of income, and therefore, the learned trial court had directed the petitioner to give only Rs. 1,000/- per month to each of the two sons i.e. total of Rs. 2,000/- per month as maintenance to the two sons and nothing to the opposite party no.3. In the Statement of Account that has been filed as Annexure to the counter affidavit, the learned counsel for the opposite party no.2 and 3 has pointed several transactions of huge amount of money that has been deposited on various dates by cash and also by cheque in between 2001 to 2009. It has been stated by the learned counsel for the opposite party no.3 that the opposite party no.3's parents are quite well off and her mother was very successful gynecologist, having her own clinic. The opposite party no.3, however, was prevented from practising, even though she has studied medicine, by the petitioner. The petitioner insisted that she would be allowed to practise only when she could set up her own clinic. The father of the opposite party No.03 bought plot no. 495 in the year 2003 admeasuring 15,000 Sqft. of which 5,000 Sqft. was given to Dr. Ravindra Prasad, the petitioner whereas 5,000 Sqft. each was made out in favour of her mother Smt. Swapna Nigam, and her Brother Rajesh Nigam. The possession of 5,000/- Sqft. of plot No. 495 in village Sarsawa is still continuing with the petitioner, so that a hospital/clinic could be constructed to enable both the opposite party no.3 and the petitioner to practise there. However, the opposite party no. 3 was prevented from practising for ten years, so that she continued to look after the house and her son, thus, wasting her education, as a Medical Doctor. It was only after she was thrown out of the matrimonial home and her father died that she took up

job on contractual basis as a Medical Officer in District Hardoi. The moment, the opposite party No.3 started working the petitioner started torturing her mentally, accusing her of infidelity and of illicit relationship with her co-workers and subordinates. He would say unpleasant things and abuse her even in front of the general public. She got tired but she kept herself distant from such allegations and kept working and concentrating on her job. However, the petitioner not being satisfied with leaving her alone with her sons attempted to assault the sons and her friend, who had taken them out for a visit to the park. Her friend was beaten up brutally, and therefore, the FIR was lodged by the opposite party no. 3.

14. With regard to the learned counsel for the petitioners' argument regarding non-maintainability of the criminal proceedings initiated by the order impugned as no case under Section 498-A of the IPC can be made out, if the Limitation of three years has passed; Learned counsel for the petitioner has placed reliance on ***Kamlesh Kalra vs. Shilpika Kalra and Others Criminal Appeal No. 416 of 2020 decided on 24.04.2020 Manu/SC/0812/2020, Y. Abraham Ajith and Others vs. Inspector of Police, Chennai and Another (2004) 8 SCC 100*** and ***M. Saravana Porselvi vs. A.R. Chandrashekar @ Parthiban and Others (2008) 11 SCC 520.***

15. This Court shall now consider each of such judgements. In the case of M. Saravana Porselvi(Supra), the parties were living separately since, 1996, the appellant had filed a compliant before All Woman Police Station at Virudh Nagar, where an enquiry was directed to be conducted. Later on with the intervention of the friends and relatives, the parties entered into an agreement of Divorce on 24.07.1996. It was also registered in the office of Joint Sub-Registrar, the appellant received a sum of Rs. 25,000/- as a permanent alimony. The first respondent married again. in 1998 and had two children from the subsequent marriage, It was thereafter that the appellant filed a complaint against the respondent i.e. her husband and parents-in-law in May, 2006, because the woman stayed at Chennai the first respondent had married for the second time and she came to know about the second marriage much later. On received of summons in a petition under Section 13 (1) (A) of the Hindu Marriage Act after lodging of FIR, the respondents were arrested and an application for quashing of the FIR was filed, which was allowed. The appellant being aggrieved against such order approached the Hon'ble Supreme Court on the ground that since Investigation on the FIR was still going on the High Court ought not to have interfered only on the basis of the statements made by the respondent before the Court. The respondent had asked the Hon'ble Supreme Court that the High Court did not commit any error as the deed of divroce dated 24.07.1996 was registered document, therefore, the public document of which judicial notice could have been taken by the High Court. The Court, thereafter, observed that the customary divorce may be legal or illegal, but the fact that such an agreement had taken placed and Rs.25,000/- had been handed over by way of the permanent alimony has not been denied by the appellant. The appellant being in the legal profession was held to be aware of legal implications thereof. The parties had been living separately for more than ten years. If the parties were living separately for so long, a case under Section 498-A of the Penal Code could not to be said to be made

out at such distant point of time. Particularly in view of the bar of limitation as contained in Section 468 of the Cr.P.C. Considering the facts of the case that Hon'ble Supreme Court observed that it was unbelievable that the appellant was really harassed by the husband and her in-laws.

16. The Court dismissed the appeal, thereafter, leaving it open for the appellant to question the validity or existence of customary divorce proceedings, as alleged by the respondent no.1.

17. In **Kamlesh Kalra and Others vs. Shilpika Kaplra and others(Supra)**, the Supreme Court was considered the appeal filed by the mother-in-law of the complainant, Shilpika Kalra. The complainant and the son of the appellant had got married on 28.07.2007. They were both working. Thereafter, they fell out and started living separately since 10.06.2009. The husband had also filed a divorce petition before the Family Court, Bandra, which was pending. After a gap of nearly three and a half years i.e. on 28.01.2013, wife Shilpika Kalra, filed a complaint in Delhi seeking registration of FIR against the husband and his family alongwith his relatives Stridhan articles was alleged to be in the possession of all the accused. The police, thereafter, registered an FIR on 29.10.2014 under Sections 406, 498-A of the IPC. The only allegation against the appellant was that being mother-in-law, she had demanded the salary of the complainant and took possession of all wedding gifts and case etc. that were given by the parents of the complainant to her. The entire Stridhan of the respondent was with the mother-in-law.

When the case was heard before the learned trial court, the husband/Manish Kumar Kalra deposited Stridhan articles and a pay order of Rs.5,98,000/- made out in favour of Shilpika Kalra, which she refused to accept. A charge sheet was filed, the learned trial court took cognizance, thereafter, the police in its report stated that the respondent had approached them again on 05.12.2016 with an additional list of articles, which had not been returned by the appellant and her son. This list was given after seven years of divorce petition having been filed. The learned trial court framed charges under Section 498-A of the IPC against the mother-in-law, Kamlesh Kalra and the Husband, Manish Kalra. Before charge sheet was filed, the High Court in a writ petition filed for quashing of FIR observed that since no charge sheet has been filed against two of the accused, petition filed by them has become infructuous. With regard to the other writ petitioners i.e. Manish Kalra and Kamlesh Kalra, it was observed that they were not liable to be proceeded under Section 498-A of the IPC as FIR was filed beyond the period of limitation of three years.

18. With regard to Section 406 of the IPC and retaining of Stridhan and other weeding gifts by the appellants, the Court observed that it was continuing offence and therefore, the FIR was not liable to be quashed. Since there was a specific allegation against the appellant, mother-in-law, Kamlesh Kalra of retaining the goods, the Husband, Manish Kalra, was not as responsible and FIR under Section 406 of the IPC was quashed against him. The appellant, Kamlesh Kalra filed an appeal regarding the observations made by the High Court the respondent, Shilpika Kalra also filed a Special Leave Petition. Both the appeals were tagged and heard together. The Court referred to observations made in earlier judgements like ***Vanka***

Radhamanohari Vs. Vanka Venkata Reddy (1993) 3 SCC 4 and ***Arun Vyas vs. Anita Vyas (1999) 4 SCC 690*** and a Judgement of the Delhi High Court in ***Asha Ahuja vs. Rajesh Ahuja Manu/DE/0380/2003*** and regarding observation of the Court that if the parties were living separately since long and no material was shown with regard to reconciliatory measures being taken for whatever reasons, and still the respondents failed to file a complaint within time, the period of limitation would apply as there were no allegation that physical and mental harassment continued beyond the date of separate living.

19. The Supreme Court observed with respect to Section 498-A being applied that the parties were living separately since 2009, a Divorce Petition had already been filed by the said date. The FIR was filed in 2015 without alleging "continued cruelty" from the date of separation till the date of filing of FIR.

20. In ***Y. Abraham Ajith (Supra),*** the respondent No.2, the wife of the appellant filed a complaint in the Court of the Magistrate alleging commission of offences punishable under Sections 498-A, 406 IPC and Section 4 of the Dowry Prohibition Act, 1961. The Magistrate directed the police to investigate. After investigation the police filed the charge sheet. The appellant filed an application under Section 482 Cr.P.C. before the High Court, alleging that the Magistrate had no jurisdiction even to entertain a complaint even if the allegations contained therein were accepted in their totality, as no part of cause of action had arisen within the jurisdiction of the Court concerned. The complaint itself had disclosed that the respondent had left the place of the alleged incident on 15.04.1997, and therefore, could not have filed the complaint at that place. The Court observed after referring to the Sections 177 Cr.P.C. and 178 Cr.P.C. that the complainant had on 15.04.1997 left the matrimonial house on account of alleged dowry demand by the husband and his family, thereafter, not even a whisper of allegation were made about any demand of dowry or commission of any act constituting an offence at the said place of matrimonial residence. Therefore, the logic for Section 178(c) of the Cr.P.C. relating to "continuing offence" could not be upheld as no part of cause of action had arisen in the city concerned.

It is evident from the facts that the case of ***Y. Abraham Ajith (Supra)*** does not apply to the facts of the instant case.

21. In ***Sirajul and others vs. State of U.P. and Others (Supra)***, the Hon'ble Supreme Court observed that while it is true that the cases covered by statutory bar of limitation may be liable to be quashed without any further enquiry, cases not covered by statutory bar can also be quashed on the ground of delay in filing of criminal complaint in appropriate cases as the Court may consider that there is a violation of rights of the accused for a separate trial, which is a part of the Article 21 of the Constitution having regard to the nature of the offence, the extent of delay, the person responsible for the delay and other attending circumstances. The Court considered the fact that the appellant/accused has been earlier exonerated in proceedings arising out of the cross-case filed by the complainant by the Investigating Officer and a report was filed before the Court. At least after ten years after the commencement of the trial against him, the complainant did not even bother to seek simultaneous trial of the cross-cases.

The incident was of the year 1992 in respect of which there are two cross-cases. The Court observed that the conduct of the complainant had to be taken into account and admittedly the complainant had stood convicted in the cross-case. It would be unfair and unjust to permit the complainant/ respondent no.2 to proceed with the complaints filed after 16 years of the incident.

Evidently, the case cited by the learned counsel for petitioner does not apply to the facts of the instant case.

22. Learned counsel for the petitioner has placed reliance upon ***Preeti Gupta (Supra),*** where Preeti Gupta, the sister-in-law and a permanent resident of a different town in a different District and in a different State and the unmarried brother-in-law of the complainant who was also living in a different State were falsely implicated by the complainant, under Sections 498-A, 406, 341, 323 and 120 (B) of the IPC read with Section ¾ of the Dowry Prohibition Act, 1961. None of the prosecution witnesses had stated anything against the appellant, the appellants had clearly stated in the appeal that they had never visited the place, where the complainant alleged that she was physically assaulted. In the facts of the said case the Supreme Court observed that since there was no denial of the assertion made by the appellant that they had never visited the place where the complainant was assaulted, the High Court under Section 482 of the Cr.P.C. could exercise its power to quash criminal proceedings initiated against them. The said case is also inapplicable in the case of the petitioner.

23. Learned counsel for the petitioner has placed reliance on ***Joseph Salvaraj vs. State of Gujarat*** and paragraph 24 to 26 thereof. The Hon'ble Supreme Court observed that the civil dispute was going on between the parties with regard to some agreement between them for sale/purchase of telecast rights of God TV in their respective areas of living. FIR was lodged by the respondent under Section 406 and 420 of the IPC, whereas a summary Civil Suit under Order 37 Rule 11 CPC had already been filed making similar allegations. The Court observed that no case under Section 406, 420 of the IPC was made out. The allegations in the FIR disclosed the civil dispute between the parties and the FIR had been filed only with an intention to harass and humiliate the appellant. There appeared to be no cheating or dishonest inducement for delivery of property or breach of trust by the appellant. The Court thereafter, drew a distinction between civil wrong and criminal wrong and relied upon its own as judgement in ***Devendra vs. State of U.P. 2009 (7) SCC 207*** and observed that when a dispute between the parties constitutes only a civil wrong and not a criminal wrong, the Court would not permit a person would be harass.

Clearly, the said case is not applicable in the case of the petitioner.

24. On the other hand in ***Arun Vyas and Another vs. Anita Vyas (1999) 4 SCC 690,*** the Hon'ble Supreme Court while considering and almost similar facts and situation where marriage took place of the respondent with the appellant in 1986 and the respondent filed a complaint in Court on 18.10.1995 alleging that she was being beaten up by her husband and his family, as her parents failed to satisfy a demand of dowry, and she ultimately had to leave her house in October, 1988 came to the

conclusion that the learned Magistrate misplaced his sympathy and discharge the appellants in 1996 taking into account limitation prescribed under Section 468 Cr.P.C. while ignoring the provisions of Section 473 Cr.P.C. The Court observed that Sections 467 to 473 define period of limitation. The point of commencement of period of limitation in the case of a continuing offence is embodied in Section 472 and in the case other than a continuing offence is contained in Section 469. Such Sections have been added in the new Code of Criminal Procedure to protect persons from prosecution on the basis of State grievances and complaints which may turn out to be vexatious. At the same time, it is necessary to ensure that due to delays on the part of investigating and prosecuting agencies and the application of Rule of Limitation, the criminal justice system is not rendered toothless and ineffective and the perpetrators of crime are not placed in an advantageous position, the Parliament has classified offences into two categories looking into the nature and gravity of such offences and prescribed limitation only in cases where the punishment is of three years or less. Even in such cases under section 473, if any court is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice it may take cognizance of an offence after the expiry of the period of limitation.

25. The Court further observed on the basis of Judgment rendered in the ***Vanka Radhamanohari Vs. Vanka Venkata Reddy (1993) 3 SCC 4*** that the essence of the offence in Section 498A is cruelty as defined in the explanation appended to that Section. It is a continuing offence and on each occasion on which the respondent was subjected to cruelty she would have a new starting point of limitation: the last act of cruelty was committed against the respondent within the meaning of the explanation on 13.10.1988 when she was forced to leave the matrimonial home. The period of limitation for offence under Section 406 ended on 12.10.1991 but charge sheet was filed on 22.12.1995, which was clearly barred by limitation but the Court should have looked into Section 473 Cr.P.C. which conferred power on it to take cognizance of an offence after the period of limitation, if it was satisfied that it would serve the interest of justice. The interest of justice demands that the Court should protect the oppressed and punish the oppressor/offender. In complaints under Section 498A the wife will invariably be oppressed having been subjected to cruelty by the husband and their in-laws. It is therefore, appropriate for Court in the case of delayed complaint to construe liberally Section 473 Cr.P.C. in favour of a wife who is subjected to cruelty more so when the conduct of the accused is such that applying the rule of limitation will give an unfair advantage to him or result in miscarriage of justice.

26. Looking to the explanation the word cruelty has given under Section 498A clause (a) says that cruelty means any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman.

27. It is evident from a perusal of the FIR and the Charge Sheet and the statements given by the complainant before the Investigating Officer and the contents of the counter affidavit filed in this petition, that the complainant even after leaving the

matrimonial home was not allowed to live peacefully by the husband or concentrate on her job. The petitioner has been constantly harassing her and her case falls clearly under the explanation (a) of the word "cruelty' given under Section 498-A of the IPC.

28. No case made out to show interference in this petition.

29. Accordingly, the petition stands **rejected.**

(2022)02ILR A544
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.01.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No.1805 of 2018

Lalli @ Siv Lali & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Arvind Kumar

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, Section 482 - Indian Penal Code, Sections 363, 366 & 376 - The Protection of Children from Sexual Offences Act, 2012, Section 3, 4 - father alleged that accused have enticed away his daughter alleged to be 15 years of age - CMO certified age of his daughter to be 18 years - In her statement recorded u/s 164 Cr.P.C., his daughter stated that she had gone away with the applicant no. 2 out of her own free will and she married the applicant no. 2 and is residing with him as his wife - She stated that her father had lodged an FIR on false allegations and no wrong has been committed with her - She is living happily with the applicant no. 2 as her parents used to beat her with sticks - She ran-away with the applicant no. 2 out of her own free will - Marriage certificate was also produced - Held - FIR was lodged on false allegations & the proceedings initiated on the basis of the said FIR are a clear abuse of the process of law - Proceedings liable to be quashed

Allowed. (E-5)

List of Cases cited:

1. State of Haryana V. Bhajan Lal 1992 Supp (1) SCC 335

2. Vineet Kumar Vs St. of U.P. (2017) 13 SCC 369

3. Pankaj Kumar Vs St. of Mah. (2008) 16 SCC 117

4. Geo Varghese Vs St. of Raj. 2021 SCC Online SC 873

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

1. Heard Mr. Arvind Kumar, learned counsel for the applicants and Mr. Prem Prakash, learned AGA for the State.

2. By means of the present application under Section 482 Cr.P.C. the applicants have sought quashing of summoning order and the order dated 12.10.2017 passed by the Additional Sessions Judge, Court No. 5, Barabanki in C.T. No. 39/2017 as well as charge-sheet No. 127/2016 dated 04.09.2016 in case Crime No. 90/2016, under Sections 363, 366, 376 IPC and 3/4 POCSO Act, Police Station Ramnagar, District Barabanki.

3. The facts of the case, briefly stated, are that on 29.03.2015 a first information report under Sections 363, 366 IPC was lodged at Police Station Ramnagar, District Barabanki by the opposite party no. 2,

Ghan Shyam, father of the applicant no. 1 alleging that Parvesh, Nandu, Pratap and wife of Parvesh have enticed away his daughter-applicant no. 1 alleged to be 15 years of age. Although the applicant no. 2 was not named in the FIR, his name was subsequently added and the name of all the persons made accused in the FIR were expunged upon coming into the light the fact that the applicant no. 1 had married with applicant no. 2.

4. The applicant no. 1 was produced before the Chief Medical Officer, Barabanki for her medical examination who certified her age to be 18 years.

5. In her statement recorded under Section 164 Cr.P.C., which was recorded after expiry of a period of four years of the alleged incident and in pursuance of the direction issued by this Court vide order dated 23.06.2016 passed in Writ Petition No. 14565 (MB) of 2016, the applicant no. 1 stated that she had gone away with the applicant no. 2 out of her own free will and she married the applicant no. 2 and is residing with him as his wife. She gave birth to a son who could not survive. She categorically stated that her father had lodged an FIR on false allegations and no wrong has been committed with her. She is living happily with the applicant no. 2 as her parents used to beat her with sticks. She ran-away with the applicant no. 2 out of her own free will.

6. A copy of the marriage certificate issued by the District Marriage Officer, Barabanki has also been placed on record, in which the age of the applicant no. 2 is mentioned to be 21 years and it has been certified that the applicant no. 1 got married to the applicant no. 2 on 09.07.2015.

7. The applicants have also brought on record a copy of a certificate dated 05.03.2018 issued by the Village Pradhan certifying that the applicant no. 1 is the wife of the applicant no. 2, they reside in Village Utkhara, Police Station and Tehsil Ramnagar, District Barabanki and they have got a son, namely, Kishan who was born on 04.12.2017. The applicants have also filed a copy of "Mother and Child Care Card" issued by the Integrated Health Development Service, National Health Mission which states that the applicant no. 1 gave birth to a son on 04.12.20174 and in this card apparently prepared in the year 2017, the age of the applicant no. 1 stated to be 20 years.

8. By means of an order dated 04.04.2018, notice was ordered to be issued to the opposite party no. 2-informant and the respondent-State was also given opportunity to file its objections/counter affidavit.

9. The learned Chief Judicial Magistrate, Barabanki has submitted a report dated 23.04.2018 stating that the notice issued to the opposite party no. 2 has been served in person but in spite of personal service of notice, the opposite party no. 2 has not filed any objection nor a counter affidavit in this case. The State has also elected not to oppose the application by filing a counter affidavit.

10. It has been pleaded in the affidavit filed in support of the application that the applicants had filed Writ Petition No. 14565 (MB) of 2016 seeking quashing of the FIR registered as case Crime No. 90/2016, under Sections 363, 366, 376 IPC and 3/4 POCSO Act, Police Station Ramnagar, District Barabanki lodged by the opposite party no. 2 and by means of an

order dated 23.06.2016 this Court had disposed off the writ petition with a direction that till a report under Section 173 (2) Cr.P.C. was forwarded by the police, the applicants shall not be arrested in the aforesaid case crime.

11. It has been pleaded by the applicants that the applicant no. 1 was found to be major in her medical examination and was willing to go with her husband-applicant no. 2, however, her father deliberately detained her and, therefore, the applicant no. 1 had to approach this Court again by filing Writ Petition No. 21317 (HC) of 2016 and when the applicant no. 1 was produced in this Court, she categorically stated that she wanted to go with the applicant no. 2-Tannu Yadav son of Parag Yadav.

12. By means of the judgment and order dated 19.09.2016, the aforesaid writ petition was allowed and the applicant no. 1 was allowed to live her life as per her own wish and since then applicant no. 1 is residing with the applicant no. 2 as wife and husband peacefully.

13. The applicants had filed the instant application under Section 482 Cr.P.C. on 02.04.2018 and on 04.04.2018, this court had passed an order issuing notice of the application to the opposite party no. 2, which was served on him personally on 22.04.2018. However, the opposite party no. 2 has not put in appearance in the case to contest the same and it appears that he is not interested in prosecution of the applicant no. 2, who is now the son-in-law of the informant - opposite party no. 2.

14. The scope of interference by the High Courts in proceedings under Section 482, Cr.P.C. has been succinctly laid down by the Hon'ble Supreme Court in ***State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335,*** in the following words: -

"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 under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the

same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

12. In ***Vineet Kumar versus State of U.P***. reported in ***(2017) 13 SCC 369,*** the Hon'ble Supreme Court has been pleased to hold that: -

"*41. Inherent power given to the High Court under Section 482 Cr.P.C. is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the case falls in one of the categories as illustratively enumerated by this Court in State of Haryana v. Bhajan Lal. Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding under Category 7 as enumerated in State of Haryana v. Bhajan Lal, which is to the following effect: (SCC p. 379, para 102)*

"102. (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."

15. In ***Pankaj Kumar v. State of Maharashtra, (2008) 16 SCC 117***, the Hon'ble Supreme Court was pleased to explain the scope and ambit of powers of the High Courts under Section 482, Cr.P.C. in the following words: -

"14.The scope and ambit of powers of the High Court under Section 482 CrPC or Article 227 of the Constitution has been enunciated and reiterated by this Court in a series of decisions and several circumstances under which the High Court can exercise

jurisdiction in quashing proceedings have been enumerated. Therefore, we consider it unnecessary to burden the judgment by making reference to all the decisions on the point. It would suffice to state that though the powers possessed by the High Courts under the said provisions are very wide but these should be exercised in appropriate cases,ex debito justitiaeto do real and substantial justice for the administration of which alone the courts exist. The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. The powers have to be exercised sparingly, with circumspection and in the rarest of rare cases, where the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. (See Janata Dal v.H.S. Chowdhary [(1992) 4 SCC 305 : 1993 SCC (Cri) 36] ,Kurukshetra University v. State of Haryana [(1977) 4 SCC 451 : 1977 SCC (Cri) 613] and State of Haryana v.Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] .)"The expression "rarest of rare cases" used by the Hon'ble Supreme Court in Bhajan Lal has been explained in Google India (P) Ltd. v. Visaka Industries, (2020) 4 SCC 162 in the following words: -

"43. As to what is the scope of the expression "rarest of rare cases" indicated in para 103, we may only refer to the judgment of this Court in Jeffrey J. Diermeier v. State of W.B.,(2010) 6 SCC 243 wherein the law laid down by a Bench of three Judges in Som Mittal (2) v. State of Karnataka (2008) 3 SCC 574 has been referred to : (Jeffrey J. Diermeier case(2010) 6 SCC 243, SCC p. 252, para 23)

"23. The purport of the expression "rarest of rare cases", to which reference was made by Shri Venugopal, has been explained recently in Som Mittal (2) v. State of Karnataka(2008) 3 SCC 574. Speaking for a Bench of three Judges, the Hon'ble the Chief Justice said : (SCC pp. 580-81, para 9)

"9. When the words "rarest of rare cases" are used after the words "sparingly and with circumspection" while describing the scope of Section 482, those words merely emphasise and reiterate what is intended to be conveyed by the words "sparingly and with circumspection". They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasise that the power under Section 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection.'"

16. In a recent pronouncement reported in ***2021 SCC Online SC 873, Geo Varghese Vs. State of Rajasthan,*** the Hon'ble Supreme Court held as under:-

"35. The scope and ambit of inherent powers of the Court under Section 482 CrPC or the extra-ordinary power under Article 226 of the Constitution of India, now stands well defined by series of judicial pronouncements. Undoubtedly, every High Court has inherent power to actex debito justitiae i.e., to do real and substantial justice, or to prevent abuse of the process of the Court. The powers being

very wide in itself imposes a solemn duty on the Courts, requiring great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power vested in the Court should not be exercised to stifle a legitimate prosecution. However, the inherent power or the extra-ordinary power conferred upon the High Court, entitles the said Court 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 the ends of justice require that the proceeding ought to be quashed.

36. The following observations made by this Court in the case of State of Karnataka v. L. Muniswamy may be relevant to note at this stage:--

"The whole some power under Section 482 CrPC entitles the High Court to quash a proceeding when 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 High Courts have been invested with inherent power, both in civil and criminal matters, to achieve a salutary public purposes. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature."

17. The entire material available on record, including the statements of the applicant no. 1 under Section 161 Cr.P.C. and Section 164 Cr.P.C., report of the medical examination of the applicant no. 1 conducted by the Chief Medical Officer, Barabanki, the certificate of registration of marriage of the applicant no. 1 and applicant no. 2 and the mother and child safety card issued by the Integrated Child Development Services, National Health Mission establish that the applicant no. 1 is major, she had gone with the applicant no. 2 and has married him willingly and the allegations levelled against the applicant no. 2 in the FIR are false. The police has submitted the charge-sheet dated 04.09.2016 and the Additional Sessions Judge, Court No. 5, Barabanki has passed an order summoning the applicant no. 2 and has issued non-bailable warrant against him without a proper application of mind to the aforesaid material available on record.

18. The State as well as the opposite party no. 2 have not filed any counter affidavit and, therefore, the averments made in the affidavit filed in support of the application under Section 482 Cr.P.C. remain uncontroverted.

19. Considering the aforesaid facts and circumstances, it appears that the FIR in question was lodged on false allegations and the proceedings initiated on the basis of the said FIR are a clear abuse of the process of law.

20. Therefore, in view of the above and considering the dictum of the Apex Court, the entire proceedings initiated in pursuance of the charge-sheet No. 127/2016 dated 04.09.2016 in case Crime No. 90/2016, under Sections 363, 366, 376 IPC and 3/4 POCSO Act, Police Station Ramnagar, District Barabanki as well as summoning and NBW dated 12.10.2017 including the charge-sheet No. 127/2016 and FIR registered as case Crime No. 90/2016 are hereby quashed.

21. Accordingly, the application is ***allowed.***

(2022)02ILR A550
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2021

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 Cr.P.C. No.2742 of 2007

Sanjay Gulati ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Krishna Kumar Singh

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

(A) FIR alleges advancement of money to Applicant accused but goods not received in return-receipt of goods could not be refuted by complainant -no mention of the Applicant in the FIR-no disclosure of prima facie commission of offence against Applicant-such proceeding would result in an abuse of the process of law-proceeding quashed.

Held, In the entire complaint there is no allegation of any threat 10 having been extended by the applicant, or by the alleged Sandeep, to the complainant and any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do. Therefore, this Court is of the considered opinion that the essential ingredients of the offence punishable under Sections 420 and 506 IPC are not made out from a bare perusal of the complaint, besides the fact that the entire complaint does not make any mention of the name of the complaint namely viz. Sanjay Gulati. **(para 22)**

Application allowed. (E-9)

List of Cases cited:-

1. Surya Pratap Singh Vs St. of U.P. & anr. reported in 2015 8 ADJ 580

2. Lourence D" Souza Vs St. of U.P. & anr. reported in 2017 (2) ALJ 156

3. Anil Mahajan Vs Bhor Industries Ltd. & anr. (2005) 10 SCC 228

4. Geo Varghese Vs St. of Raj., 2021 SCC Online SC 873

5. Rajiv Thapar Vs Madan Lal Kapoor, (2013) 3 SCC 330

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

1. Heard Shri Krishna Kumar Singh, learned counsel for the applicant and learned A.G.A. for the State-respondents and perused the record.

2. By means of the instant application under Section 482 of the Criminal Procedure Code the applicant-Sanjay Gulati s/o Shri Mahendra Gulati has prayed for quashing of the entire proceedings of Complaint Case No. 419 of 2006 under Section 420, 506 I.P.C. in Police Station Civil Lines, District Moradabad pending in the Court of Civil Judge (Junior Division), Moradabad, Court No. 2.

3. The facts of the case as borne out from the record are that the complainant Kamal Singh, who has been arrayed as the opposite party No. 2 in the application under Section 482 Criminal Procedure Code, filed a complaint dated 23-06-2005 under Section 156 (3) of the Criminal Procedure Code alleging that he had taken

a loan from Syndicate Bank for his business of cycles and had submitted a quotation of "Sandeep Traders, Jail Road, Moradabad". On 30.05.2005 a cheque number 757645 amounting to Rs. 30,000/- was issued in the name of Sandeep Traders but Sandeep did not give the goods to the complainant and he said that he will give the same as and when the same will be available and he obtained signatures of the complainant for obtaining payment from the Bank. Thereafter, the second cheque bearing number 054830 dated 09-06-2005 for Rs. 20,000/- was given by the Bank. Sandeep kept on saying that he will give the goods. On 20.6.2005, the complainant went to Sandeep, the complainant accompanied by his brothers Charan Singh, Vipin Bishnoi and Mohit Bishnoi went to Sandeep, when Sandeep said that the entire arrears stood settled and he would not give the goods and threatened the complainant, He has complained that Sandeep wants to usurp the complainant's money fraudulently.

4. The statement of complainant was recorded under Section 200 Criminal Procedure Code and the statements of witnesses Charan Singh and Vipin Bishnoi were recorded under Section 202 Criminal Procedure Code and on 17-01-2007, the Additional Chief Judicial Magistrate, Moradabad, Court No. 2 passed an order summoning Sandeep Kumar for being tried for offences under Sections 420, 506 Indian Penal Code.

5 . Aggrieved by the complaint and the summoning order, the applicant **"Sanjay Gulati** s/o Shri Mahendra Gulati" who is the proprietor of "Sandeep Traders" - with which the complainant Kamal Singh was having business relations, has approached this Court by filing the instant application under Section 482 Cr.P.C.

6. In the affidavit filed in support of application, the applicant has stated that he owns a shop of cycles and cycle parts and he is running his business in the name of "Sandeep Traders". The allegations against him are totally false and frivolous and are designed only to harass him. He has already delivered the goods in respect of which cheque numbers 757645 and 054830 were issued and the opposite party No. 2 has received the goods and made endorsements of receiving on the bills, a copy whereof has been filed as Annexure No. 3 to the affidavit filed in support of the application under Section 482 Criminal Procedure Code. The applicant has further stated that the complainant-opposite party No. 2 has taken a commercial loan of Rs. 50,000/- from Syndicate Bank, Moradabad and when he failed to deposit the same, the Bank issued a notice for recovery of the amount and in order to take undue advantage and to delay the recovery proceedings, the opposite party No. 2 has filed the complaint. From a perusal of the complaint no offence under Sections 420 and 506 I.P.C. is made out against the applicant- Sanjay Gulati s/o Shri Mahendra Gulati.

7. On 12-02-2007, this Court was pleased to pass the following order in this case: -

"Issue notice to opposite party no. 2 to file counter affidavit within six weeks.

Learned A.G.A. may also file counter affidavit within the same period.

Rejoinder affidavit may be filed within two weeks thereafter. List after expiry of the aforesaid period.

Till the next date of listing, further proceedings in complaint case No. 419 of 2006, Kamal Singh Vs. Sanjay Gulati, pending before Civil Judge (JD), court no. 2, Moradabad against the applicant shall remain stayed."

8. In compliance of the aforesaid order, a notice was issued to the opposite party No. 2, which has not been returned unserved. Even otherwise, when the proceeding of the complaint case is lying stayed since 12-02-2007, it cannot be accepted that the complainant-opposite party No. 2 has no knowledge of the filing of the present application under Section 482 Criminal Procedure Code in this Court. Still none of the opposite parties has filed counter affidavit or any application for vacation of interim order dated 12-02-2007.

9. Shri Krishna Kumar Singh Advocate, learned counsel for the applicant has submitted that all the allegations in complaint are against **"Sandeep"** whereas the complainant had business relations with **"Sandeep Traders"**, of which the applicant-**Sanjay Gulati** s/o Shri Mahendra Gulati is the proprietor and there is absolute no mention of **Sanjay Gulati** proprietor of Sandeep Traders in the complaint and the complaint does not disclose commission of any offence by Sanjay Gulati. The applicant-Sanjay Gulati s/o Shri Mahendra Gulati cannot be tried for any offence on the basis of aforesaid complaint.

10. The aforesaid submission of learned counsel for the applicant appears to be sound as in the entire complaint, there is no mention of applicant-**Sanjay Gulati** s/o Shri Mahendra Gulati, who is the proprietor of "Sandeep Traders". Therefore, the allegations levelled in the complaint, even if the same are to be taken to be true, do not disclose the commission of any offence by **Sanjay Gulati** s/o Shri Mahendra Gulati, the proprietor of "Sandeep Traders".

11. The learned counsel for the applicant has further submitted that the complainant has already received the goods and he has made an endorsement of receiving of goods on the bills - a copy whereof has been filed as Annexure-3 to the affidavit filed in support of the application under Section 482 Criminal Procedure Code. The complainant-opposite party No. 2 has not filed any counter affidavit disputing the correctness of the endorsement of receiving of goods made on the bills and it should be presumed that the complainant-opposite party No. 2 does not dispute its correctness, rather, he admits it by implication. Therefore, the allegations of non delivery of the goods is found to be false on the basis of undisputed material available on the record of this Court.

12. In ***Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330***, the Hon'ble Supreme Court has formulated certain steps to determine the veracity of a prayer for quashing under Section 482 Criminal Procedure Code as follows:-

"30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would

rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3 Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4.Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

(emphasis supplied by me)

13. In the case in hand, the material relied upon by the accused particularly the receipt of goods (annexure-3) has not been refuted by the complainant and this Court finds that the proceeding with the trial would result in an abuse of the process of law and would not serve the ends of justice.

14. The learned counsel for the applicant has next submitted that even as per the complaint-allegations, the complainant was in business relations with "Sandeep Traders" and his grievance is regarding non payment of certain amount due in business transactions. He has submitted that the dispute of non payment of any amount payable towards consideration of sale of goods is a dispute of purely civil nature, for which the appropriate remedy lies in the civil court, namely filing a suit for recovery of money as provided under Section 57 of Sale of Goods Act, 1930. In this regard, he has placed reliance on a judgement of this Court in the case of **Surya Pratap Singh Vs. State of U.P. and another reported in 2015 8 ADJ 580.** The relevant portion of the aforesaid judgment is contained in paragraph Nos. 62 and 63, which are being reproduced below:-

"62. In the light of facts and circumstances stated above and law settled by Hon'ble Apex Court in the decisions of Hridaya Ranjan Prasad Verma (supra), Alpic Finance Ltd. (supra), S.W. Palanitkar and Others (supra), Uma Shankar Gopalika (aupra), Devendra Kumar Singla (supra), Anil Mahajan (supra), Neelu Chopra and Another (supra), Paramjeet Batra (supra), Arun Bhandari (supra), G. Sagar Suri and Another (supra) and by this Court in M/s Rohit Stationary Centre (P) Ltd. & Others (supra), this Court is of the considered view that complaint does not disclose any criminal offence at all, much less, any offence either under Section 406 I.P.C. or Section 420 I.P.C. and present case is purely a case of civil dispute between the parties, based on various commercial transactions during course of business, for which remedy lies before the Civil Court by filing of appropriate suit, subject to permissibility of limitation for filing the same.

63. In the circumstances, this Court is of further view that by filing of criminal complaint a dispute of purely civil nature is given a cloak of criminality with intention to pressurize the applicant and his wife to bring them to his own terms and to enforce obligations arising out of breach of contract touching commercial transactions instead of approaching Civil Court with a view to realize money at the earliest, as such by allowing continuance of complaint and consequential proceedings relating to it would amount to abuse of process of court and to prevent the same it is just and expedient in the interest of justice to quash the same by exercising inherent power of this Court under Section 482 Cr.P.C. "

15. Learned counsel for the applicant has taken the Court through the entire allegations in the complaint which indicate that the complaint is regarding non delivery of goods even after making payments and on certain arguments having occurred when he demanded the goods and he has alleged that **"Sandeep wants to usurp his money fraudulently",** which is purely a case of civil dispute between the parties, based on various commercial transactions during course of business, for which remedy lies before the Civil Court by filing of appropriate suit. By filing a criminal complaint, a dispute of purely civil nature has been given a cloak of criminality and as such by allowing continuance of complaint and consequential proceedings relating to it would amount to abuse of process of court and to prevent the same it is just and expedient in the interest of justice to quash the same by exercising inherent power of this Court under Section 482 Cr.P.C.

16. The learned Counsel for the applicant has next submitted that besides the fact that there is absolutely no allegation against the applicant-Sanjay Gulati s/o Shri Mahendra Gulati proprietor of Sandeep Traders, the allegations do not make out ingredients of offence of cheating which is provided under Section 415 I.P.C. as follows:-

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

Explanation,--A dishonest concealment of facts is a deception within the meaning of this section."

17. The learned counsel for the applicant has placed reliance on a judgement of this Court in the case of **Lourence D" Souza Vs. State of U.P. and another** reported in 2017 (2) ALJ 156 in which this Court has explained the essential ingredients of the offence of cheating in the following words:-

"The essential ingredients of the offence of cheating are as follows: -

(I) Deceiving or making of false representation.

(II) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security and

(III) "mensrea" or fraudulent or dishonest intention of the accused at the

time of making the inducement or false representation."

18. From a perusal of the record it is evident that the opposite party no. 2 claims that he was doing business with the applicant since long and in a routine manner the instant business transaction was also made. 'Mens rea' or the guilty mind, at the time of making inducement is a necessary ingredient of the offence of cheating. Therefore, it cannot be said that there was any dishonest intention on the part of accused/applicant at the time when the parties entered into the transaction. On the basis of allegations made in the complaint, it cannot be said that Section 420 of I.P.C. is attracted in the present case.

19. In the case of **International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and Others Versus Nimra Cerglass Technics (P) Ltd. and Others, (2016) 1 SCC 348**, the Hon'ble Supreme Court has explained the definition of cheating as under: -

"The making of a false representation is one of the essential ingredients to constitute the offence of cheating under Section 420 I.P.C.. In order to bring a case for the offence of cheating it is not merely sufficient to prove that a false representation had been made. It is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant. If it is established that the intention of the accused was dishonest at the very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating but further that established that a representation was made by the accused has subsequently not been kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court. Mere breach of contract cannot give rise to criminal prosecution for cheating and criminal liability should not be produced in disobedience of civil nature."

20. In **Anil Mahajan vs. Bhor Industries Ltd. & Anr. (2005) 10 SCC 228,** the Hon'ble Supreme Court has drawn a distinction between a breach of contract and cheating in the following words:-

"6. .....A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction."

According to the Hon'ble Apex Court:-

8. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it

can be inferred that the accused had the intention to deceive the complainant to pay."

21. In the entire complaint, there is no allegation that the alleged Sandeep had fraudulently or dishonestly induced the complainant to deliver any property by deceiving the complainant. Further the complaint does not make out the commission of offence of criminal intimidation, which is defined under Section 503 I.P.C. as follows:-

"503. Criminal intimidation.--Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

22. In the entire complaint there is no allegation of any threat having been extended by the applicant, or by the alleged Sandeep, to the complainant and any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do. Therefore, this Court is of the considered opinion that the essential ingredients of the offence punishable under Sections 420 and 506 IPC are not made out from a bare perusal of the complaint, besides the fact that the entire complaint does not make any mention of the name of the complaint namely viz. Sanjay Gulati.

23. In a recent pronouncement reported in **2021 SCC Online SC 873, Geo Varghese Vs. State of Rajasthan,** the Hon'ble Supreme Court held as under:-

"35. The scope and ambit of inherent powers of the Court under Section 482 CrPC or the extra-ordinary power under Article 226 of the Constitution of India, now stands well defined by series of judicial pronouncements. Undoubtedly, every High Court has inherent power to act ex debito justitiae i.e., to do real and substantial justice, or to prevent abuse of the process of the Court. The powers being very wide in itself imposes a solemn duty on the Courts, requiring great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power vested in the Court should not be exercised to stifle a legitimate prosecution. However, the inherent power or the extra-ordinary power conferred upon the High Court, entitles the said Court 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 the ends of justice require that the proceeding ought to be quashed."

36. The following observations made by this Court in the case of ***State of Karnataka v. L. Muniswamy7*** may be relevant to note at this stage:--

"The whole some power under Section 482 CrPC entitles the High Court to quash a proceeding when 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 High Courts have been invested with inherent power, both in civil and criminal matters, to achieve a salutary public purposes. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature."

24. In view of the aforesaid facts and the legal position, this Court is satisfied that allowing the proceedings to continue would be an abuse of the process of the court and the ends of justice require that the proceedings ought to be quashed. In the light of sub clause 30.3 and 30.4 of ***Rajiv Thapar (supra)***, the application under Section 482 Criminal Procedure Code deserves to be **allowed**. Accordingly, the present application under Section 482 Criminal Procedure Code is allowed. The entire proceedings of Complaint Case No. 419 of 2006 under Section 420, 506 IPC at Police Station Civil Lines, District Moradabad pending in the Court of Civil Judge (Junior Division), Moradabad, Court No. 2 are hereby quashed.

(2022)02ILR A557
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.11.2021

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 Cr.P.C. No.2998 of 2007

Basant Lal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Dinesh Kumar Yadav, Sri Dharmendra Singhal, Sri Madhukar Maurya

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

(A) Criminal Law-FIR lodged-Police enquired-no persons as to description of the complainant could be find-no appearance of complainant before the High Court -neither any application for stay vacation-complaint bogus-abuse of process of law-complainant has no interest in pursuing his complainant-proceeding quashed.

Application allowed. (E-9)

List of Cases cited:-

1. Geo Varghese Vs St. of Raj., 2021 SCC Online SC 873

2. St. of Karnataka Vs L. Muniswamy

3. Pankaj Kumar Vs St. of Mah., (2008) 16 SCC 117

4. Rajiv Thapar Vs Madan Lal Kapoor, (2013) 3 SCC 330

5. Haryana Vs Bhajan Lal 1992 Supp (1) SCC 335

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

1. Heard Sri Madhukar Maurya, Advocate, holding brief of Sri Dinesh Kumar Yadav, Advocate for the applicants and Sri Pankaj Srivastava and Shri Rakesh Chandra Srivastava, learned Additional Government Advocates appearing for the State and perused the record.

2. By means of the instant application under Section 482 of Code of Criminal Procedure the applicants have prayed for quashing of the complaint lodged as

Complaint Case No. 1015 of 2006 titled Raju Vs. Basant Lal and others, pending in the Court of learned Additional Chief Judicial Magistrate, Ist, Aligarh, under Sections 323, 452, 427, 504 and 506 of the Indian Penal Code and all consequential proceedings thereon.

3. On 05-07-2006, one Raju son of Shri Ramdeen, resident of Mohalla Bhagwan Nagar, Police Station Sasni Gate, District Aligarh lodged a complaint alleging that he is a trader of readymade garments and so are the applicants. The complainant and the applicants are known to each other and they have been trading the goods from each other. On 02-07-2006 all the three applicants went to the complainant's house and demanded goods worth Rs.20,000/-. The complainant declined their request and demanded payment of Rs.10,000/- already due from the applicants, upon which the applicants got angry, abused and assaulted him, torn his clothes, broken household goods and caused financial loss of about Rs.5,000/- to Rs.6000/-. Statements of witnesses were recorded under Section 202 of Code of Criminal Procedure and thereafter the summoning order was passed on 16-09-2006.

4. The applicants gave an application dated 27-11-2006 (a copy whereof has been annexed as Annexure No. 4 to the affidavit filed in support of the Application under Section 482) to the District Magistrate, Aligarh stating that the applicant no. 3 Pradeep Kumar is in service of the Postal Department of the Government of India since the year 1995 and he is residing at New Delhi, the applicant no. 2 Satish Kumar is doing private job and the applicant no.1 also works as an agent. All of them reside at New Delhi and they have never had any relation with Aligarh. Raju son of Ramdeen, Dharamveer son of Pyare Singh and Ram Babu son of Sita Ram, all residents of Aligarh, are hatching a conspiracy for entangling the applicants in false cases. None of the applicants are clothes merchants. Earlier also, an Advocate had sent a notice from Ghaziabad in an attempt to entangle the applicants in a false case. The applicants had sent a reply to the aforesaid notice and upon an inquiry held by the police, it was found that the name and address of the complainant was fictitious. One Chetan Prakash, a neighbour of the applicants has prepared forged documents of the house of the applicant no. 3 and on the basis thereof he has taken a loan in connivance with certain bank officers. Chetan Prakash is a proclaimed offender and upon coming to known about these facts the applicants have filed F.I.R. No. 153 of 2003, under Sections 420, 468, 471, 120-B of the Indian Penal Code and F.I.R. No. 125 of 2003, under Sections 420 and 193 of the Indian Penal Code.

5. The aforesaid Chetan Prakash, his wife Uma, brother Vipin Prakash and their associates are pressurizing the applicants in several ways and on the applicants' complaint F.I.R. No. 92 of 2005, under Section 506 and 34 of the Indian Penal Code has been registered. As the conspiracy hatched by the aforesaid persons failed in Delhi, they hatched another conspiracy to teach a lesson to the applicants in Uttar Pradesh. In this regard the applicants have given complaints to the police authorities in Ghaziabad and Noida as well as to the Director General of Police, Uttar Pradesh, Lucknow. By means of the aforesaid application the applicants requested the District Magistrate to get a thorough inquiry conducted against Raju resident of Bhagwan Nagar and

Dharamveer and Ram Babu residents of Jaiganj. They further stated that in case in the inquiry the applicants are found guilty they will accept whatever punishment would be inflicted upon them.

6. Upon the aforesaid application dated 27-11-2006, an inquiry was conducted by the police and a report was submitted to the Senior Superintendent of Police, Aligarh stating that upon inquiry no person by the description of Raju son of Ramdeen, resident of Bhagwan Nagar as well as the other two persons mentioned by the applicants in the complaint was found and it was reported that there was no need of any police action.

7. The applicants have challenged the complaint and the summoning order on the ground that the complaint is bogus and it was filed with a view to achieve ulterior motive and it is an abuse of the process of court and, therefore, it deserves to be quashed.

8. On 14-02-2007 an interim order was passed in this case staying further proceedings of the Complaint Case and a notice was ordered to be issued to the complainant / opposite party no. 2 enabling him to file a counter affidavit within a period of six weeks and the learned AGA was also given an opportunity to file a counter affidavit within a same period.

9. The notice was sent to the complainant/opposite party no.2 through the Chief Judicial Magistrate, Aligarh, who has sent a report dated 04-06-07 stating that no person of the description "Raju son of Ramdeen, resident of Bhagwan Nagar, Police Station, Sasni Gate, Aligarh" could be found.

10. Sri Madhukar Maurya Advocate has submitted that even though the notice could not be served on the complainant - opposite party no. 2, the stay of proceedings of the complaint case would surely amount to notice of the present application under Section 482 Cr.P.C. Had the complainant been genuinely interested in pursuing the complaint, he would have come to know about the present application when the proceedings of the complaint got stayed. However, in spite of the proceedings of the complaint case remaining stayed since as far as back as 14-02-2007, neither the opposite party no.2 complainant has put in appearance in the case nor has he filed any application for vacation of the interim order or a counter affidavit disputing the correctness of the averments made in the application under Section 482 Cr.P.C. as well as the affidavit filed in its support and the same remain uncontroverted. The learned counsel for the applicants has submitted that this conduct of the complainant/opposite party no.2 fortifies his contention that the complaint is false and bogus and the proceedings initiated by the complainant amount to an abuse of the process of law for harassing the applicants.

11. The scope of interference by the High Courts in proceedings under Section 482, Cr.P.C. has been succinctly laid down by the Hon'ble Supreme Court in State of **Haryana v. Bhajan Lal 1992 Supp (1) SCC 335,** in the following words: -

"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 under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

12. In ***Vineet Kumar versus State of U.P. reported in (2017) 13 SCC 369,*** the Hon'ble Supreme Court has been pleased to hold that: -

"41. Inherent power given to the High Court under Section 482 Cr.P.C. is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the case falls in one of the categories as illustratively enumerated by this Court in State of Haryana v. Bhajan Lal. Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously

instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding under Category 7 as enumerated in State of Haryana v. Bhajan Lal, which is to the following effect: (SCC p. 379, para 102)

"102. (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."

13. In ***Pankaj Kumar v. State of Maharashtra, (2008) 16 SCC 117,*** the Hon'ble Supreme Court was pleased to explain the scope and ambit of powers of the High Courts under Section 482, Cr.P.C. in the following words: -

"14.The scope and ambit of powers of the High Court under Section 482 CrPC or Article 227 of the Constitution has been enunciated and reiterated by this Court in a series of decisions and several circumstances under which the High Court can exercise jurisdiction in quashing proceedings have been enumerated. Therefore, we consider it unnecessary to burden the judgment by making reference to all the decisions on the point. It would suffice to state that though the powers possessed by the High Courts under the said provisions are very wide but these should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. The powers have to be exercised sparingly, with circumspection and in the rarest of rare cases, where the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. (See Janata Dal v.H.S. Chowdhary [(1992) 4 SCC 305 : 1993 SCC (Cri) 36] ,*Kurukshetra University v. State of Haryana* [(1977) 4 SCC 451 : 1977 SCC (Cri) 613] *and State of Haryana v.Bhajan Lal* [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] .)"The expression "rarest of rare cases" used by the Hon'ble Supreme Court in Bhajan Lal has been explained in Google India (P) Ltd. v. ***Visaka Industries, (2020) 4 SCC 162*** in the following words: -

"43. As to what is the scope of the expression "rarest of rare cases" indicated in para 103, we may only refer to the judgment of this Court in Jeffrey J. Diermeier v. State of W.B.,(2010) 6 SCC 243 wherein the law laid down by a Bench of three Judges in Som Mittal (2) v. State of Karnataka (2008) 3 SCC 574 has been referred to : (Jeffrey J. Diermeier case(2010) 6 SCC 243, SCC p. 252, para 23)

"23. The purport of the expression "rarest of rare cases", to which reference was made by Shri Venugopal, has been explained recently in ***Som Mittal (2) v. State of Karnataka(2008) 3 SCC 574.*** Speaking for a Bench of three Judges, the Hon'ble the Chief Justice said : (SCC pp. 580-81, para 9)

"9. When the words "rarest of rare cases" are used after the words "sparingly and with circumspection" while describing the scope of Section 482, those words merely emphasise and reiterate what is intended to be conveyed by the words "sparingly and with circumspection". They

mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasise that the power under Section 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection.'"

14. In a recent pronouncement reported in 2021 SCC Online SC 873, Geo **Varghese Vs. State of Rajasthan**, the Hon'ble Supreme Court held as under:-

"35.The scope and ambit of inherent powers of the Court under Section 482 CrPC or the extra-ordinary power under Article 226 of the Constitution of India, now stands well defined by series of judicial pronouncements. Undoubtedly, every High Court has inherent power to act ex debito justitiae i.e., to do real and substantial justice, or to prevent abuse of the process of the Court. The powers being very wide in itself imposes a solemn duty on the Courts, requiring great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power vested in the Court should not be exercised to stifle a legitimate prosecution. However, the inherent power or the extra-ordinary power conferred upon the High Court, entitles the said Court 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 the ends of justice require that the proceeding ought to be quashed.

36.The following observations made by this Court in the case of ***State of Karnataka v. L. Muniswamy*** may be relevant to note at this stage:--

"The whole some power under Section 482 CrPC entitles the High Court to quash a proceeding when 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 High Courts have been invested with inherent power, both in civil and criminal matters, to achieve a salutary public purposes. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature."

15. In ***Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330***, the Hon'ble Supreme Court has formulated certain steps to determine the veracity of a prayer for quashing under Section 482 Criminal Procedure Code as follows:-

"30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would

rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4.Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

(emphasis supplied by me)

16. Examining the uncontroverted averments made in the application and the affidavit filed in its support as well as the other material brought on record in light of the law laid down through various pronouncement of the Hon'ble Supreme Court, namely the application dated 27-11-2006 submitted by the applicants to the District Magistrate, Aligarh, the report submitted to the Senior Superintendent of Police, Aligarh stating that upon inquiry no person by the description of Raju son of Ramdeen, resident of Bhagwan Nagar as well as the other two persons mentioned by the applicants in the complaint was found and there was no need for any police action and the report dated 04-06-07 submitted by the Chief Judicial Magistrate, Aligarh, stating that no person of the description "Raju son of Ramdeen, resident of Bhagwan Nagar, Police Station, Sasni Gate, Aligarh" could be found, coupled with the fact that in spite of the proceedings of the complaint case remaining stayed since as far as back as on 14-02-2007, neither the opposite party no.2 complainant has put in appearance in the case nor has he filed any application for vacation of the interim order or a counter affidavit disputing the correctness of the averments made in the application under Section 482 Cr.P.C. This Court is satisfied that the contention of Sri Madhukar Maurya, the learned Counsel for the Applicants, that the complaint is bogus and it was filed with a view to achieve ulterior motive, and it is an abuse of process of the Court, is correct and the material relied upon by the applicant has not been refuted.

17. The criminal proceeding initiated by the complainant- opposite party no. 2 by filing of the complaint is manifestly attended with mala fide and the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to some private and personal grudge. The complainant is apparently bogus and the complainant has no interest in pursuing his complaint.

18. In the aforesaid circumstance, in case the stay order is vacated now and the proceedings of the complaint are allowed to

resume, no useful purpose will be served and the prosecution of the applicants would only result in their persecution. Allowing the proceeding to continue would be an abuse of the process of the Court, and the ends of justice require that the proceeding ought to be quashed. To do real and substantial justice and to prevent abuse of the process of the Court, the application under Section 482 Cr.P.C. deserves to be allowed.

19. Therefore, the application under Section 482 Cr.P.C. is allowed. The Complaint Case No.1015 of 2006, Raju Vs. Basant Lal and others, pending in the Court of learned Additional Chief Judicial Magistrate, Ist, Aligarh, under Sections 323, 452, 427, 504 and 506 of the Indian Penal Code and the summoning order dated 16-09-2006 are liable to be quashed and are hereby quashed.

(2022)02ILR A564
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.02.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No.4690 of 2021

Dr. Mohd. Ibrahim & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Farooq Ayoob

Counsel for the Opposite Parties:
G.A., Farakshan Khatoon, Pooja Tiwari

(A) Criminal Law-FIR lodged-property dispute-section 307 IPC-Medical examination-simple injuries-chances of conviction u/s 307 IPC is remote and bleak-mere incorporation of section 307 IPC would not be a bar to the compromise entered to end the disputes-impugned order and entire proceeding quashed..

Application allowed. (E-9)

List of Cases cited:-

1. Narinder Singh & ors. Vs St. of Pun. & anr.; (2014) 6 SCC 466

2. St. of M.P. Vs Laxmi Narayan & ors.; (2019) 5 SCC 688

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

1. Heard Mr. Farooq Ayoob, learned counsel for the applicants as well as Mr. Veer Raghav Chaubey, learned AGA for the opposite party no. 1 - State and Ms. Farakshan Khatoon, learned counsel for opposite parties no. 2 and 3.

2. By means of the present application under Section 482 Cr.P.C. the applicants have sought quashing of the summoning order dated 27.08.2016 passed by the learned Additional Chief Judicial Magistrate, Court No. 19, Barabanki in Case No. 2514 of 2016 arising out of charge-sheet No. A-133/16 dated 31.05.2016 filed in case Crime No. 0176 of 2016 under Sections 147, 148, 149, 323, 504, 506, 427, 307 IPC, Police Station Safdarganj, District Barabanki.

3. On 31.05.2016 the opposite party no. 2 had filed an FIR alleging that there arose a property dispute between the parties and the revenue authorities had demarcated the land about 22 days ago. On 31.05.2016 the applicants started tiling the informant's farms and upon protest they assaulted and threatened the opposite parties no. 2 and 3. On 28.07.2021 the parties have entered into a compromise, a copy of whereof has been filed as Annexure No. 6 to the affidavit

filed in support of the application in which it is stated that Mohd. Amin son of Shakur who was also named in the FIR has died on 02.07.2020. With the intervention of respected persons and relatives the parties have entered into a compromise and there is no dispute remaining between them and the opposite parties no. 2 and 3 do not want any action against the applicants.

4. By means of an order dated 09.12.2021 this Court had directed that a letter be sent to the Additional Chief Judicial Magistrate, Court No. 19, Barabanki to verify the compromise dated 28.07.2021 in accordance with the procedure prescribed in law and send the report to this Court.

5. In compliance of the aforesaid order, the learned Additional Chief Judicial Magistrate, Court No. 19, Barabanki has submitted a report that the applicants and the opposite parties no. 2 and 3 have appeared before him along with their Advocates and they accepted the compromise.

6. Before proceeding to decide the instant application under Section 482 Cr.P.C. in terms of the compromise, it has to be examined as to whether the charge-sheet and the proceedings of a case can be quashed on the basis of a compromise entered into between the parties.

7. In ***Narinder Singh and Others Vs. State of Punjab and Another; (2014) 6 SCC 466,*** the Hon'ble Supreme Court has been pleased to sum up and lay down the principles by which the High Court would be guided in giving adequate treatment to the settlement between parties and exercising its power under Section 482 Cr.PC. while accepting the settlement and quashing the proceedings or refusing to accept the settlement in the following words: -

" 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2 When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3 Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4 On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5 While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6 Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7 While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court,

mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

8. The aforesaid decision in ***Narinder Singh and others (supra)*** has been followed by the Hon'ble Supreme Court in ***State of Madhya Pradesh vs Laxmi Narayan & Others; (2019) 5 SCC 688*** and in that case the Hon'ble Supreme Court has held that: -

"15.1 that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2 such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3 similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4 offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;"

9. Copies of medico legal examination report of the opposite parties

no. 2 and 3 have been filed along with the affidavit filed in support of the application under Section 482 Cr.P.C. which indicate that both of them have suffered contusions and abrasions which in the opinion of the Doctor are simple in nature and none of the persons has suffered any grievous injury which may support the charge of committing an offence under Section 307 IPC.

10. Examining the facts of the present case in light of the aforesaid law laid by the Hon'ble Supreme Court, it transpires that the FIR was lodged stating that there was a property dispute between the parties. Although the FIR and the charge-sheet make a mention of Section 307 IPC, the medical examination report of the opposite parties no. 2 and 3 mentions simple injuries of contusions and abrasions only and there is no report of any serious injury having been suffered by the opposite parties no. 2 and 3. Further, none of the injuries is reported to have been inflicted on any vital part of the body of any of the injured persons. The injuries are reported to have been caused by hard and blunt object.

11. Keeping in view of the aforesaid facts, the chance of conviction of the applicants under Section 307 IPC is remote and bleak.

12. After lodging of the FIR and submission of charge-sheet the parties have entered into a compromise which has been verified by the Additional Chief Judicial Magistrate, Court No. 19, Barabanki and accepting the submissions of Mr. Farooq Ayoob, learned counsel for the applicants, Ms. Farakshan Khatoon, learned counsel for the opposite parties no. 2 and 3, both of whom have submitted that the charge-sheet and summoning order and the entire criminal proceedings in this regard be quashed.

13. The learned AGA has no objection against the application being allowed on the basis of the compromise.

14. Keeping in view of the entire facts, I am of the view that mere incorporation of Section 307 IPC in the FIR and the charge-sheet, would not be a bar to the compromise entered into between the parties to put an end to the disputes between them and the present case would fall within the exception carved out by the Hon'ble Supreme Court in Para 29.6 in ***Narinder Singh and others*** (supra) and para 15.4 of the judgment in the case of ***State of Madhya Pradesh vs. Laxmi Narayan & others (supra).***

15. In view of the peculiar facts and circumstances of the case, the continuance of the proceedings of the case even after the parties have entered into a compromise would only result in persecution of the applicants, which would give rise to a failure of justice.

16. In view of aforesaid discussions, the instant application under Section 482 Cr.P.C. is ***allowed*** on the basis of the compromise dated 28.07.2021.

17. The summoning order dated 27.08.2016 passed by the learned Additional Chief Judicial Magistrate, Court No. 19, Barabanki in Case No. 2514 of 2016 arising out of charge-sheet No. A-133/16 dated 31.05.2016 filed in case Crime No. 0176 of 2016 under Sections 147, 148, 149, 323, 504, 506, 427, 307 IPC, Police Station Safdarganj, District Barabanki including the entire proceedings initiated thereafter are hereby quashed

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(2022)02ILR A569
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.02.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Application U/S 482 No. 4741 of 2016

Rama Sharan Pandey & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sunil Kumar, Baljeet Singh

Counsel for the Opposite Parties:
G.A., Anoop Kumar Upadhyay

(A) Criminal Law-Application u/s 482 Cr.P.C. -against Revisional order-maintainable-allegation u/s 406 IPC alleged against Applicant no.2 and 3 but all accused summoned -summoning order must show application of mind-impugned order lacks application of mind-summoning order quashed for Applicant no. 1,4 to 6.

Application partly allowed. (E-9)

List of Cases cited:-

1. Jitendra Kumar Jain Vs St. of Delhi & ors. reported in (1998) 8 SCC 770

2. Dhariwal Tobacco Products Ltd. & ors. Vs St. of Mah. & anr. , reported in 2009 2 SCC 370

3. Shakuntala Devi & ors. Vs Chamru Mahto & anr., reported in 2009 3 SCC 310

4. Pepsi Foods Ltd & anr. Vs Special Judicial Magistrate & ors., reported in 1998 5 SCC 749

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

1. Heard learned counsel for the applicants, learned AGA for the State and perused the record.

2. The present application under Section 482 Cr.P.C. has been filed to quash the impugned summoning order dated 29.07.2015 passed by the Judicial Magistrate First, Gonda in Criminal Complaint No. 16 of 2015 (Jitendra Singh Vs. Ramasharan Pandey & others), Police Station Paraspur, District Gonda as well as against the order dated 04.7.2016 passed by the Additional Sessions Judge/Special Judge (E.C. Act) Gonda in Criminal Revision No. 331 of 2015, (Ramasharan Pandey Vs. State of Uttar Pradesh and another) along with the criminal proceedings of Criminal complaint no. 16 of 2015 pending before the Judicial Magistrate First, Gonda.

3. Shri Anoop Kumar Upadhyay, learned counsel for the respondent and learned AGA have raised a preliminary objection regarding maintainability of the present application under Section 482 against the revisional order which is also under challenge.

4. Learned counsel for the applicants has submitted that the summoning order was passed without application of mind. It is further submitted that by the impugned summoning order all the applicants were summoned under Sections 323, 504, 506 and 406 of IPC whereas the offence under Section 406 has been alleged against Dev Sharna Pandey and L There is no allegation or accusation under Section 406 of IPC against the applicant nos. 1,4,5 and 6 and the same could be seen from the statement of complainant under Section 200 Cr.P.C., even then the summons have been issued

against the applicant nos. 1, 4, 5 and 6 under Section 406 IPC also.

5. Learned counsel for the applicants undertakes that they will cooperate and participate in the proceedings before the learned trial court. It is also undertaken that they will not seek any adjournment.

6. On the other hand, learned AGA and the learned counsel for the respondents have submitted that in the complaint there are allegations against all the applicants and no specific name has been taken and it could only be seen during trial.

7. After hearing the respective parties and perusing the record, it is found that a person aggrieved from a revisional order has a remedy to challenge it under Section 482 Cr.P.C. Section 397 (3) Cr.P.C. is to prevent the second revision so as to avoid the frivolous litigation whereas in the present case, it is not a second revision preferred by the applicants rather it is an application challenging the revisional order, which is not barred.

8. The Hon'ble Supreme Court in the case of ***Jitendra Kumar Jain Vs. State of Delhi and others*** reported in ***(1998) 8 SCC 77***0 has held that the powers under Section 397 Cr.P.C. and under Section 482 Cr.P.C. are distinguishable and separate. Against the revisional order, scrutiny can be done by the High Court in exercise of its jurisdiction under Section 482 Cr.P.C.

9. The Hon'ble Apex Court in the case of ***Dhariwal Tobacco Products Limited and others Vs. State of Maharashtra and another reported in 2009 2 SCC 370*** has held that even in cases where a second revision before the High Court after dismissal of first one by Sessions Judge is barred under Section 397 (3) Cr.P.C.but the inherent power of the Court is available.The power of the High Court can be exercised not only in terms of Section 482 of the Cr.P.C. but also in terms of Section 483 thereof.

10. Hon'ble Supreme Court in the case of ***Shakuntala Devi and others Vs. Chamru Mahto and another*** reported in ***2009 3 SCC 310*** has held that the power of the High Court to entertain a petition under Section 482 Cr.P.C. was not subject to the prohibition under Sub Section 3 of Section 397 Cr.P.C. and the doors to the High Court to a litigant who had lost before the Sessions Judge were not completely closed.

11. In the light of the law settled by the Hon'ble Supreme Court, the present application under Section 482 is maintainable against the revisional order.

12. The Hon'ble Apex Court in the case of ***Pepsi Foods Ltd and another Vs. Special Judicial Magistrate and others*** reported in ***1998 5 SCC 749*** has held that summoning of an accused in criminal case is a serious matter. It is not that the complainant has to bring only two witnesses in support of his complaint and to have the criminal law set into motion. The summoning order must show that the magistrate has applied his mind before passing the summoning order, which is found to be lacking in the present case as far as summoning applicant nos. 1, 4, 5 and 6 under Section 406 IPC is concerned as there is no allegation against the applicant nos. 1, 4, 5 and 6 for offence under Section 406 Cr.P.C. in the statement of the complainant under Section 200 Cr.P.C.

13. Taking into consideration the aforesaid, the present application under

Section 482 is ***partly allowed*** to the extent that summoning order dated 29.07.2015 is hereby set aside as far as it relates with the applicant nos. 1, 4, 5 and 6 for offence under Section 406 IPC. Rest of the part of the impugned summoning order will remain intact and in force.

14. At this stage, learned counsel for the applicants has submitted that for the remaining sections slapped upon the applicants, he does not want to press the petition and seeks liberty to file bail application before the learned trial court which may be decided in view of law laid by Hon'ble Supreme Court in order dated 7.10.2021 passed in ***Petition for Special Leave to Appeal (Cri) No.5191 of 2021 Satender Kumar Antil versus Central Bureau of Investigation and another.***

15. Learned A.G.A. as well as Shri Anoop Kumar Upadhyay, learned counsel for the respondent has no objection to the prayer made by learned counsel for the applicants.

16. On due consideration to the submissions of learned counsel for the parties', it is provided that in case, the petitioners appear before the trial court within ten days' from today and file bail application, the same shall be decided expeditiously considering the law laid down in the case of ***Satender Kumar Antil versus Central Bureau of Investigation and another (supra).***

17. The present application under Section 482 is finally decided in terms, as indicated above.

(2022)02ILR A571

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 21.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Application U/S 482 No.5541 of 2021

Vajid Ali ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sukh Deo Singh, Pritosh Shukla, Pramod Kumar

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law-During Trial the victim affirmed her own statement given u/s 164 Cr.P.C.-original statement u/s 164 Cr.p.c. is lost-Application moved by the Applicant seeking time for cross examination-as in the absence of statement u/s 164 cr.p.c.-no cross-examination was possible-Rejected-impugned-original statement u/s 164 Cr.P.C. would be required if the victim resiled from her statement u/s 164 Cr.P.C.-to verify the contents and to compare them with statement made in examination in chief-last opportunity was given which was not availed-impugned order not unreasoned.

Application rejected. (E-9)

List of Cases cited:-

1. St. of Delhi Vs Shri Ram Lohia, AIR 1960 SC 490

2. Utpal Das Vs St. Of West Ben., AIR 2010 SC 1894

3. R. Shaji VS St. of Ker. 2013 (14) SCC 266

4. 'Jai Prakash Singh Vs St. of Bih. & anr. decided on 14.07.2006 reported in 2006 Criminal Law Journal 4245

5. Ashok Dulichand Vs Madhavlal Dubey & anr. 1975 (4) SCC 664

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

1. Heard learned counsel for the petitioners and learned AGA for the State.

2. This petition has been filed with the following main prayer:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash and set aside the impugned order dated 08/12/2021 passed on Application of the Petitioner, in Session Trial No. 46/2015, "State Vs. Vajid & Ors." pending before Learned Special Judge (POCSO Act)-12, Sultanpur, in Case Crime No. 5/2015, under sections 363, 366, 376D IPC read with 3/4 POCSO Act, PS Sangrampur, District Amethi, in the interest of justice, as contained in Annexure-1 to this Writ Petition.

To stay the further proceeding in Session Trial No. 46/2015, "State Vs. Vajid & Ors." pending before Learned Special Judge (POCSO Act)-12, Sultanpur, in Case Crime No. 5/2015, under sections 363, 366, 376D IPC read with 3/4 POCSO Act, PS Sangrampur, District Amethi, during the pendency of this Petition before this Hon'ble Court in the interest of justice."

3. The petitioner is assailing the order dated 08.04.2021 passed in Sessions Trial No. 46 of 2015 in Case Crime No. 5 of 2015, by which the petitioners application for providing opportunity to cross-examine PW-4 (the victim) has been rejected by an unreasoned order.

4. It has been submitted that the father of opposite party no.2 lodged FIR on 08.01.2015, under Sections 363, 366 IPC, Police Station Sangrampur, District Amethi, against one Asif who alongwith the petitioner, (who was not named in the FIR) having enticed the respondent no.2 had taken her away. After investigation the Investigating Officer submitted a charge sheet against the petitioner and co-accused, Asif, under Sections 363, 366, 376 IPC read with Section 3/4 of the POCSO Act and cognizance was taken. Thereafter, the trial proceeded against the petitioner and co-accused. During trial on 15.11.2021, the statement of the PW-04, (respondent no.2) the victim was recorded. It was recorded that PW-04 had affirmed her own statement given under Section 164 of the Cr.P.C., but the statement under Section 164 Cr.P.C. in its original was lost. The order dated 02.12.2021 by the learned trial court has recorded that for the loss of the statement of under Section 164 Cr.P.C., and the negligence of the employee concerned, learned District Judge be informed. No action was taken however, against such irresponsible employee.

5. It has been argued that In the examination-in-chief of the respondent no.2, the respondent no.2 had placed reliance upon her statement under Section 164 Cr.P.C. Therefore, the petitioner through his counsel moved an application on 08.01.2021 and sought time for cross-examination as in the absence of statement of PW-4 under Section 164 Cr.P.C., no cross examination was possible. Learned trial court has rejected such application by an unreasoned order. The order dated 08.12.2021 is exparte and against the provision of Section 172 (2) and Section 294 of the Cr.P.C.

6. It has been argued that the statement of the respondent no.2 under Section 164 Cr.P.C. cannot be read as

evidence because only a photo copy of the same is available.

7. Under Section 172 (2) any criminal court may send for police diary of a case under enquiry or trial in such court, and may use such diary, **not as evidence in the case,** but to aid it in such enquiry or trial.

8. It has been stated by the learned AGA for the State Ms. Shikha Sinha that under Section 161 Cr.P.C. the Investigating Officer records the statement of the witnesses including the victim. Under Section 164 of the Cr.P.C., the Magistrate having jurisdiction in the case records any confession or statement made to him in the course of an investigation or at any time afterwards, before commencement of the enquiry or trial. The Magistrate explains to the person making the statement that he is not bound to make a confession, but if he does so, it may be used as evidence against him. However, Sub-Sections (2),(3) and (4) of Section 164 of the Cr.P.C. are inapplicable in the case before this Court as this is not a question of a confession being made, but it is the question of a statement being made by the victim before the trial court before the commencement of the enquiry or trial. It has been pointed out that such a statement is kept in sealed cover and a copy of the same is given to the Investigating Officer to tag it alongwith the case diary. When the accused are summoned under Section 204 and they appear before the trial court, the trial court ensures that under Section 207 of the Cr.P.C. they are given copies of all documents relied upon by the Investigating Officer in filing the charge sheet. A copy of the case diary including statements under Sections 161 and 164 Cr.P.C. are also given and such copies being certified copies in possession of the accused, can always be used by the accused at the time of cross-examination of the witnesses.

9. This Court has considered also the various precedents of the Supreme Court. It is a settled law that a Statement recorded under section 164 is not a substantive piece of evidence of the facts stated but can be used to corroborate or contradict a witness. In ***State of Delhi vs Shri Ram Lohia, AIR 1960 SC 490,*** it was held that Statements recorded under Section 164 of the Code are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under Section 164 of the Code and that what he had stated there was true would not make the entire statement admissible much less that any part of it could be used as substantive evidence in the case.

10. In ***Utpal Das vs State Of West Bengal, AIR 2010 SC 1894***, it was held that a Statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 Cr.P.C. can be used to cross examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness.

11. In ***R. Shaji versus State of Kerala 2013 (14) SCC 266,*** the Supreme Court was considering the evidentiary value of and the object of statements taken section 161 and 164 Cr.P.C. and whether the statements made thereunder can be regarded as substantive evidence. The appellant, R Shaji had argued that

statements of certain witnesses were recorded under section 164 Cr.P.C. before the Magistrate. The said statements were not put on record before the trial court and the same were not marked. Thus the trial would vitiate as the accused has been denied an opportunity to contradict the aforementioned statements of the witnesses, which were made on appearance before the magistrate, which though are not in the nature of substantive evidence, could well be used for the purpose of corroboration and contradiction. Denial of such opportunity is against the requisites of a fair trial,

The Supreme Court observed in paragraph 25 thus:- *"clause (iv) of Section 207 Cr.P.C. clearly provides that any statement recorded under Section 164 Cr.P.C. shall be made available to the accused along with all the other documents that have been filed along with the chargesheet. The appellant herein has neither urged that the statements recorded under section 164 Cr.P.C. were not a part of such documents before the trial court, nor was any issue raised by him at the time of cross-examination of....., the investigating officer. The same is a question of fact. However, it appears from the documents on record that such documents, if the same were in fact a part of the record, were not marked. They raised this issue for the first time before the High Court, and the High Court dealt with the same observing:-*

"reading of the judgement of the court below shows that both sides referred to the same (the statement under Section164 Cr.P.C.), in detail and the court below has also referred to the same in its judgement. It is well settled that the statement under section 164 Cr.P.C. can be used both for corroboration and contradiction of the author of the statement and thus, the Court did not find this ground worth acceptance. Even otherwise, it appears that statement recorded under section 164 Cr.P.C. by the magistrate was not in detail. No question had been put to the witnesses whose statements have been recorded nor an attempt had been made to extract answers from them nor the witnesses were asked by the learned magistrate what they wanted to say and they had no clue as to what they had to speak. Therefore, they simply spoke what came to their mind at that point of time whether it was relevant or irrelevant. The witnesses could not be deemed to carry so much of wisdom to enable them to know what are essential facts they need to state before the learned magistrate. The witnesses whose statements were recorded before. the magistrate were simply asked, "have you finished, you can go"

The court observed further in paragraph 26 as follows:-

"evidence given in a court under oath has a great sanctity, which is why the same is called substantive evidence. Statements under section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under section 164 Cr.P.C. can be used for both corroboration and contradiction. In a case where magistrate has to perform the duty of recording her statement under section 164 Cr.P.C., he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager, will not be aware of the purpose for which he has been brought, and what he must disclose in a statement under section 164 Cr.P.C.. Hence, the magistrate should ask the

witness explanatory questions and obtain all possible information in relation to the said case."

Referring to the object of taking statements under In 164, the Supreme Court observed in paragraph 27 as follows:

"so far as the statement of witnesses recorded under section 164 is concerned, The object is twofold; in the first phase, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under section 164. A proposition to the effect that if a statement of a witness is recorded under section 164, his evidence in court should be discarded, is not at all warranted." (vide Jogendra Nahak versus State of Orissa..,2000(1) SCC 272, CCE versus Duncan Agro Industries Ltd.2000 (7)SCC 53)

Para 28.. "Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C. can be relied upon for the purpose of corroborating statements made by witnesses in the committal courtor even to contradict the same. As the defence had no opportunity to cross examine the witnesses whose statements are recorded under section 164 Cr.P.C., such statements cannot be treated as substantive evidence."

Para 29 "during the investigation the police Officer may sometimes feel that it is expedient to record the statement of a witnessUnder section 164 Cr.P.C.. This usually happens when the witness to a crime are clearly connected to the accused, or where the accused is very influential, and to which witnesses may be influenced.(Vide Mamand versus Emperor.,AIR 1946 PC 45,Bhuboni Sahu versus R .,AIR 1949PC 257 Ramcharan versus state of UP..,AIR 1968 SC 1473 Dhanabal versus state of Tamil Nadu. 1980(2) Scc 84)."

12. This Court is of the considered opinion that a statement under Section 164 Cr.P.C. has no evidentiary value as such. The proving or disproving of which, shall weigh in the decision making of the learned trial court. It is only used as an aid in case during examination and cross-examination of witness in the trial by the learned trial court or by the accused.

13. This is evident from perusal of Section 172 (2) of the Code itself as it says that case diary is not to be used as evidence in a case, but an aid to such enquiry or trial.

14. Learned counsel for the petitioner has also pointed out Section 294 Cr.P.C. Section 294 is being quoted herein below:-

"***294. No formal proof of certain documents.--****(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.*

(2) The list of documents shall be in such form as be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed: Provided

that the Court may, in its discretion, require such signature to be proved."

15. Ms. Shikha Sinha, Learned AGA for the State has argued that a perusal of Section 294 shows that it relates to documentary evidence, which is filed by either the prosecution or the accused in support of their respective case. Where the genuineness of any document is not disputed, such document may be read in evidence, in any enquiry, trial or otherwise, proceedings, without proof of the signature of the person to whom it purports to be signed but the Court may in its discretion require such signatures to be proved also.

16. Since the statement under Section 164 of the Cr.P.C. has only very limited evidentiary value and is required only in case, witnesses resile from such statement during the examination-in-chief or the cross-examination, it could not be treated as coming under documentary evidence under Section 294 of the Cr.P.C.

17. Learned counsel for the petitioner in his rejoinder affidavit has submitted that the Patna High Court in the Case of, ***'Jai Prakash Singh vs. State of Bihar and Anr.'*** decided on 14.07.2006 reported in ***2006 Criminal Law Journal 4245*** has in a similar case showed interference.

18. This Court has carefully perused the judgement of the Patna High Court, which has only a persuasive value and cannot be said to be a binding precedent for this Court; and finds that it relates to a case where a photo copy of an injury report being produced by the prosecution, the original injury report was not tagged along with the case diary. No notice was sent to the Investigating Officer for producing the original injury report. He, however, on his own sent a letter to the Superintendent of Police to the District stating that therein that the original injury report was not available in the record of the case at the Police Station. The prosecution wanted to prove the photocopy of the injury report and learned trial court allowed the application of the prosecution. The petitioner filed a petition under Section 482 Cr.P.C. challenging such order submitting that a photo copy of the injury report cannot be admitted as evidence. The Court considered the question "whether or not the photocopy of the injury report can be treated as secondary evidence?" and admitted as such under the circumstances of the case. The Patna High Court placed reliance upon the case of ***Ashok Dulichand vs. Madhavlal Dubey & Anr. 1975 (4) SCC 664,*** where the Hon'ble Supreme Court had explained the circumstances under which a photocopy of a document can be admitted as evidence. For such admission as evidence, it has to be explained as to what were the circumstances under which the photocopy was prepared and who was in possession of the original document at that time when a photocopy was taken, and this should be above suspicion. The Court considered the circumstances of the particular case in ***Jay Prakash Singh (Supra)*** and the fact that the original injury report was not attached with the case diary at the very first instance. The prosecution was not able to satisfy the court the facts and circumstances regarding when the photocopy of the original injury report was prepared and under what circumstances. Therefore, the Court held that the photocopy of the injury report was not admissible in the evidence.

19. Learned counsel for the petitioner has placed reliance upon Section 65 of the

Indian Evidence Act and Sub Clause (c) thereof and says that secondary evidence may be given of the existence, condition or contents of a document only when the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

20. It has been submitted that the original statement under Section 164 Cr.P.C. of the victim was not produced by the prosecution and no reason for the same was also given, therefore, the photocopy of the 164 Cr.P.C. could not be treated as Secondary Evidence and could not be made admissible by the learned Trial Court. The argument regarding admissibility or otherwise of statement under Section 164 Cr.P.C. of the victim can only be considered at the time when the trial has concluded and while considering evidence, the Trial Court gives a finding that the witness/victim has resiled from her statement under Section 164 Cr.P.C. only then its original would be required to verify the contents thereof and to compare the same with the statement made in Examination-in-Chief and the admission if any made in the examination of such a victim. Hence this argument is also rejected as misconceived.

21. Having considered the arguments made by the learned counsel for the petitioner and learned AGA for the State and also the evidentiary value of a statement the Section 164 Cr.P.C., this Court finds no good ground to show interference in the order impugned dated 08.12.2021.

22. This Court finds from the perusal of the order that the learned trial court has recorded that the prosecution witness-04 (i.e. the victim) had been summoned and was returned twice and she lived out of station and a last opportunity had already been given for cross-examination which was not availed of by the accused. Such an order cannot be said to be an unreasoned order as argued by the learned counsel for the petitioner.

23. Accordingly, this petition stands ***rejected.***

(2022)02ILR A577
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2022 & 20.01.2022

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Application U/S 482 Cr.P.C. No.22902 of 2021

Bheem Singh ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Neeraj Pandey, Sri Om Prakash Singh Sikarwar

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

(A) Criminal Law-Application for recalling witnesses-filed after delay of 4 years and 1 years after recording of examination in chief of respective witnesses-Trial pending for defence evidence and Applicant is in jail-Trial court rejecting application u/s 311 Cr.P.C. affirmed. (E-9)

List of Cases cited:-

1. The State represented by the Deputy Superintendent of Police Vs Tr. N. Seenivasagan, 2021 SCC Online SC 212

2. Natasa Singh Vs C. B. I., (2013) 5 SCC 741

3. Rajaram Prasad Yadav Vs St. of Bih., (2013) 14 SCC 461, the Supreme Court held as under: (SCC, p. 473-74, para 17)

4. Jamatraj Kewalji Govani Vs The St. of Mah., AIR 1978 SC 178 (3 Judge Bench)

5. Ram Jeet & 8 ors. Vs St. of U.P., AIR 1958 All 439) 25.

6. State represented by the Deputy Superintendent of Police Vs Tr. N. Seenivasagan

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

1. The instant application under Section 482 of the Code of Criminal Procedure (in short "the Code") has been filed to quash the impugned order dated 7.10.2021 passed by Additional Sessions Judge Court No. 4, Deoria, in the Sessions Trial No. 40 of 2017 (State v. Bheem Singh and Another) arising out of Case Crime No. 458 of 2015 under Section 307 of Indian Penal Code (hereinafter referred as "IPC"), registered at Police Station - Lar, District Deoria by which two applications filed by the applicant/accused under Section 311 of the Code have been rejected by a common order dated 7.10.2021.

BRIEF FACTS OF THE CASE:

2. The prosecution case, in brief, is that the First Information Report (in short "FIR") dated 25.8.2015 has been lodged by PW-1 Vinod Singh (younger brother of the injured) against the applicant, Subhash Singh, and two other known persons stating that on 23.8.2015, elder brother of the first informant, Balindera Singh went to the market 'Lar' for some personal work by his motorcycle. After finishing his work, he was returning to his home and reached 400 meters from Dhamauli Tiraha at about 6:00 P.M. In the meantime, two motorcyclists reached there from his back side, the applicant and Subhash Singh were sitting as a pillion rider and both the motorcycles were being driven by unknown persons. Subhash Singh called Balindera Singh from the back side. No sooner did the brother of the first informant slow down his motorcycle and turn behind on exhortation of Subhash Singh, the applicant shot fire upon Balindera Singh, who fell on the ground. At the time of the incident, Dhirendra Singh was roaming in his field situated some distance from the spot and Girjesh Singh was attending his natural call at that time. On hearing the gunshot, both rushed to the spot and the accused persons fled away from the spot rolling firearms in the air to Bhagalpur. The incident has taken place due to old enmity. The informant took the injured firstly to Government Hospital, Lar and then to District Hospital Deoria. Treatment of his brother is going on in Trauma Centre, Medical College Lucknow. When the condition of Balindera Singh improved to some extent, he told him about the incident.

3. The FIR of the present incident has been lodged by the PW-1 Vinod Singh at Police Station- Lar District Deoria on 25.8.2015 at 16:30 hours under Section 307 of IPC against the applicant, Subhash Singh, and two unknown persons after about 46 hours of the incident on the basis of Tahrir dated 25.8.2015 which are Annexure-2 and Annexure-3 to the affidavit.

4. The applicant has filed the statements of PW - 1 Vinod Singh (informant), PW- 2 Balindera Singh (injured), PW- 3 Dhirendra Singh (as eye-

witness), and PW-5 Dr. Rajesh Yadav, who had conducted the medical examination of the injured on 23.8.2015 at 8:10 P.M. at District Hospital Deoria as Annexure- 4, 5, 6, and 7 to the affidavit. The applicant has also filed the medical examination report dated 23.8.2015 as Annexure-1 and two applications which have been filed under Section 311 of the Code as Annexure- 9 and 10 to the affidavit.

5. As per the medical report of the injured Balindera Singh (age about 50 years), he has received injury no. 1 entry wound of firearm size 1 cm. x 1 cm. right side chest wall at the back region, 22 cm. below to right side top of the shoulder, 10 cm. from the middle part of the body, margin are inverted, blackening and blood oozing is present and injury no. 2 exit wound of firearm size 1 cm. x 1cm. situated at the middle part of the chest, 10 cm. from the right nipple and 21 cm. left nipple and margins are everted.

6. Two applications have been filed by the applicant under Section 311 of the Code on 4.10.2021 with a prayer to recall PW- 1 Vinod Singh and PW- 5 Dr. Rajesh Yadav for further cross-examination to ask 5 specific questions in the statement of PW-1 and four specific question in the statement of PW-5, which are as under:

"यह कि वादी मुकदमा (पी०डब्लू०-1) से, उसकी पुनः प्रतिपरीक्षा (re cross examination) में निम्नलिखित प्रश्न पूछा जाना न्यायहित में आवश्यक है-

(i) अपनी मुख्य परीक्षा में, और प्रतिपरीक्षा दिनांकित 10.10.2017 में, आपने अपने जिस दोस्त 'सुरेश सिंह' से रोडवेज बस स्टेशन, लार पर दरख्वास्त लिखवाने वाली बात कही है उस सुरेश सिंह के पिता का नाम क्या है, वह कहाँ का निवासी है, उसकी शैक्षिक योग्यता क्या है और उसकी आजीविका का स्रोत क्या है?

(ii) आपके उक्त दोस्त सुरेश सिंह से आपकी दोस्ती कब, कहाँ और कैसे हुई?

(iii) आपके उक्त दोस्त सुरेश सिंह के परिवार के किस सदस्य/किन सदस्यों को आप जानते एवं पहचानते हैं?

(iv) आपके उक्त दोस्त सुरेश सिंह इस समय जीवित है या नहीं?

(v) यदि इस समय आपका उक्त दोस्त सुरेश सिंह जीवित नहीं है तो उसकी मृत्यु किस तिथि को हुई?

यह कि डॉ० राजेश यादव (पी०डब्लू०-5) को माननीय न्यायालय में प्रतिपरीक्षा हेतु पुनः आहूत करना न्यायहित में आवश्यक है जिससे उनसे निम्नांकित प्रश्न पूछे जा सकें-

(I) कोई मरीज "Oriented" है या "Disoriented", यह जानने के लिए डाक्टर क्या तरीका अपनाते है?

(ii) आपने चोटिल/बलेन्द्र सिंह/पी०डब्लू०-2 के "Orientation" का मूल्यांकन कैसे किया था?

(iii) आपने बलेन्द्र सिंह/ पी०डब्लू०-2 की injury report (प्रदर्श क-3) में उसे "Oriented" अंकित/दर्शित करने के पूर्व उससे क्या बात-चीत की थी और उसने आपसे क्या कहा था?

(iv) आपने अपने साक्ष्य में यह कहा है कि मरीज पूरी तरह होश में था और लोगों को

पहचान रहा था, आपने यह किस आधार पर कहा है?

SUBMISSION BEFORE THIS COURT:

7. Learned counsel for the applicant submits that according to the statement of PW- 1 Vinod Singh, he got his Tahrir of the present case written by his friend Suresh Singh at the Bus Station Lar, Deoria on 25.08.2015. In earlier cross-examination of PW-1, the question with regard to the identity of said Suresh Singh had not been asked. PW-2 Balindera Singh stated that Suresh Singh, son of Rama Shankar, resident of village Ajna was alive at the time of the incident and he had not written his report. But Suresh Singh son of Rama Shankar resident of village Ajna was not alive on 25.8.2015 because he had died on 1.9.2014 before the incident. If the alleged Suresh Singh died about one year before the incident, the very genesis of the prosecution case would be proved false.

8. Learned counsel further submits that the family member of the applicant did not know about the date of the death of Suresh Singh. After examination of PW-2, it was revealed that Suresh Singh has died on 1.9.2014. Due to these reasons, questions regarding the identity of the said Suresh Singh had not been asked during earlier cross-examination of PW-1 are essential to the just decision of the case.

9. It is further submitted that PW-5 Dr. Rajesh Yadav, who conducted the medical examination on 23.8.2015 indicates that the injured was "oriented" but in his evidence, he stated that the injured was conscious and was recognizing people but unable to speak which is contrary to the medical report.

10. He further contended that there is contradiction and ambiguity between the medical report of the injured, wherein it has been mentioned that at the time of medical examination injured was "oriented" and in the cross-examination of PW-5 Dr. Rajesh Yadav stated that the injured was conscious. Questions had not been asked in earlier cross-examination to the PW-5 Dr. Rajesh Yadav with regard to the consciousness of the injured which are also essential to the just decision of the case. Learned counsel for the applicant relied upon the judgment of the Supreme Court of case **The State represented by the Deputy Superintendent of Police v. Tr. N. Seenivasagan, 2021 SCC Online SC 212.**

11. Learned A.G.A. has supported the impugned order and vehemently opposed the prayer of the applicant and submitted that PW-1 Vinod Kumar Singh is not an eye-witness of the incident. The FIR of the present case has been lodged by PW-1 Vinod Kumar Singh after about 46 hours of the incident on the basis of information received from the injured. The application for recalling PW-1 has been filed after about 4 years of recording the statement-in-chief of PW-1 Vinod Kumar Singh and another application for recalling PW-5 Dr. Rajesh Yadav has been filed after about one year of recording the examination-in-chief of PW-5. Both the applications have been filed when the case was fixed in defence evidence.

12. He further submits that as per the police report of the present case Suresh Singh was not a scribe of the Tahrir of the complaint and was not an eye-witness of the incident. PW-2 Balindera Singh has disclosed the identity of said Suresh Singh in his cross-examination that he was

resident of his village and was not posted in police department at Balia. He has died after the incident. It is not true that the identity of Suresh Singh has not been disclosed. The evidence of PW-1 Vinod Kumar Singh has been recorded on 5.9.2017, 21.9.2017, 10.10.2017, and 27.10.2017 and elaborate cross-examination has been done. It has been disputed that Suresh Singh has died before the incident, the applicant can lead oral or documentary evidence in defence.

13. Learned A.G.A. further contended that the applications have been filed after 8 dates from closing the prosecution evidence. There is the direction of the Apex Court to conclude the trial expeditiously. If any material contradiction or ambiguity is found in the prosecution evidence, the applicant would be entitled to the benefit of the doubt. The applications for recalling PW-1 and PW-5 are not bona fide, the reasons assigned are also not satisfactory and have been filed after a long delay.

14. Heard, Sri Om Prakash Singh Sikarwar, learned counsel for the applicant, Sri Manoj Kumar Dwivedi, learned A.G.A for the State and perused the materials on record.

DISCUSSION:

15. The trial court by its order dated 7.10.2021 dismissed the applications for recalling the witnesses for further cross-examination and rejected the submission urged on behalf of the applicant on the ground that the defence has elaborately cross-examined PW-1 and PW-5. The applicant has ample opportunity to lead oral or documentary evidence in defence. The applicant can also make an argument on this point. If there is any contradiction or ambiguity in the prosecution evidence. It is a settled position of law that the accused would be entitled to benefit of the doubt.

16. The order of the trial court has been assailed on two grounds, firstly; after reading the evidence of PW-1 and PW-2 the identity of scribe Suresh Singh is not clear. Secondly; if the complaint has been written by Suresh Singh, son of Rama Shankar, who died about one year before the incident, in that case, the genesis of the prosecution case would be proved false.

17. Before I proceed to examine the weight of the submissions made by learned counsel for both parties, it would be useful to notice the law with regard to the scope of Section 311 of the Code.

18. Section 311 is manifestly in two parts, the first part of the Section has given discretion to the Court and enables it any stage of an inquiry, trial, or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded; on the other hand, the second part of the Section is mandatory and imposes an obligation on the Court, to do one of aforesaid three things if the new evidence appears to it essential to the just decision of the case. In order to appreciate the submission of the applicant it will be worthwhile to refer to Section 311 of the Code, which reads as under:

*"**311. Power to summon material witness, or examine person present.-** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a*

witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

19. In this backdrop, it would be useful to make a reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311 of the Code, wherein the Apex Court highlighted the basic principles which are to be borne in mind while dealing with an application under Section 311 of the Code.

20. In **Natasa Singh v. C. B. I., (2013) 5 SCC 741**, the Apex Court, after referring the various decisions of the Supreme Court, has observed and held as under: (SCC, p. 748-49, para 15,16)

"15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 of Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interest of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same." (Vide: Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr.1, Zahira

Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.2, Zahira Habibullah & Anr. v. State of Gujarat & Ors.3, Kalyani Baskar (Mrs.) v. M. S. Sampoornam (Mrs.)4, Vijay Kumar v. State of U.P. & Anr.5, and Sudevanand v. State through C.B.I.6)

21. In **Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461**, the Supreme Court held as under: (SCC, p. 473-74, para 17)

"17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 Cr. PC. should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 Cr.PC. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 Cr. PC. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be

magnanimous in permitting such mistakes to be rectified.

17.11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 Cr.PC. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

22. In **Swapan Kumar Chattarjee v CBI, (2019) 14 SCC 328, t**he Supreme Court observed as under: (SCC p. 331, para 11 & 12)

"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

23. Section 311 of the Code gives a wide power to the court to summon a material witness or to examine a person present in court or to recall a witness already examined. It confers a wide discretion on the court to act as the exigencies of justice require. The word "just" cautions the court against taking any action which may result injustice either to the accused or to the prosecution. Where the court exercise the power under the second part, the inquiry cannot be as to

whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction. [Vide: **Jamatraj Kewalji Govani v. The State of Maharashtra, AIR 1978 SC 178 (3 Judge Bench)]**.

24. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the court. But the second part does not allow any discretion; it binds the court to examine fresh evidence and the only condition prescribed is that this evidence must be essential to the just decision of the case. Whether the new evidence is essential or not must of course depend on the facts of each case and has to be determined by the presiding Judge. (Vide: **Ram Jeet and 8 others v. State of U.P., AIR 1958 All 439)**

25. In the case of **The State represented by the Deputy Superintendent of Police v. Tr. N. Seenivasagan,** in this case, the prosecution had sought to produce a copy of the Approval order granted the authority on record and had it marked as an exhibit in the evidence, for which purpose witnesses were sought to be recalled. In its applications, the prosecution noted that the witnesses were required to mark the relevant document, which was crucial for the decision of the case. It was submitted that Exhibit. P-1 the order of sanction itself shows that the order was issued by the Board and at the time of filing the charge sheet the Investigation Officer had obtained the Approval Order of the Board but not submitted it before the court. With great respect to the judgment of the Apex Court, which does not help the applicant in the present case, because the documentary evidence had been obtained at the time of filing of charge sheet which had not been filed before the court.

26. Keeping in mind the position of law, now I revert back to the facts of the present case. It is admitted case that PW-1 Vinod Kumar Singh is not an eye-witness of the incident; the FIR has been lodged by PW-1 after about 46 hours of the incident on the basis of information received from the injured PW-2 Balindera Singh; the name of said Suresh Singh has not been mentioned in the Tahrir of the present case.

27. The application for recalling PW-1 has been filed after about 4 years of recording the statement-in-chief of the PW-1 Vinod Kumar Singh and another application for recalling PW-5 Dr. Rajesh Yadav has been filed after about one year of recording the examination-in-chief of PW-5. It has been informed by the learned counsel for the applicant during the argument that the applicant is in judicial custody. It is appropriate to mention here that PW-2 Balindera Singh stated in his cross-examination that Suresh Singh son of Rama Shankar was not his friend and he was resident of his village and he died after the incident. The identity of said Suresh Singh has been disclosed by PW-2 in his statement. There is no occasion to appreciate the prosecution evidence in detail at this stage.

28. In view of the facts and circumstances and keeping in mind the position of law I am of the considered opinion that learned trial judge gave well-

founded reasons for rejecting the applications. Therefore, the order dated 7.10.2021 passed by the learned trial court is liable to be affirmed for the following reasons:

(i) The applications for recalling the witnesses PW-1 and PW-5 have been filed after a long delay of 4 years, 1 year after recording the chief-examination of PW-1 and PW-5 respectively, and the reasons assigned therein are unsatisfactory.

(ii) The trial of the present case is pending since 2015 and the applicant is in judicial custody and the trial is pending for defence evidence.

(iii) The identity of scribe Suresh Singh has been disclosed by PW-2 Suresh Singh and he was not an eye-witness.

(iv) The applicant has an opportunity to produce oral or documentary evidence with regard to the fact that Suresh Singh has died before/or after the incident.

(v) The FIR has been lodged about 46 hours after the incident on the basis of information received from the injured PW-2 Balindera Singh.

(vi) According to PW-1 Vinod Kumar Singh, Suresh Singh was scribe of the complaint (Tahrir). However, this fact has not been disclosed in the Tahrir.

29. For the aforesaid reasons, impugned order dated 7.10.2021 passed by the trial court is affirmed. Accordingly, the present application is dismissed along with the applications filed by the applicant under Section 311 of the Code.

30. Before parting with the judgment, it is made clear that the observations made in this judgment are limited to the purpose of determination of this application and will in no way be construed as an expression on the merits of the case. The trial court will adjudicate the matter on its own merits uninfluenced by any of the observations made therein.

The present case has been delivered on 18.01.2022 inadvertently date on which case was reserved the case is wrongly typed as 17.11.2022 instead the same should be 17.11.2021, therefore, to rectify the said mistake, file of the said case has been summoned from the office suo-moto and the same is rectified by me by order dated 20.01.2021 deleting the date on which case was reserved as 17.11.2022 and in place of it substitute the date on which case was reserved as 17.11.2021.

This order shall also be treated as a part of the judgment already passed in the present application.

(2022)02ILR A586
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 Cr.P.C. No.27519 of 2007

Karmraj Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anurag Pathak

Counsel for the Opposite Parties:
A.G.A.,Sri Sumit Daga

(A) Criminal Law-Defamation-Trial court convicted the complainant but Appellate Court acquitted-complaint cannot be quashed under 8th exception to section 499 IPC on this ground-have to be proved in Trial-Magistrate after examining the witnesses u/s 200 and 202 Cr.P.C. have summoned the accused-alleged offence in which applicants are summoned committed in District Roorki-as per section 177 Cr.P.C.-CJM, Saharanpur did not have jurisdiction to try the offence-Complaint quashed.

Application allowed. (E-9)

List of Cases cited:-

1. SubramanianSwamy Vs U.O.I., Ministry of Law & ors. (2016) 7 SCC 221

2. Birla Corporation Limited Vs Adventz Investments & Holdings Limited & ors. (2019)16 SCC610

3. VijayDhanuka & ors. Vs Najima Mamtaj & ors. (2014)14SCC 638

(Delivered by Hon'ble Sameer Jain, J.)

1. List has been revised. Learned counsel for the applicants and learned AGA for the State are present. None present on behalf of opposite party no.2.

2. Heard Sri Anurag Pathak, learned counsel for the applicants, Sri M.P.S. Gaur, learned A.G.A. for the State and perused the record of the case.

3. The present application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to quash the further proceedings of Complaint Case No. 1317 of 2007, under sections 500, 211, 120B IPC pending before learned Judicial Magistrate (II), Saharanpur.

4. Perusal of the record shows that opposite party no.2 filed a criminal complaint against applicants on 26.03.2007 in the Court of Additional Chief Judicial Magistrate-I, Court No.19, Saharanpur with the allegation that he (opposite party no.2) and applicant no.1 were posted as guards in sub-prison Roorki and he (opposite party no.2) lodged a criminal complaint against applicant no.1 and his family members under Sections 147, 148, 149, 323, 307, 504, 506, 427, 460 IPC, which was finally decided on 13.08.2004 by Additional District and Sessions Judge, Roorki and applicant no.1 and other accused persons were found guilty and were convicted under Section 323 IPC, therefore, due to that reason applicant no.1 was having enmity with opposite party no.2 and he (applicant no.1) moved an application under Section 156(3) Cr.P.C. on false allegations against opposite party no.2 and his family members. 5. On 27.03.2001 a case was registered against him (opposite party no.2) under Sections 323, 316, 504 IPC at Case Crime No. 58 of 2001 at Police Station Gangnahar Roorki. It is further alleged that opposite party no.2 was arrested and during investigation he remained in Roorki jail for about 12 days and after investigation, charge-sheet was filed against opposite party no.2 and his wife under Sections 323, 504, 506 IPC and no charge-sheet was filed under Section 316 IPC. On 24.04.2006, trial court acquitted opposite party no.2 and his wife under Sections 504, 506 IPC, but convicted them under Section 323/34 IPC. It is further mentioned in the complaint that opposite party no.2 challenged the order of the trial court dated 24.04.2006 before the Court of Sessions in Criminal Appeal No. 53 of 2006. On 31.07.2006, the appeal filed by opposite party no.2 was allowed and conviction order dated 24.04.2006 passed by the trial court was set aside by the Court of Sessions and opposite party no.2 and his wife Smt. Neelam Dixit were acquitted. It

is further mentioned in the impugned complaint that as opposite party no.2 and his family members were having very good reputation in the society, therefore, due to false case lodged by applicant no.1, their social image was badly damaged and they were defamed and due to false case lodged by applicant no.1, the opposite party no.2 could not be promoted, therefore, applicants may be summoned and convict under Sections 500, 501, 211, 120B IPC.

6. In support of the complaint, opposite party no.2 examined himself under Section 200 Cr.P.C. and witnesses Ram Charan and Rajendra Singh were examined under Section 202 Cr.P.C.

7. On 05.07.2007, ACJM-I, Saharanpur summoned the applicants under Sections 500, 211, 120B IPC.

8. Learned counsel for the applicants contented that as the trial court convicted opposite party no.2 and his wife under Section 323/34 IPC, therefore, it cannot be said that case lodged by applicant no.1 was a false case, even, if the appellate court allowed the appeal of opposite party no.2 and acquitted him of all the charges. Therefore, prima facie no offence under Sections 500, 211, 120B IPC is made out against the applicants and further as per Exception eight to Section 499 IPC no offence under Section 500 IPC is made out against applicants. He further contended that all the applicants are the resident of District Nai Teehri (Uttrakhand), therefore, they reside beyond the jurisdiction of the Court of District Saharanpur and as per Section 202(1) Cr.P.C., an inquiry or investigation was necessary before issuing summons to applicants, which was not done/conducted in the present case and without any inquiry/investigation, learned Magistrate merely on the basis of statements recorded under Sections 200 and 202 Cr.P.C. issued summons against the applicants, therefore, on this ground also summoning order dated 05.07.2007 is liable to be set aside.

9. Learned counsel for the applicants also submitted that from the perusal of the complaint as well as the statements of witnesses recorded under Section 200, 202 Cr.P.C., it is apparent that cause of action, if any, can only arise at Roorki and not in Saharanpur, therefore, impugned complaint dated 26.03.2007 filed by opposite party no.2 in the Court of ACJM-I, Court No.19, Saharahpur is bad in law and Magistrate of District Saharanpur was not having jurisdiction to try the case, therefore, from this angle too, summoning order dated 05.07.2007 is liable to be quashed.

10. Per contra, learned A.G.A. submitted that perusal of the complaint clearly shows that the application under Section 156(3) Cr.P.C. was moved by the applicant no.1 against opposite party no.2 and his wife only due to the reason that earlier opposite party no.2 lodged a criminal complaint against applicant no.1 and his family members, in which, a conviction order was passed, therefore, the FIR lodged against opposite party no.2 and his wife in pursuance of application moved under Section 156(3) Cr.P.C. by applicant no.1 cannot be said to be filed/lodged in good faith and as appellate court found the allegation false, therefore, prima facie offence under Sections 500, 211, 120B IPC is made out against the applicants and benefit of Exception eight to Section 499 IPC cannot extended in favour of applicants. He further contended that as learned trial court recorded the statements of witnesses under Section 202 Cr.P.C.,

therefore, trial court conducted an inquiry, as desired under law, therefore, present application moved on behalf of applicants is liable to be dismissed.

11. I have heard both the parties and perused the record of the case. The first argument advanced by learned counsel for the applicants is that as trial court convicted the opposite party no.2 on the complaint lodged by applicant no.1 and only in appeal, opposite party no.2 and his wife were acquitted, therefore, it cannot be said that applicant no.1 was having any intention to harm the opposite party no.2 and complaint/application moved by applicant no.1 was false and, therefore, applicants are entitled to get benefit of Exception eight to Section 499 IPC.

Section 499 of Indian Penal Code, which defines the defamation runs as follows:-

*"**499. Defamation.**--Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.*

Explanation 1.--It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.--It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.--An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.--No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

*First Exception.--**Imputation of truth which public good requires to be made or published.**--It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.*

*Second Exception.--**Public conduct of public servants**.--It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.*

*Third Exception.--**Conduct of any person touching any public question.**--It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.*

*Fourth Exception.--**Publication of reports of proceedings of Courts.**--It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.*

Explanation.--A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

*Fifth Exception.--**Merits of case decided in Court or conduct of witnesses and others concerned.**--It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.*

*Sixth Exception.--**Merits of public performance.**--It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.*

Explanation.--A performance may be substituted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

*Seventh Exception.--**Censure passed in good faith by person having lawful authority over another.**--It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.*

*Eighth Exception.--**Accusation preferred in good faith to authorised person**.--It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.*

Ninth Exception.--Imputation made in good faith by person for protection of his or other's interests.--It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

*Tenth Exception.--**Caution intended for good of person to whom conveyed or for public good**.--It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good."*

12. From the perusal of Section 499 IPC, it is apparent that the present matter can fall under 8th exception, but the question is whether at the time of issuing summons, on the basis of exceptions to Section 499 IPC, a criminal defamation complaint can be dismissed?

13. The law is well settled that a person, who pleads the exception has the

burden to prove the same and, therefore, at the stage of issuing summons, it is not possible to give advantage of any exceptions to Section 499 IPC including 8th exception to the accused persons, as accused can only take advantage of the same during trial.

14. This question has been decided by Hon'ble Supreme Court in case of **Subramanian Swamy Vs. Union of India, Ministry of Law and others (2016) 7 SCC 221.** Hon'ble Supreme Court in this case in paragraph No. 209 observed as under:-

"It is settled position of law that those who plead Exception must prove it. It has been laid down in M.A. Rumugam (supra) that for the purpose of bringing any case within the purview of the Eighth and the Ninth Exceptions appended to Section 499 IPC, it would be necessary for the person who pleads the Exception to prove it. He has to prove good faith for the purpose of protection of the interests of the person making it or any other person or for the public good. The said proposition would definitely apply to any Exception who wants to have the benefit of the same. Therefore, the argument that if the said Exception should be taken into consideration at the time of the issuing summons it would be contrary to established criminal jurisprudence and, therefore, the stand that it cannot be taken into consideration makes the provision unreasonable, is absolutely an unsustainable one and in a way, a mercurial one. And we unhesitatingly repel the same"

15. Thus, the argument advanced by learned counsel for the applicants that in view of 8th exception to Section 499 IPC, the impugned complaint as well as summoning order both are liable to be quashed, cannot be accepted as it can only be proved by the applicants during trial and not at this stage.

16. The next argument was that applicants are the resident of Uttarakhand, therefore, they reside beyond the jurisdiction of Additional Chief Judicial Magistrate-I, Court No.19, Saharanpur, who issued summons to applicants, therefore, as per Section 202(1) Cr.P.C. before issuing summons to applicants an inquiry/investigation was necessary, which was not done in the present matter.

17. The law in this regard is also well settled that as per Section 202(1) Cr.P.C. if a criminal complaint was filed before the Magistrate against a person, who resides outside his jurisdiction then before issue of process against him it is mandatory for the Magistrate to either inquire the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit. A reference in this regard may be taken from **Birla Corporation Limited Vs. Adventz Investments and Holdings Limited and others (2019) 16 SCC 610. (Paras 30, 31 & 32)**

18. Now, the question is whether in the present case before issuing summons to applicants, learned Magistrate conducted any inquiry/investigation or not as contemplated under Section 202(1) Cr.P.C. The record of the case shows that two witnesses, namely Ram Charan and Rajendra Singh were examined under Section 202 Cr.P.C. and summoning order dated 05.07.2007 shows that trial court at the time of issuing process to the applicants relied upon the statements under Sections 200 and 202 Cr.P.C. Now, the question is

whether statements of witnesses recorded under Section 202 Cr.P.C. is an inquiry for the purpose of Section 202(1) Cr.P.C. or not.

19. Hon'ble Supreme Court in the case of **Vijay Dhanuka and others Vs. Najima Mamtaj and others (2014) 14 SCC 638** after observing that an inquiry/investigation as contemplated under Section 202(1) Cr.P.C. is necessary before issuing summons to accused if they reside beyond the jurisdiction of trial court, further observed in paragraph No. 14 as follows:-

"In view of our answer to the aforesaid question, the next question which falls for out determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2(g) of the Code, the same reads as follows:-

2(g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."

20. Thus, from the judgment of Vijay Dhanuka case (supra), it is apparent that if Magistrate examined witnesses under Section 202 Cr.P.C. and if he was satisfied with the statements recorded under Section 200 Cr.P.C. and 202 Cr.P.C., that accused should be summoned then he can summon them even those accused resides beyond its jurisdiction, as the statement recorded under Section 202 Cr.P.C. is an inquiry as defined under Section 2(g) of Cr.P.C.

21. In the present case, learned trial court examined Ram Charan and Rajendra Singh under Sections 202 Cr.P.C. and relied upon their statements at the time of issuing process, therefore, in view of Hon'ble Supreme Court in Vijay Dhanuka case (supra), it cannot be said that without conducting any inquiry, learned Magistrate issued summons to applicants. Thus, this point raised by learned counsel for the applicants also fails.

22. The last contention raised by learned counsel for the applicants is that learned Additional Chief Judicial Magistrate-I, Court No. 19, Saharanpur was not having jurisdiction to try the case as all the alleged offences under Section 500, 211, 120B IPC, in which, applicants were summoned were committed in Roorki and not in District Saharanpur. I find force in this argument.

23. Perusal of the complaint and statements recorded under Sections 200 and 202 Cr.P.C. shows that application under Section 156(3) Cr.P.C. was moved by

applicant no.1 against opposite party no.2 and his wife before Judicial Magistrate, Roorki and FIR was also lodged at Police Station Gangnahar, Roorki. The trial court situated at Roorki conducted the trial of opposite party no.2 and his wife and convicted them under Section 323/34 IPC and further the appellate court, who acquitted the opposite party no.2 and his wife, was also not situated in District Saharanpur, therefore, admittedly the alleged offences were committed in Roorki and not in District Saharanpur. Now, the question is whether cause of action of the present case can arise in District Saharanpur or not.

24. Section 177 of The Code of Criminal Procedure states about the jurisdiction of the criminal courts in inquiries and trials, which reproduced as under:-

"177. Ordinary place of inquiry and trial. Every offene shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."

25. As per Section 177 of The Code of Criminal Procedure an offence shall ordinarily be inquired and tried by the court within whose jurisdiction it was committed. As, I have already observed that the alleged offences in which applicants were summoned were committed in District Roorki, therefore, as per Section 177 of The Code of Criminal Procedure, the Additional Chief Judicial Magistrate-I, Court No.19, Saharanpur was not having jurisdiction to try the same, as there is no evidence on record, which can show that the act done in Roorki was having any consequence which has ensued in District Saharanpur, therefore, no advantage of Section 179 Cr.P.C. may be given to opposite party no.2.

26. Thus, in my considered view ACJM-I, Saharanpur was not having jurisdiction to try the present case.

27. Therefore, present application under Section 482 Cr.P.C. is ***allowed*** and impugned complaint being Complaint No. 1317 of 2007 under Sections 500, 211, 120B IPC pending in the Court of Additional Chief Judicial Magistrate-I, Court No.19, Saharanpur and summoning order dated 05.07.2007 are hereby quashed

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(2022)02ILR A593
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2022

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Application U/S 482 Cr.P.C. No.43233 of 2017

Nitin Garg ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Varun Dev Sharma

Counsel for the Opposite Parties:
A.G.A.,Sri Tapan Kumar Mishra, Sri Sushil Kumar Shukla

(A) Criminal Law-Matrimonial dispute-no allegation of dowry demand -parties settled the disputes amicably-mutually divorced-other criminal cases which were pending are disposed-parties reached settlement-chargesheet quashed.

Application allowed. (E-9)

List of Cases cited:-

1. Gian Singh Vs St. of Pun. & anr., (2012) 10 SCC 303

2. Parbathbhai Aahir @ Parbatbhai Bhimsinghbhai Karmur & ors. Vs St. of Guj. & anr., (2017) 9 SCC 641

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

1. Heard Sri Varun Dev Sharma, learned counsel for the applicant, Sri Tapan Kumar Mishra, learned counsel for the opposite party no. 2, and Sri Manoj Kumar Dwivedi learned A.G.A. for the State, and perused the material on record.

2. The present application under section 482 of the Code of Criminal Procedure (in short "the Code") has been filed for quashing the impugned charge-sheet No. 43 of 2017 dated 18.10.2017 arising out of case crime no. 22 of 2017 under sections 498-A, 323, 506 of Indian Penal Code (hereinafter referred as "IPC") registered at Police Station- Mahila Thana, District Meerut and stay the further proceedings of Criminal Case No. 5204 of 2017 (State v. Nitin Garg) pending in the court of Special Chief Judicial Magistrate, Meerut.

3. First Information Report ("FIR") has been lodged by the opposite party no. 2 as case Crime No. 22 of 2017 under Sections 323, 506, 307, 354 of IPC on 2.5.2017 at Police Station- Mahila Thana, District Meerut against the applicant aged about 39 years (husband), Satish Chand Gupta (father-in-law) and Saurabh (brother-in-law/*Jeth*).

4. Brief facts of the case are that First Information Report dated 2.5.2017 by the opp. party no. 2/victim stating therein that the marriage of the victim was solemnized with the applicant on 3.12.2003 according to Hindu rites and rituals at Meerut and her father spent more than his capacity. After the marriage, the applicant used to commit marpeet with her, after consuming excess liquor but she tolerated the behaviour of her husband for the future of her son and complained to her brother-in-law (Jeth) and father-in-law. On such a complaint, her father-in-law stated that the applicant is not physically fit. Prior to two years of lodging the FIR, father-in-law of the victim entered her room started molesting her and attempted to commit rape with her. After this incident, the victim left this house and shifted to another house of the applicant. On 25.4.2017, co-accused Saurabh came and caught hold of her forcibly and attempted to commit rape. Anyhow she escaped herself. On her information, her father came on 29.4.2017 from Darjeeling and they threatened to dissolve the marriage after taking Rs. 2 crores otherwise she would not be left alive. Earlier, her husband two times attempted to commit murder by strangulation of her neck.

5. After completing the investigation, on 18.10.2017, a charge-sheet has been submitted in the aforesaid case against the applicant under Sections 498-A, 323, 506 of IPC and Special Chief Judicial Magistrate, Meerut took cognizance on 7.11.2017 under Sections 498-A, 323, 506 of IPC.

6. Learned counsel for the applicant as well as learned counsel for the opp. party no. 2 have jointly submitted that the parties have settled their matrimonial dispute before Supreme Court Mediation Centre on 16.11.2018 wherein the opposite party no. 2 has expressed her opinion that she does not wish to pursue the present case any further. Copy of aforesaid settlement has been annexed as Annexure SA.- 1 to the Supplementary Affidavit. Both the parties have agreed in the

aforesaid settlement that they will make joint request before the Court to dispose of/quash the following cases:

(a) HMA No. 1950 of 2016 pending before the Family Court, Meerut (Nitin Garg v. Navita Garg)

(b) Case arising out of CR No. 22 of 217 pending before CJM, Meerut (Mahila Thana)

(c) Complaint case No. 48 of 2018 pending before the CJM, Kalimpong.

(d) Case arising out of GR Case No. 297 of 2017 from FIR No. 231 of 2017 pending before CJM, Kalimpong.

7. Learned counsel for both the parties further submitted that in pursuance of aforesaid settlement, out of four cases, three cases have been disposed of. The relevant copies of the orders have been filed as Annexure SA-2, SA-3, and SA-4 to the Supplementary Affidavit. Both the parties have agreed, voluntarily and of their own free will to settle their matrimonial dispute on the terms and conditions mentioned in the settlement dated 16.11.2018, and a decree under Section 13-B of the Hindu Marriage Act, 1955 has been passed between the parties on 20.2.2021 by the Principal Family Court, Meerut.

8. The fact of settlement has been confirmed and admitted by learned counsel for both the parties and they have jointly submitted that in the interest of justice the proceedings of the criminal case be quashed in the light of the aforesaid settlement. It is relevant to mention here that the opp. party no. 2 has admitted the fact of settlement in her affidavits which have been filed in support of urgency application, moved for early disposal of the present case.

9. To appreciate the submission of the applicant it will be worthwhile to refer some decision of the Supreme Court with regard to scope and power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code.

10. A three-Judge Bench of the Supreme Court, after considering the reference, whether non-compoundable offence be permitted to be compounded by the court directly or indirectly, in **Gian Singh v. State of Punjab & Anr., (2012) 10 SCC 303,** has observed as under: (SCC, p. 340-41, para 56, 57 & 58)

"56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided.

57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained

in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

11. In **Parbathbhai Aahir @ Parbatbhai Bhimsinghbhai Karmur & Ors. v. State of Gujarat & Anr., (2017) 9 SCC 641**, (3 Judge) after referring the various judgments of the Supreme Court summarized the broad principles relating to the scope of inherent jurisdiction under Section 482 of the Code as under; (SCC, p. 653, para 16)

"16. The broad principles which emerges from the precedents on the subject, may be summarised in the following propositions:

16.1. 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.

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent poser 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.

16.5. 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.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family or 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.

16.7. 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 insofar as the exercise of the inherent power to quash is concerned.

16.8. 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.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would case oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offence 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."

12. Thus, it is a settled position of law that when the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure: (i) ends of justice, or (ii) to prevent abuse of the process of any court. While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives. Such a power is not to be exercised in heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc.

13. The instant case, as the allegations made in the FIR as well as the settlement would demonstrate, there is a matrimonial dispute between the parties; there is no allegation with regard to demand of dowry; both the parties have settled their matrimonial disputes amicably before the Supreme Court Medication Centre; both the parties mutually divorced under Section 13-B of the Hindu Marriage Act, 1955 on 20.2.2021 and other criminal cases which were pending between the parties are also disposed of in pursuance of the settlement dated 16.11.2018.

14. In view of the above facts including the settlement between the parties, and keeping in mind the position of law, I am of the considered opinion that cognizance order dated 7.11.2017 is liable to be quashed.

15. In conclusion, charge-sheet No. 43 of 2017 dated 18.10.2017 as well as cognizance order dated 7.11.2017 passed by the Special Chief Judicial Magistrate, Meerut, in Criminal Case No. 5204 of 2017 (arising out of Case Crime no. 22 of 2017 under sections 498-A, 323, 506 of IPC registered at Police Station - Mahila Thana, District Meerut), pending for trial in the court of Special Chief Judicial Magistrate, Meerut is, hereby, quashed. The present application stands **allowed** accordingly.

16. A copy of this order be transmitted to the trial court for information.

(2022)02ILR A598
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2022

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Criminal Appeal No. 29 of 2017
with
Criminal Appeal No. 30 of 2017
with
Criminal Appeal No. 31 of 2017

Kareem ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri V.P. Srivastava, Senior Counsel, Sri Pankaj Kumar Tyagi, Ms. Ankita Verma, Sri A. Kumar Srivastava

Counsel for the Opposite Party:
A.G.A., Sri Pankaj Bharti

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860 - Sections 452, 302/34 & 506-challenge to-conviction-evidence of eye-witnesses PW-1 and PW-2 unreliable being interested witness –PW-1 stated in his cross-examination that he heard the sound of two shots and there was no blood on the spot-no source of light has

been disclosed which makes prosecution case doubtful-testimony of DW-1 regarding place of incident is doubtful as he stated in his examination-in –chief that he saw dead body in the agriculture field near tubewell-statement of PW-1 and PW-2 u/s 161 were not recorded, thus the investigation is also faulty and defective-moreso, two witnesses were not produced by prosecution who had seen the incident in the site plan and whose statement were recorded-prosecution failed to prove the charge against the appellants/accused beyond reasonable doubt-judgement of conviction is set aside-appellants are acquitted of the charged offences.(Para 1 to 28)

The appeals are allowed. (E-6)

List of Cases cited:

1. Mahabir Singh Vs St. of Har. (2001) SCC (Cri.) 1262

2. Dayal Singh & ors. Vs St. of Uttranchal (2012) AIR SC 3046

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. These criminal appeals have been preferred against the judgment and order of conviction and sentence dated 17.11.2016, passed by the Addl. Sessions Judge, Court No. 2, Muzaffar Nagar in S.T. No.483 of 2013 *(State vs. Kareem and others)*, under Sections 452, 302/34, 506 IPC, P.S. Mansoorpur, District- Muzaffar Nagar, convicting accused (Kareem, Shahjad, Wajid) for offences under Sections 452, 302/34, 506 IPC and sentencing each of them with imprisonment for 3 years and fine of Rs.5000/- under Section 452 IPC, in default of fine, 3 months further imprisonment, life imprisonment to each of them along with fine of Rs.10,000 under Section 302/34 IPC, in default of fine, 6 months further imprisonment and 2 years imprisonment along with fine of Rs.5000/- to each of them under Section 506 IPC, in default of fine, 3 months further imprisonment. Accused Kareem has been acquitted from the charges under Section 25/27 of the Arms Act, giving benefit of doubt.

2. Being aggrieved therefrom, accused Shahjad preferred Criminal Appeal No. 31 of 2017, accused Kareem preferred Criminal Appeal No.29 of 2017 accused Wajid preferred Criminal Appeal No.30 of 2017 for setting aside their conviction and passing an order of acquittal.

3. Since common issues are involved in all the three appeals, hence all the three appeals are being disposed of by a common order. The fact stated in Criminal Appeal No.29 of 2017 shall be treated as a leading appeal.

4. In brief, prosecution case is that on 29.7.2012 at 5 AM in the morning when first informant Deepak along with his mother Kauhal Devi were present in house of his brother Rahul, neighbour Kareem, Shahjad, Fayyaz and Wajid entered the house, Kareem and Shahjad were armed with country-made pistols. Fayyaz and Wajid told that give him a lesson for bothering Anjum, daughter of Kareem and kill the Rahul. On the said exhortation, Kareem and Shahjad fired shots with intention to murder Rahul, Rahul fell down on spot due to injury caused to him. On account of noise raised by him and his mother and on seeing the villagers arriving, accused ran away, giving warning that they will kill them also. They carried injured Rahul to District Hospital where doctor declared him dead.

5. On the basis of written report (Ext. Ka-1), Case Crime No. 365/2012, under

Sections 452, 302, 506 IPC was lodged against accused. Chik FIR (Ext. Ka-9) was registered and its entry was recorded in G.D. (Ext. Ka-10). The investigation of the case was handed over to Ramesh Chandra Yadav, S.O. Mansoorpur, Sub-Inspector Pritam Singh Rawal prepared inquest memo (Ext. ka-2) of deceased Rahul and relevant documents, like, letter to R.I. (Ext. Ka-3), letter to C.M.O. (Ext. Ka-4), photo lash (Ext. Ka-5), dead body challan (Ext. Ka-6) and sent the dead body for postmortem.

6. Investigating Officer prepared spot map (Ext. Ka-18) and recorded statement of witnesses, recovered pellets from the place of incident and prepared its memo (Ext. Ka-16) and recovered cartridges and prepared its memo (Ext. ka-17). During investigation, weapon of the crime, country-made pistol and two live cartridges were recovered from the possession of Kareem vide recovery memo (Ext. Ka-7). FIR was lodged against Kareem under Section 25/27 of the Arms Act in Case Crime No.469/2012. Charge-sheet under Sections 452, 302/34, 506 IPC was submitted against accused Kareem, Shahjad and Wajid and charge-sheet under Section 25 of the Arms Act was submitted against Kareem by Investigating officer which are Ext. Ka-19 & Ext. Ka-14 respectively. Charges were framed against accused Kareem, Shahjad and Wajid under Sections 452, 302/34, 506 IPC and under Section 25 of the Arms Act against the accused Kareem which they denied and claimed trial.

7. In joint trial of the two cases, prosecution produced as many as 8 witnesses viz. P.W.-1 Deepak, 1st informant and brother of deceased (eye-witness), P.W. 2 Smt. Kaushal, mother of deceased (eye-witness), P.W.3, Sub-Inspector Pritam Singh Rawal who prepared inquest, etc, P.W.4 Dr. Rajesh Kumar Dawrey who conducted postmortem of the dead body of deceased, P.W.5 H.C.P. Brijesh Kumar who lodged First Information Report of the incident under Sections 452, 302/34, 506 IPC, P.W.6 Constable Clerk Brahmajeet Singh who lodged the First Information Report under Section 25/27 of the Arms Act, P.W.7 Sub-Inspector Rajpal Singh who conducted investigation of case under the Arms Act, P.W.8 Sub-Inspector Ramesh Chandra Yadav who concluded investigation of case under Section 452, 302/34, 506 IPC. Defence has produced one witness Naushad as D.W.1.

8. P.W.1 Deepak in his examination-in-chief has stated that he knows accused kareem, Shahjad and Wajid who belong to his village. He knows accused Fayyaz who also belongs to his village. Accused are his neighbours. The name of his deceased brother is Rahul Sharma. Incident is of 27.9.2012, on that day, he, his brother Rahul and mother Kaushal were present in the house. In the morning at 5 AM, Kareem, Wajid, Shahjad and Fayyaj came to his house. Kareem and Shahjad were armed with country-made pistol. All the four entered into his house, Wajid and Fayyaz said that give him lesson due to misbehaviour done by him with Anjum, daughter of Kareem. Accordingly, Kareem and Shahjad on the exhortation of Fayyaz and Wajid fired shot to his brother Rahul. He and his mother saw the incident. Rahul was sleeping when shot was fired. Rahul fell down from Takhat as soon as he received shot. Nobody came in spite of making noise. Accused ran away along with country-made pistol after making fire shot. He carried his brother in the car of his

village Pradhan Dushyant to the police station Mansoorpur and told the incident to Station Officer. Station Officer has told him to take injured Rahul to Government Hospital, Muzzafar Nagar for treatment where doctor declared Rahul dead. The report of the incident was written by Jasveer in the hospital and the same was lodged against accused. In cross-examination, P.W.-1 stated that his mother, brother and sister were sleeping in the house and he was sleeping in the gher situated at a distance of 50-60 mtrs from the house. There are 4-5 houses in between his house and gher . His animals are being tied in the gher that is why he sleeps in the gher. He further stated that he heard two shots. His brother was in the house. When he came to his brother, then he found no blood near the body.

9. P.W.-2 Smt. Kaushal (mother of deceased) in her examination-in-chief stated that accused are her neighbours and Rahul was her son. Incident was of 27.9.2012 at 5 AM. She wake up at 4 AM and for milking her cow and buffalow, she went to gher where her elder son sleeps. She milked her cow and buffalow in the gher. She and her son Deepak came to house at about 5 AM. As soon as she was going to sleep the accused Kareem, Fayyaz, Wajid and Shahjad come inside the room through gallery. Rahul was sleeping on takht and she was on a charpai parallel to him. Fayyaz and Wajid said that give him a lesson as he misbehaved Anjum and end the life of Rahul. Accordingly, Kareem and Shahjad fired at Rahul. First shot was fired by Kareem and the second shot by Shahjad. On being shot, Rahul fell down from takht. Accused threatened if she made a noise, they will kill her also. First of all, Deepak came there. Deepak covered Rahul's injured stomach from his lungi. Deepak called village Pradhan and took Rahul for treatment. In cross-examination, P.W.2 stated that first of all Deepak came there. Deepak covered the Rahul's injured place from his lungi. He wear clothes inside the lungi. She became unconscious after the incident. Police has not taken into custody mattress, etc. Police has not taken into custody any item from her house and room in her presence. The shots hit the left side of stomach and the thigh. Intestine protruded from the fire-arm injury in the stomach.

10. P.W.3 Inspector Pritam Singh Rawal in his examination-in-chief has stated that on 27.9.2012, he was posted as Sub-Inspector at police station Mansoorpur, he prepared the Panchayatnama of the body of deceased Rahul and other documents relating to Panchayatnama were also prepared by him and dead body was handed over for postmortem to Constable Kapil Bhati and Constable Dinesh Kumar.

11. P.W.4 Dr. Rajesh Kumar Dawrey in his examination-in-chief has stated that he was posted on 17.9.2013 at the District Hospital, Muzaffar Nagar and he conducted the postmortem at 4 PM. Following injuries were found on the body of deceased:-

1. A gun shot wound of entry size 3cm x 2.5cm x abdomen cavity deep, present over left side of abdomen, at 2'O clock position and 15cms away from amblicus, abraided collar and B/T (blackening and tattooing), present around the wound in the area of 10cm x 8cm, margins inverted and lacerated. Intestine was protruding out from wound.

2. Multiple pellet wounds in the area of 13cm x 9cm x muscle and sic....

deep, present over anterior aspect of left thigh, 16cm about the knee. On exploration 6 tiny pellets recovered from muscles and skin.

3. A contusion 1.5cm x 1cm present over anterior aspect of right thigh in the middle part.

12. P.W.5 H.C.P. Brijesh Kumar has stated in his examination-in-chief that he was posted on 27.9.2012 at Police Station Mansoorpur, District Muzaffar Nagar as Constable / Clerk. On the basis of the written report of the informant Deepak, Chick Report No. 201 of 2012 Case Crime No.365/2012, under Sections 452, 302, 506 IPC was prepared. He proved chick report (Ext. Ka-9) and G.D. (Ext. Ka-10).

13. P.W.6 Constable Clerk Brahmajeet Singh has stated in his examination-in-chief that he was posted on 28.9.2012 at police station Chappar, District Muzaffar nagar as Constable / Clerk. He taken the memo of recovery of country-made pistol 12 bore from Station Officer Ramesh Chandra Yadav at 22.00. On the basis of memo of recovery, Case Crime No.369/2012 (State vs. Kareem), under Section 25/27 of the Arms Act was registered whose entry was made in G.D. No.56 at 22.00. He identified the Chick (Ext. Ka-11) and G.D. (Ext. Ka-12) which are in his handwriting.

14. P.W.-7 Sub-Inspector Rajpal Singh who conducted investigation of recovery of one country-made pistol and 2 cartridges), has stated in his examination-in-chief that on 29.9.2012, he was posted as Sub-Inspector at police station Mansoorpur, District Muzaffar Nagar. The investigation of Case Crime No.369/2012, under Section 25/27 of the Arms Act was handed over to him and he examined the witnesses. The site plan (Ext. ka-13) was prepared by him on the pointing out of the informant. He submitted charge-sheet (Ext. Ka- 14), under Section 25/27 of the Arms Act and proved it.

15. P.W.8 Ramesh Chandra Yadav, Sub-Inspector, the Investigation Officer of murder case, has stated in his examination-in-chief that since 27.9.2012 he was posted as Station Officer at Police Station Mansoorpur District Muzaffar Nagar, investigated Case Crime No.365/2012, under Sections 452/302/506 IPC. He recorded statement of Constable Brijesh Kumar who wrote First Information Report. The statement of first informant Deepak was also recorded at the police station. He went to District Hospital with official jeep along with Sub-Inspector Pritam Singh, Constable Manoj Kumar, Constable Kamlesh Kumar and Constable Dinesh Kumar. Sub-Inspector Pritam Singh prepared inquest of deceased Rahul Sharma and other documents relating to inquest. Body was sent to postmortem. Accordingly, witnesses of the inquest were examined. Pellets were recovered from the place of incident and memo was prepared vide Ext. Ka-16. On 27.9.2012, 3 cartridges were recovered from the place of incident and memo was prepared vide Ext. Ka-17. On the pointing out of first informant, inspection of the spot was made and site plan was prepared vide Ext. Ka-18 and the same was also identified by him. The witnesses of the recovery memo were examined as well as other witnesses were examined. He arrested accused Kareem on 28.9.2012 at 8 PM along with country-made pistol of 12 bore and 2 cartridges of 12 bore. Kareem stated that with the same country-made pistol, he murdered Rahul Sharma on 27.9.2012. The recovery memo

of the country-made pistol and the cartridges was prepared by Sub-Inspector Pritam Singh vide Ext. Ka-7. Case was accordingly registered against Kareem and he was examined also, Sub-Inspector Pritam Singh who prepared inquest was examined, the Constable who was in the postmortem team was also examined. On 9.10.2012, accused Wajid was arrested and examined on 18.10.2012. After completion of investigation, charge-sheet (Ext. Ka-19) was submitted against Kareem, Shahjad and Wajid.

16. The Court after prosecution evidence, examined the accused under Section 313 Cr.P.C. and accused submitted that they have been falsely implicated in the present case due to enmity and partybandi. The accused - appellants have produced Naushad as D.W.1.

17. D.W. 1 Naushad in his examination-in-chief has stated that he knows Rahul Sharma of his village and also knows Kareem, Shahjad, Fayyaz, Wajid of his village. On 27.9.2012 in the morning at 4.30 AM, he went to mosque from his house. In the mosque, one person came and told him that Rahul Sharma was shot near the tubewell, situated in agriculture field. He was operating his tube well at that time. They went to the gher of Rahul. In the gher, Deepak and his mother were present. They called village Pradhan and thereafter all of them went to agriculture field where Rahul's body was lying near tubewell. They carried Rahul on tractor trolley to village and then in the car of village Pradhan to hospital. The house and gher of Rahul are separate. No incident has taken place at the house of Rahul. In cross-examination D.W.1 has stated that electricity supply in village was from at 4 PM in the evening till 4 AM in the morning. He saw the dead body of Rahul in the agriculture field.

18. Heard Shri V.P. Srivastava, the learned Senior Counsel assisted by Shri Pankaj Kumar Tyagi and Ms Ankita Verma, for the appellants, Shri Pankaj Bharti, learned counsel for the complainant and the learned A.G.A. for the State.

19. The submission of the learned counsel for the appellants are:

(i) P.W.1 & P.W.2 alleged eye-witnesses of the incident are interested and partisan witnesses, were not present at the place of incident as such their evidence is unreliable.

(ii) No source of light has been disclosed. The incident is of 5 AM on 27.9.2012 and there was no electricity in the village at the relevant time. As such, prosecution case is doubtful.

(iii) Place of occurrence is also doubtful as no blood was recovered from the alleged place of incident either on takht or on ground. The testimony of D.W.1 as to the place of incident is different from that of the prosecution witnesses.

(iv) Latches in investigation create doubt about the prosecution story.

In support of the contentions, the learned counsel for the appellants has placed reliance upon the judgment of the Apex court in **Mahabir Singh vs. State of Haryana, reported in 2001 SCC (Cri) 1262.**

20. On the other hand, learned counsel for the complainant Mr. Pankaj Bharti and the learned AGA for the State argued that it is a case of direct evidence and strong motive. As such, latches in the investigation will not demolish the

prosecution case as held by the Apex Court in **Dayal Singh and Others vs. State of Uttranchal, AIR 2012 SC 3046.**

21. So far as the argument of the learned counsel for the appellants that evidence of P.W.'s- 1 & 2, eye-witnesses of the incident are unreliable as they were not present on the place of incident is concerned, the evidence of P.W.'s- 1 & 2 will be relevant. P.W.1 Deepak in his examination-in-chief states that his mother, brother and sister were sleeping in room. He was sleeping at gher which is at the distance of 50-60 mtr. from his house, although in the First Information Report, first informant / P.W.1, also states that he and his mother were in the house. In his cross-examination, P.W.1 states that he heard the sound of two shots. His brother was in the house, when he came to his brother, there was no blood on the spot. This statement of P.W.1 clearly demonstrates that he was not present at the place of incident. As such, evidence of P.W.1 is not reliable and prosecution case is false and doubtful. So far as P.W.2, another eye-witness is concerned, she has stated in her examination-in-chief that her elder son Deepak had slept at gher where their animals are tied. She woke up at 4 AM in the morning on the date of incident and went at gher for milking cows and buffalows, after milking she and her son Deepak came to house at about 5 AM. She also stated in her cross-examination when she reached the gher for milking their animals, there was no electricity. P.W.1 & P.W.2 have also stated that their statements were not taken by police. It is also material to state that P.W.2 has made improvement also in her statement in order to prove that she and her son Deepak were present at the place of incident but the analysis of the statement of P.W.1 & P.W.2 as well as other evidence (FIR, site plan, etc.) on record fully reveal that P.W.1 & P.W.2 were not present at the place of incident and their evidence does not inspire confidence. It is difficult to accept that they are eye-witnesses.

22. So far as second argument of the learned counsel for the appellant that there was no source of light at the place of incident is concerned, P.W.2 in her cross-examination stated that there was no electricity when she reached the gher for milking her cows and buffalows and came back to house at 5 AM. As such, at the time of incident, there was no electricity in the house at 5 AM on 27.9.2012. D.W.1 Naushad also states in his cross-examination that electricity supply in his village was from 4 PM in evening till 4 AM in morning. So it is well established that there was no electricity in the house at the time of incident. It was, therefore, not possible for P.W.2 to identify the accused in the absence of electricity in the early morning. No alternative source of light has been set up by the prosecution. As such, prosecution case as set up against the accused appellants is doubtful.

23. So far as the third argument of learned counsel for the appellants that place of incident is doubtful is concerned, it is material to state that no blood was found either on takhat or on the ground or at any other place which make the place of occurrence doubtful. In the site plan also, there is no mention of blood, etc. any any place. It is also material to state that 36 pellets were found below the takhat while accused was sleeping on the takhat. D.W.1 Naushad in his statement-in-chief as well as in cross-examination stated that body of deceased Rahul was found in agriculture field near tubewell and no incident has

taken place at the residence of Rahul. The above evidence belies the place of incident as also the prosecution case.

24. With regard to the fourth argument of learned counsel for the appellants that the investigation is faulty and defective, following facts will be relevant:

(a) Statement under Section 161 Cr.P.C. of P.W.1 & P.W.2 were not recorded at all.

(b) Witnesses Kalwa who has seen the incident as shown in the site plan and Mange whose house is also mentioned in site plan were examined under Section 161 Cr.P.C. but they were not produced by prosecution.

25. The counsel for the appellant placed reliance upon the judgment of the Apex Court in the case of **Mahabir Singh vs. State of Haryana reported in 2001 SCC (Cri) 1262** on the point of non-examination of P.W.1 & P.W.2 under Section 161 Cr.P.C. Paragraph nos. 13 & 14 of the judgment are relevant and read as follows:

"13. If a Public Prosecutor failed to get the contradiction explained as permitted by the last limb of the proviso to Section 162(1) of the Code, is it permissible for the court to invoke the powers under Section 172 of the Code for explaining such contradiction? For that purpose we may examine the scope of Section 172 of the Code. That section deals with the diary of proceedings in investigation. Sub- section (1) enjoins on the Investigating Officer to enter in a diary the time at which he began and the place or places visited by him during the course of investigation. Such entries should be made on a day-to-day basis. Sub- sections (2) and (3) of Section 172 read thus:

172 (2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.

14. A reading of the said sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the entries in a Case Diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for

contradiction. In other words, the power conferred on the court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the court from using the power under Section 172 of the Code for the purpose of explaining the contradiction."

26. It is also material that prosecution has not produced witnesses Kalwa and Mange whose statement under Section 161 Cr.P.C. have been recorded. In the site plan, it is mentioned that Kalwa had caught accused Kareem at place "G" but he fled away giving threat. The above discrepancy on the part of investigation also makes the prosecution case doubtful.

27. In view of the facts and circumstances of the case and the evidence available on record, we find that witnesses produced by prosecution do not inspire confidence that they are eye witnesses of the incident. There was no source of light at the place of incident and place of occurrence is also doubtful. There are lapses on the part of investigation. Prosecution has failed to prove the charge against the appellants - accused beyond reasonable doubt. Accordingly, judgement and order dated 17.11.2016 passed by the learned trial court is not sustainable and is liable to be set aside.

28. The appeals are **allowed**. The judgment of conviction and order of sentence dated 17.11.2016 is set aside. Appellants are acquitted of the charged offences. Appellants- Kareem and Shahjad in Criminal Appeal Nos.29 of 2017 and 31 of 2017 respectively are in jail. They shall forthwith be released from the jail, if not wanted in any other case. Appellant Wajid in Criminal Appeal No.30 of 2017 is on bail. His bail bond and sureties stand discharged.

Let a copy of the judgment along with the original record be sent to the court below for compliance

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(2022)02ILR A606
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.02.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 863 of 2021

Rahul @ Abhinav Kumar & Ors.
...Appellants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellants:
O.P. Tiwari

Counsel for the Opposite Parties:
G.A.,Manoj Kumar Gupta

A. Criminal Law - Scheduled Caste & Schedule Tribe (Prevention of Atrocities) Act, 1989 - Section 14(A)(1) - Section 3(1) (da) (dha) - Indian Penal Code, 1860 - Sections 147, 323, 324, 504 & 506- summoning order-appellants had been summoned through a printed order and did not follow the dictum of law as propounded by the Apex Court-at the stage of summoning only prima facie case is to be seen-it cannot be said that no offence is made out-Disputed question of fact cannot be adjudicated at this stage-However, appellants got a right of discharge application before the Trial Court-quashing of charge-sheet and entire proceedings is refused.(Para 1 to 14)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Ankit Vs St. of U.P. & anr. JIC 2010 91) 432

2. R.P. Kapur Vs St. of Punj. (1960) AIR SC 866

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

4. St. of Bih. Vs P.P. Sharma (1992) SCC (Cr.) 192

5. Zandu Pharmaceuticals Works Ltd. Vs Mohd. Saraful Haq & anr.(2005) SCC (Cr.) 283

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

1. Heard learned counsel for the appellants and learned A.G.A. for the State through Video Conferencing.

2. This appeal has been preferred under Section 14 (A) (1) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 against the summoning order dated 15.12.2020 passed by Special Judge, (SC/ST Act), Unnao and impugned charge-sheet No.162 of 2020 dated 3.7.2020 submitted by investigating officer in Special Case No.9 of 2021, F.I.R./Case Crime No. 136 of 2020, under Sections 147, 323, 324, 504, 506 IPC and Section 3(1)(da)(dha) of SC/ST Act, Police Station- Purwa, District- Unnao.

3. Before arguing the case on merits, learned counsel for the appellants while pressing the present appeal submits that after submission of charge sheet the appellants have been summoned by order dated 15.12.2020 and the court below while summoning the appellants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the appellants. The court below has summoned the appellants through a printed order, which is wholly illegal.

4. It has been further submitted that the impugned summoning order dated 15.12.2020 is not a judicial order as it has been passed on a printed proforma without recording any reasons in support of satisfaction for taking cognizance against the appellants and merely the case, Section, date of the order and date of the summon have been filled.

5. It is next submitted that no offence as described in the F.I.R. or in the statement of the witnesses recorded during the course of investigation has taken place and the whole story as narrated in the F.I.R. as well as in the statement of the witnesses has been cooked and manufactured, therefore, the court below has materially erred in summoning the appellants, as such the orders are liable to be set aside.

6. Learned counsel for the appellants has relied upon a decision of this Court in ***Ankit Vs. State of U.P. and another JIC 2010 (1) 432*** and has submitted that order impugned being on a printed proforma is clearly without application of judicial mind and hence is liable to be quashed on this ground alone.

7. Learned A.G.A., however, opposes the contention of learned counsel for the appellants on the ground that the court below keeping in view the charge sheet and material submitted therewith, after applying judicial mind and finding sufficient material on record, summoned the appellants along with other co-accused persons to face trial and, therefore, there is nothing illegal so far as the order of summoning passed by the court below is concerned.

8. I have considered the arguments advanced by the learned counsel for the parties and perused the record.

9. The certified copy of the impugned summoning order dated 15.12.2020 has been annexed with the appeal in support of the contention. From a perusal of the above order, it is evident that it is a typed proforma, in which name of the parties, police station, case crime number, section of the offence and date fixed is filled by someone in hand writing. It appears that the blanks in the printed proforma filled up by some Court employee and the Special Judge, SC/ST Act, Unnao has just put his initial which leads to the conclusion that the Special Judge, SC/ST Act, Unnao has passed the order in a mechanical manner without application of judicial mind.

10. Despite there being a series of the decisions of the Apex Court and this Court disapproving such practice of passing orders on printed proforma by the Special Judge, SC/ST Act, Unnao, order being passed in such a manner which shows that judicial mind has not been applied in passing the order. This type of order has already been unsustainable by this Court in the case of ***Ankit (supra)*** relying on in a number of decisions of the Apex Court.

11. In view of the above, the conduct of the trial court concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and order must reflect that the learned Special Judge, SC/ST Act had applied his mind to the facts as well as law applicable thereto.

12. So far as quashing of charge sheet and entire proceedings is concerned, from the perusal of the material on record and looking into the facts of the case at this stage, it cannot be said that no offence is made out against the appellants. All the submission made relates to the disputed question of fact, which cannot be adjudicated upon by this Court. At this stage, only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of *R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283*. The disputed defence of the accused cannot be considered at this stage. Moreover, the appellants have got a right of discharge according to the provisions prescribed in Cr.P.C., as the case may be, through a proper application for the said purpose and he is free to take all the submissions in the said discharge application before the Trial Court.

13. The prayer for quashing the proceedings and charge sheet is refused.

14. In view of the above, the present appeal is partly allowed.

15. Accordingly, the impugned cognizance order and consequently summoning order dated 15.12.2020 passed by learned trial court is hereby quashed. The trial court is directed to pass a fresh order after applying the judicial mind.

16. Accordingly, this appeal under Section 14(A)(1) is finally **disposed of.**

17. Let this order be communicated to the court below for necessary compliance.

(2022)02ILR A609
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 865 of 1985

Shiv Singh ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri V.P. Goel, Sri Atul Mehra, Sri Sudhir Mehrotra

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860 - Section 307 - modification-quantum of sentence-incident took place in the year 1983 about 38 years ago and now appellant is more than 57 year of age, the only bread earner in his family-both the parties are distant relative-accused suffered the agony of conviction for more than 36 years-no criminal antecedents have been shown to his credit after passing of so much of long period out of jail- At this stage, it would be appropriate the accused be sentenced with the period already undergone and amount of fine be imposed.(Para 1 to 20)
B. The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. 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. the impact on the society as a whole has to be seen. It is therefore, necessary to avoid undue leniency in imposition of sentence. the criminal justice jurisprudence adopted in the country is not retributive but reformative. at the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system. (Para 10 to 16)

The appeal is partly allowed. (E-6)

List of cases cited:

1. Mohd Giasuddin Vs St. of A.P. (1977) AIR SC 1926

2. Sham Sunder Vs Puran (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan (2013) 9 SCC 509

4. Jameel Vs St. of U.P. (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734

6. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

7. Shyam Narain Vs St. (NCT of delhi) (2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

9. St. of Punj Vs Bawa Singh (2015) 3 SCC 441

10. Raj Bala Vs St. of Har. (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattisgarh (2017) 13 SCC 449

12. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

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

1. This criminal appeal has been filed against the judgement and order dated 26.03.1985 passed by the Session Judge, Mainpuri in S.T. No. 196 of 1984, under Section 307 I.P.C., Police Station- Kotwali, District- Mainpuri, whereby learned Judge convicted and sentenced the appellant to 05 years rigorous imprisonment under Section 307 I.PC.

2. The prosecution story in brief is that the present accused Shiv Singh entered into the house of complainant and enquired about the mother and father of the complainant and after 2-4 minutes hit his mother by country made pistol on account of which her mother shrieked and became unconscious. She was taken to District Hospital, Mainpuri where she regained consciousness and was medically examined by Dr. M.L. Gupta, PW-3. Her statement was also recorded by Tehsildar which is Ext. Ka-1. A written report (Ext. Ka-2) was filed at police station Kotwali Mainpuri by the complainant, Brijendra Singh. Thereafter, a chick report was prepared which is Ext. Ka-5 and entry was made in the General Diary at serial no.23, an extract of which is Ext. Ka-14. Thereafter, Sub-Inspector, Maharaj Singh, PW-4 investigated the matter and recorded statement of complainant, his mother and other certain witnesses. As the accused applicant was not traceable, proceedings under Section 82/83 Cr.P.C. was initiated. On 22.12.1983, the Investigating Officer submitted the charge-sheet (Ext. Ka-13) against the accused in his abscondance. The trial court after taking cognizance against the accused framed charges against the accused. The accused-appellant pleaded not guilty.

3. The trial court after examining the prosecution witnesses and hearing the accused under Section 313 Cr.P.C., convicted and sentenced the accused-apellant to undergo five years rigorous imprisonment under Section 307 I.P.C.

4. Feeling aggrieved from the judgment and order dated 26.03.1985 passed by Session Judge, Mainpuri, this criminal appeal has been filed.

5. At the very outset, learned counsel for the appellant, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

6. In furtherance to his submission, the learned counsel for the accused-appellant submits that the appellant was of tender age at the time of incident. The incident had taken place in the year 1983 and the accused was convicted in the year 1985 and since then the appellant has suffered physical and mental agony of conviction. At present the appellant is aged about 57 years and he is having a family to support. The appellant had been in jail for a period of eight months during trial and after conviction. Further submission is that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He next submits that although the trial court has convicted the present accused while the appellant is absolutely innocent and has

been falsely implicated in this case with the ulterior intention of harassing him. Further submission is that there is no bread earner in the family of the appellant. He also submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and his age related ailments.

7. Learned A.G.A. has vehemently opposed the submission made by learned counsel for the appellant and submitted that there is ample evidence against the appellant and there is no reason to disbelieve the prosecution story as the accused-appellant is distant relative of the complainant family and why the accused will be falsely implicated in this matter. He has further submitted that the injured has specifically nominated the accused in her statement and doctor has specifically corroborated the injuries of the injured and the oral evidence of the injured finds corroboration from the medical evidence, hence the appeal be dismissed and accused be directed to suffer the sentence.

8. After considering the rival submissions advanced by learned counsel for the applicant as well as learned A.G.A. for the State, evidence brought on record, this Court deems it fit to dismiss the appeal on merits.

9. I have perused the entire material available on record and the evidence as well as judgment of the trial court. As the learned counsel for the accused-appellant does not want to press the appeal on its merit and requests to take a lenient view of the matter, this court considers the appropriate quantum sentence in this appeal.

10. 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."

11. In **Sham Sunder vs Puran, (1990) 4 SCC 731**, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation

shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

12. In **State of MP vs Najab Khan, (2013) 9 SCC 509**, the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

13. Earlier, "Proper Sentence" was explained in **Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

14. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In **Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in S**umer 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.**

15. In **Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449**, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

16. 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.

17. After considering the rival submissions made by learned counsel for the appellant, considering the facts and circumstance of the case, considering that the alleged incident which took place in the year 1983 about 38 years ago and now appellant is more than about 57-58 years of age, both the parties are distant relative, at this stage, this Court feels that it would not be proper to send the accused-appellant to jail and the accused was on bail since 01.04.1985 and the accused has suffered the agony of conviction for more than 36 years and no criminal antecedents have been shown to his credit after passing of so much long period out of jail, at this stage it does not appear appropriate to send the accused-appellant to jail now. It has been pointed out by learned counsel for the accused-appellant that the accused-appellant had remained in jail for sometime during trial. Considering all these facts, it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be imposed.

18. Considering all the facts and circumstances of the case, the accused-appellant is sentenced to the period already undergone by him in jail during trial and an amount of fine of Rs. 50,000/- be imposed instead of sending him to jail.

19. Accused-appellant is directed to deposit the fine of Rs. 50,000/- before learned lower court within four months

from the date of passing of the judgement. In default of payment of fine accused-appellant shall undergo two months imprisonment.

20. Appeal is ***partly allowed*** in the above terms.

21. Copy of this order be transmitted to the concerned lower court forthwith for compliance.

(2022)02ILR A614
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.02.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 947 of 1982

Radhey Shyam & Ors. ...Appellants
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri K.K. Dixit, Dharm Trivedi, Jai Pal Singh, Amicus Cure, Om Prakash Dixit, Poonam Singh, Reetesh Singh, Smriti

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860 - Sections 302, 201-challenge to-conviction-Both PW-1 and PW-2 stated that the wife and nephew of the deceased were present at the time of incident but these witnesses were not produced before the trial court-prosecution failed to explain why wife and nephew did not go to lodge the report rather it was lodged by PW-1 (villager)-statement of PW-2 with regard to the assault of the deceased with Banka three and four times is contrary to the report of the post-mortem of the headless body of the deceased-inquest report of the head recovered has been signed by PW-1 but the same denied in his statement , PW-1 failed to explain how his signature was mentioned on the report, even he denied the recovery of head-weapon of assault was not recovered by the Investigating officer nor unknown recovered head was sent for D.N.A. test which shows the conduct of the Investigating Officer, head could not be connected due to negligence of the Investigating officer-no satisfactory evidence about motive in sofar as the illicit relations of wife, if she was wife of the deceased then she definitely inherited the property but land of the deceased was inherited by sister of the deceased-prosecution failed to bring home the guilt of the appellant beyond reasonable doubt-appellant deserves the benefit of doubt-he is acquitted from the charges levelled against him.(Para 1 to 52)

The appeal is allowed. (E-6)

List of Cases cited:

1. Shaikh Nabab Shaikh Babu Musalman & ors. Vs St. of Mah. (1993) Supp. (2) SCC 217

2. Vijaysing Dharamdas Thakar Vs St. of Guj (1996) Crl. L.J. 2932

3. Surendra Pratap Chauhan Vs Ram Nail & ors. (2001) Crl. L.J. 98

4. Shivaji Dayanu Patil Vs St. of Mah. (1989) AIR 1762

5. The St. of U.P. Vs Jaggo @ jadgish (1971) AIR SC 1586

6. Habeeb Mohammed Vs The St. of Hyderabad (1954) AIR 51

7. Ganesh Bhawan Patel Vs St. of Mah. (1979) AIR 135

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

(A) INTRODUCTION

(1) Four accused persons, namely, Radhey Shyam, Raj Kumar, Jagdish and Siyaram, were tried by the VII Additional Sessions Judge, Hardoi in Sessions Trial No. 791 of 1981 : State Vs. Radhey Shyam and others, arising out of Case Crime No.210 of 1981, under Sections 302 and 201 of the Indian Penal Code , 1860 (hereinafter referred to as "**I.P.C.**") at police station Pihani, District Hardoi.

(2) Vide judgment and order dated 02.12.1982, the learned VII Additional Sessions Judge, Hardoi, convicted and sentenced the accused persons in the manner as stated herein below :-

"Accused Radhey Shyam and Siyaram

i. Under Section 302 I.P.C. to undergo life imprisonment; and

ii. Under Section 201 I.P.C. to undergo three years' R.I."

"Accused Jagdish and Raj Kumar

i. Under Section 302 readwith Section 34 I.P.C. to undergo life imprisonment; and

ii. Under Section 201 I.P.C. to undergo three years' R.I."

Their sentences were directed to run concurrently."

(3) Feeling aggrieved by the judgment and order dated 02.12.1982, the convicts/appellants have preferred the instant appeal. During pendency of the instant appeal, convict/appellant no.1-Radhey Shyam, convict/appellant no.3-Jagdish and convict/appellant no.4-Siyaram died, hence their appeal stand abated vide orders dated 01.02.2021, 02.07.2015 and 02.07.2015, respectively. Now, the instant appeal survives only with regard to **appellant no.2-Raj Kumar.**

(B) FACT

(4) Shortly stated, the prosecution case runs as under :-

On 19.09.1981, at about 07:00 am, informant Raj Bahadur (P.W.1) and his brother Sumnesh Chandra were going towards their field for cutting Urd (mnZ). Sripal (deceased) and his wife Madhu were going to village Sirsa for taking medicine from Dr. Sobaran and when they reached near the field of Leela Seth situated on the southern side of the village of chak road leading to village Sirsa, accused persons Jagdish son of Chhotey, Radhey Shyam and Raj Kumar son of Hansraj, and Siyaram son of Ram Gulam, village Bargawan, police station Biswan, District Sitapur, came out from the field of Jonhari (tksUgjh ds [ksr) of Ram Prasad and on coming to chak road, accused Radhey Shyam challenged Sripal that "idM yks ekj Mkyks" (he should be catched and killed). Accused Radhey Shyam and Siyaram were armed with banka and accused Jagdish and Raj Kumar were armed with lathies. It has been stated that at about 07:00 a.m., all the four accused persons surrounded Sripal (deceased) and tried to catch him and started scuffling, thereupon Sripal (deceased) and his wife also raised alarm. On hearing the alarm, informant Raj Bahadur (P.W.1), his brother Sumnesh, his village Pradhan Jaswant Singh, Rajnish, Leela and other villagers ran by

challenging them. By that time, all the accused persons dropped Sripal (deceased) on chak road, caught him and accused Siyaram and Radhey Shyam cut his neck with banka, whereas accused Raj Kumar and Jagdish were catching him. Thereafter, Radhey Shyam (accused) took away the head of Sripal along with his companions and ran towards the eastern side. They tried to catch them but they were threatened and they could not apprehend them. Angauchha (vaxkSNk) belonging to Radhey Shyam and a torn piece of cloth of the bushirt of Siyaram were lying on the place of occurrence. The dead body of Sripal (deceased) was lying in the supervision of Rajneesh and others.

It has also been stated that Sripal (deceased) had married Madhu about five months ago from this occurrence. Madhu is aged about 14-15 years, who has an illicit connection with Siyaram (accused) and due to that Siyaram (accused) and Sripal (deceased) had a lot of bickering with each other. Mother-in-law of Sripal, namely, Smt. Sarojani was also living with Sripal (deceased). Sripal (deceased) was alone and he had none else in his family. He had a lot of land and property and to take away his wife and property, all these four accused collusively murdered Sripal (deceased).

(5) The evidence of P.W.1-Raj Bahadur shows that Pradhan Jaswant Singh had sent him to the police station for giving information in respect of the incident. Thereafter, he went to police station; narrated the whole incident to Munshi of the police station; whatever he told to Munshi was written by him and read it to him by the Munshi; and thereafter Munshi got his signature thereon.

(6) It transpires from the record that based on the aforesaid report/information, First Information Report (Ext. Ka.1) was registered as Case Crime No. 210 of 1981, under Sections 302, 201 I.P.C., at police station Pihani, district Hardoi, against all the four accused persons Jagdish, Radhey Shyam, Raj Kumar and Siyaram, on 19.09.1981 at 10:00 a.m.

(7) The investigation of the case was conducted by SI Shiv Murti Singh (P.W.7). His evidence runs as under :-

On 19.09.1981, he was posted as Sub-Inspector, police station Pihani. The case was registered at police station on 19.09.1981 at 10:00 a.m. in his presence. The investigation of the case was taken by him on the date itself. He recorded the statement of informant Raj Bahadur (P.W.1) at police station and proceeded to the place of occurrence. On reaching the place of occurrence, he prepared the panchayatnama (Ext. ka.4) of the dead body of the deceased Sripal, photo lash (Ext. ka. 5) and challan lash (Ext. Ka.6). Thereafter, the dead body of the deceased Sripal was sealed and was sent for post-mortem along with a letter to CMO (Ext. Ka.8) through Constable Ram Naresh and Chaukidar Bhagwandeen. He, thereafter, inspected the place of occurrence; recorded the statement of the witnesses; prepared the site plan (Ext Ka.9); and collected the blood stained earth and plain earth from the place of occurrence in a two separate containers (Ext. Ka.10). He also collected the blood stained earth of groundnut and plain earth from the field of Sunder (Ext. Ka.11). He also recovered the cloth of the victim near the dead body under recovery memo (Ext. Ka.12). He also collected the aungaucha (vaxkSNk) and a piece of bushirt of the accused near the dead body

of the deceased under recovery memo (Ext. Ka.13). He, thereafter, searched the accused persons but he could not find them.

On 27.09.1981, information about lying of a human head near the village Akohara was received by him, he reached the place, from where he recovered it in the presence of the witnesses. He prepared panchayatnama (Ext. Ka.16), photo lash (head) (Ext. Ka. 17), challan lash (Ext. Ka.18) and letter to CMO (Ext. Ka.20). Thereafter, the recovered head was sealed and was sent for post-mortem. He inspected the place of recovery of head and prepared the site plan (Ext. Ka.22). On 28.09.1981, accused persons surrendered themselves in the Court. He sent the blood stained earth and original clothe etc. to Chemical Examiner for examination. He received the report of Chemical Examiner (Ext. Ka. 22 and ka 23). On 01.10.1981, accused Jagdish surrendered in the Court. After completing the investigation, he submitted the charge-sheet (Ext. Ka.24) against the accused persons.

Sri Owais Ahmad was posted as Head Moharrir along with him at the police station; he is familiar with the handwriting and signature of Sri Owais Ahmad; the chik Ext. Ka.1 has been written in the handwriting and the signature of Sri Owais Ahmad.

(8) The evidence of P.W.3-Constable Ram Naresh shows that he was posted as Constable in September, 1981 at police station Pihani. On 19.09.1981, he brought the sealed dead body of the deceased Sripal with documents from village Akohara to District Hospital, Hardoi and presented it in a sealed condition before the doctor. Chaukidar Bhagwandin was also with him.

In cross-examination, P.W.3-Constable Ram Naresh has deposed that when he reached at the place of occurrence, dead body was lying there. Four Constables and two Inspectors were there. Chaukidar met at the place of occurrence.

(9) The post-mortem of the dead body (headless body) of the deceased Sripal was conducted on 20.09.1981, at 01:15 p.m., in District Hospital, Hardoi by Dr. J.V. Singh (P.W.5), who found the following ante-mortem injuries on his person :-

"Ante-mortem injuries of the deceased Sripal

1) Incised wound 14 cm x 10 cm x through & through at the level of C-7. C7 is clear cut. Margins of wound clean cut clotted blood present in & around the wound. The wound on cutting the skin sub-cutaneous tissue is congested. All distal structure at thorax inlet are cut (clean). The circumference of wound is 32 cms.

2) Incised wounds two on top of shoulder right parellel to each 0.5 cm above obliquely placed 4 cm medial to right around clavicular joint. Each measuring 2.5 cm x 0.8 x skin deep clotted blood present.

3) Abrasion 2 cm x 0.5 cm on back of left shoulder 1 cm below acronic clavicular joint left.

4) Abrasion 4 cm x 0.7 cm obliquely placed on left side of abdomen laterally 6 cms above light iliac crest.

5) Incised wound on web of thumb and index finger of left hand 3 cm x 1 cm x skin deep with clean cut margins coggsion clotted blood.

6) Incised wound on index finger terminal with phalageal joint palmer and medial aspect 2 cm x 1 cm x bone deep left hand cut clotted blood.

7) Incised wound on terminal phalynix of middle finger left hand 1 cm x 0.7 cm x muscle tender deep on palmer aspect clean cut margins with cogssion and clotted blood."

As per the opinion of Dr. J.V. Singh (P.W.5), deceased Sripal died due to shock & haemorrhage as a result of ante-mortem injuries sustained by him.

(10) It is significant to mention here that in his examination-in-chief, P.W.5 Dr. J.V. Singh has reiterated the aforesaid ante-mortem injuries and cause of death of the deceased Sripal and has also deposed that on 20.09.1981, he was posted as Surgeon in District Hospital, Hardoi and on the said date, at about 01:15 p.m., he conducted the post-mortem of the dead body of the deceased Sripal, which was brought by Constable Ram Naresh (P.W.3) of police station Pihani and Village Chaukidar Bhagwandin and they identified the dead body of the deceased Sripal. He further deposed that the deceased Sripal was aged about 45 years and died 1 & 1/4 days ago. The body structure of the deceased Sripal was average built. The stiffness after death on the upper part was gone and was present at the bottom. The stomach was slightly bloated. The skin was coming out from somewhere. The head was missing from the neck. He further deposed that on internal examination, it was found that the seventh cervical vertebra was cut across. Trachea was cut across the seventh cervical vertebra. The swallowing tube was also cut across the seventh cervical. The stomach was empty. In the small intestine, there was liquid faecal matter and gas and there was faecal matter and gas in the large intestines. He further deposed that he took out dhoti from the dead body of the deceased Sripal and sealed it in a cloth and sent it to the Station Officer. He has proved the post-mortem report Ext. Ka.2. He further deposed that the death of the deceased could be attributable on 19.09.1981 at 07:00 a.m.; injury no.1 was sufficient to cause death; injuries no. 1, 2, 5, 6 and 7 could be caused by banka; abrasion could be caused from the rubbing of the rough ground; and there could be a difference of about six hours of the death.

In cross-examination, P.W.5 Dr. J.V. Singh has deposed that injury no.1, which is incised wound, could be attributable to one blow and was not a result of more than one blow. He deposed that paper no.A5/11 was received by him along with the dead body, upon which he mentioned Enclosure 10 and put his signature on 20.09.1981 and also marked it as Ext Kha.2.

(11) The evidence of P.W.4-Sri Shashidhar Rai shows that he was posted as Constable in September, 1981 at police station Pihani. On 27.09.1981, he brought the sealed human head from village Akohara at Sadar Hospital, Hardoi and placed it before the doctor.

(12) The post-mortem of the recovered human head was conducted on 28.09.1981, at 03:30 p.m., in District Hospital, Hardoi by Dr. B.L. Sahani (P.W.6), who found the following on the unknown human head :-

"On the scalp at few places the scalp tissue including skin is present that too is very loose. On this at few places hair

are adhered about 3 cm in size. Sub-cutareous are separated. Cartilege of the ear and nosal septum missing. There is no brain matter or membrances in the skull. 8th maid bone is missing. The upper jaw is lacerated and almost separated out. There are seven (7) teeth attached to it. The zygomatic bones are absent both side orbit are empty. The lower jaw is attached to the skull with few very loose ligaments it contains eight (8) teeth including third molar (teeth) in upper and lower jaws are very loose. The soft tissue on face absent and ligaments most of it eaten away. The neck contains only upper four cervical vertebra are attached to skull and connecting with few very loose ligaments (connecting) soft tissue except few ligaments absent. Vertebras are eroded at places and lower most part of the 4th vertebra probably eaten away. The mental foramen in the mandible is in between mid part of the upper and lower part of the body. Mastard process and occiptal protuberance are prominent. The angle of the mandible is slightly everted."

As per the opinion of Dr. B.L. Sahani (P.W.6), the cause of death could not be ascertained, hence the skull and vertebrae was preserved.

(13) It is significant to mention that Dr. B.L. Sahani (P.W.6) has reiterated the aforesaid opinion and report on the examination of human skull in his deposition and has deposed that on 28.9.1981, he was posted as Emergency Medical Officer in Sadar Hospital, Hardoi and on that date, at 03:30 p.m., he conducted the post-mortem of an unknown human head, which was brought by Constable Sashidhar Rao, police station Pihani, district Hardoi in a sealed condition. He deposed that the age of the head was of a normal male adult who had died about nine days ago. He has proved the post-mortem report of the head (Ext. Ka. 3). He deposed that on 19.09.1981 the person could have died. He further deposed that he could not tell how and in what manner the lower part of the neck was cut. He was shown the post-mortem report (Ext. Ka.2) prepared by Dr. J.V. Singh, Sadar Hospital, Hardoi and asked him whether he can relate this skull in any way with the post-mortem report (Ext. Ka. 2), he deposed that it is not possible because in the post-mortem report (Ext. Ka.2), the 7th cervical vertebra was found to be cut, whereas according to his post-mortem report, the bone was present till the 4th cervical vertebra and the 5th, 6th and 7th vertebra were missing. This head could also be of a man of about 45 years of age.

In cross-examination, P.W.6-B.L. Sahani has deposed that this male skull could also be above 36 years. The maximum age could be 60 or 65. He stated that he could not tell. The duration of death according to the recovered head was about two to three days old. The teeth begin to loosen from about four days after death and may also start falling from the twenty-four days. The skin of the scalp starts to loosen from the fifth to the sixth day and there is a possibility of separation from the seventh to the eighth day. He stated that it is wrong to say that it is about 25-25 days old. He knows about the bones. After scientific examination, he found it to be the head of a man. The bone at the back of the skull was prominent and the mandibular angle tilted outwards, because of which, he wrote the dead body was of male as the upper bones of the female is not prominent.

In cross-examination, he has deposed that he had not found any injury on the skull.

(14) The case was committed to the Court of Session by the Chief Judicial Magistrate, Hardoi on 23.12.1981 and the trial Court framed charges against accused/appellants Raj Kumar and Jagdish under Section 302 read with section 34 I.P.C. and under Section 201 I.P.C. and against accused/appellants Radhey Shyam and Siyaram under Sections 302 and 201 I.P.C. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(15) During the trial, in all, the prosecution examined seven witnesses. Two of them, namely, the informant Raj Bahadur (P.W. 1) and Jaswant Singh (P.W.2) were examined as witnesses of fact and other witnesses, namely, P.W.3 Ram Naresh, P.W.4 Shri Shashidhar Rai, P.W.5 Dr. J.V.Singh, P.W.6 Dr. B.L. Shahni and P.W.7 SO Shiv Murti Singh were the formal witnesses and their evidence has been discussed hereinabove.

(16) We would first like to deal with the evidence of informant Raj Bahadur (P.W. 1), who is the witness of fact. He deposed that accused Radhey Shyam and Raj Kumar are brothers. Accused Jagdish is the friend of accused Radhey Shyam. Accused Siyaram is the brother-in-law of the accused Jagdish. At the time of the incident, all the four accused persons were living at village Akohara. Village Sirsa is one mile away in southern direction of village Akohara. He knew the deceased Sripal, who was living in Akohara. Sripal (deceased) got married before the incident with Madhu. Sripal (deceased) had lot of agricultural land in the village.

It is a matter of thirteen months ago and about 07:00 a.m., he was going to cut Urd (mnZ) and along with him, his brother Sumnesh was also there. They were on the chak road. They listened to the alarm and at that time, they were on chak road near the eastern field of Leela. On listening the alarm, they saw that four accused persons Radhey Shyam, Siyaram, Jagdish and Raj Kumar came out from the Jonhari field (tksUgjh dk [ksr) of Ram Prasad. Radhey Shyam and Siyaram were armed with Banka, whereas Raj Kumar and Jagdish were armed with lathies. At the relevant time, Sripal was going ahead of them on the same chak road and with him was his wife Madhu. Accused Radhey Shyam challenged Sripal and all accused persons clinging to Sripal. Sripal and his wife raised alarm. Accused persons dropped Sripal on the chakroad and accused Radhey Shyam and Siyaram cut the neck of Sripal with Banka. Accused Raj Kumar and Jagdish were catching to Sripal. Apart from them, Jaswant Singh Pradhan, Rajnish and Leela were also coming there. Thereafter, all of them challenged the accused persons, thereupon accused persons threatened them. Radhey Shyam took Sripal's severed head and went to the east with the remaining three accused. Thereafter, all of them went there, where the dead body was lying. Blood was pouring out of the corpse. There was also a bushirt cloth and a handkerchief called Agouchha lying there. Pradhan Yashwant Singh sent him to the police station to inform. Rajneesh, Yashwant, Leela and his brother Sumnesh were left with the corpse.

He went to the police station and informed the incident and whatever he was told, Munshi wrote down the same and after reading it to him, Munshi got his signature.

Accused Siyaram had an illicit relationship with the wife of Sripal,

namely, Madhu and Sripal was killed for grabbing his land. Sripal had no children. Sripal did not even have parents.

In cross-examination, P.W.1- Raj Bahadur has deposed that accused Radhey Shyam and Raj Kumar are the sons of Hans Ram. Radhey Shyam and Jagdish had no relationship but they are friend. P.W.1-Raj Bahadur has deposed before the trial Court that before one year's ago, a skirmish took place between him and Kanchan Pasi resident of Sirsa and in this regard, a complaint was lodged against him by Kanchan Pasi. In that case, a report against his brother Sumnesh, his uncle Fafan and Ganesh, his cousin brother Jagdish, Shyam Mohan and Brahmosh were also lodged. The police had also submitted charge-sheet in that case. According to him, at the time of the murder of the deceased Sripal, the said case was not decided. P.W.1 has also stated that Ketuka is the real sister of deceased Sirpal and she was married to Kunj Bihari resident of Aagolapur, which is situated at a distance of 8-9 mile from his village. Rajneesh, who is the witness of this case, is the son of Ketuka. According to him, Ketuka had filed an application for mutation of her name in respect of the property/land of Sripal. The deceased Sripal had 50-55 bighas of land, out of which, he sold out some land to Sukhlal son of Fatte. He denied that Sripal used to play gamble and he may have spent the money which got from the selling of agricultural land, in gambling.

P.W.1 has also deposed that Madhu is the daughter of Sarojini, to whom Sripal married. Sarojini is said to be a resident of Neri village, which is situated in district Sitapur. Sarojini is a widow. He stated that he did not know whether Sipahi was the husband of Sarojini or not but he knows that the husband of Sarojani was murdered. Sarojini was living in his village for two to three years before the incident of this murder and she stayed at the place of Vimlesh Lohar of his village. Sarojani is a Brahmin by caste. According to him, when Sarojani came to his village, Surendra Lohar resident of Mafia was also coming along with her. Sarojini had brought her daughter Madhu and a boy Umri of 10-11 years with her. Surendra Lohar is in jail for 5-6 months before the incident. He stated that he did not know that Surendra Lohar enticed Sarojini Lohar. When Surendra Lohar was caught, Sarojini along with her boy and girl were started living at the place of deceased Sripal. Sripal had no relation with Sarojini of man and woman. He denied that Sripal was not married to Madhu daughter of Sarojini and also Sarojini was having relation with Sripal.

P.W.1 has further deposed in his cross-examination that witness Rajneesh had asked him to report, then, he said that the corpse be saved and then he said that he would not save the corpse. Thereafter, he said that if the corpse will disappear, then, who will be responsible and therefore, he left Rajneesh there and went to lodge the report. He further deposed that he asked Madhu to lodge report but due to illicit relations, she had not gone to lodge the report. He further deposed that he went along at police station and he did not tell the peoples present there that there was any enmity with accused persons, hence they would go for lodging the report because he had no enmity with the accused persons. He is an illiterate person and only can sign. He further stated that the Inspector had not met him at police station and when he lodged the report, thereafter the Inspector met him at police station. He further stated that he had got the chick FIR before he met

with Inspector. He had no conversation concerning this incident with the Inspector at police station. He returned to the village from the police station and Inspector was also coming along with him. After returning, they had come to the place where the dead body was lying around 11:30 a.m. He stayed on the spot till about two o'clock and by that time, Inspector had sent the dead body for post-mortem and thereafter, he went home. Rajneesh had come with the body for post-mortem. He did not have a conversation with Inspector from 11:00 a.m. to 02:00 p.m. He thereafter did not go to the police station on that day and after that, he never went to the police station. He further deposed that the Inspector had come along with him and Constable on the spot through a Jeep but the Constable who wrote the FIR had not come along with them.

P.W.1 has further deposed that after the murder and before going to police station, he did not have any conversation with Madhu. After the murder, Madhu and his mother Sarojini are not living in his village and he did not know where they reside. He further deposed that on that date, Sripal was going to Madhu's medical treatment. Sripal used to tell that his woman is sick and he used to go for medicine. This has been told to him by Sripal before two days of the incident. Sripal had not told him on which day he would go for medicine. He denied the suggestion that on that day, Sripal was going with his sister Ketuka and Madhu was along with her.

P.W.1 has also stated that he had sickle for cutting Urd and Sumnesh had also his sickle. He did not reach his field, then, he heard the noise. Neither he nor Sumnesh had thrown sickle upon accused persons. He went to the police station after giving sickle to his brother Sumnesh. When he reached the place of occurrence along with Inspector, his brother Sumnesh was there. Leela was also present there and his plow and bull were also in the field of Leela which is situated at a distance of 115 steps from the place of occurrence.

P.W.1 has further stated that on seeing all the four accused persons coming, Sripal did not try to run away. At the time when Sripal was killed, Madhu was 10-15 steps to the north behind Sripal. Madhu did not run to save Sripal and till then she kept seeing to beat Sripal and got clinging to Sripal from the distance of 10-15 steps and when the killer ran after killing Sripal, then, Madhu came at the corpse. Madhu, thereafter, crying and she did not bend on the dead body of her man. Madhu, while crying, was standing at a distance of 6-7 steps. At the time of the incident, Madhu was aged about 14-15 years, whereas Sripal was aged about 50-55 years.

(17) P.W.2-Jaswant Singh, in his examination-in-chief, has deposed that he is the Pradhan of Village Akohara and was also Pradhan at the time of occurrence. About 13 months ago, at about 07:00 a.m., he went towards the Southern side of his village for call of nature and with him was also Rajneesh. After easing themselves, they were near the field of Leela and they saw that Sripal was going on chakroad towards northern side and behind him, his wife Madhu was going and at the same time, they saw that four persons came out from the Jawar's field of Ram Prasad and they all began grappling with Sripal. Sripal and his wife made noise. All the witnesses saw this occurrence. Raj Bahadur and Sumnesh were on the chakroad. All the four accused fell down Sripal and began cutting his head. Jagdish had caught his

feet on the eastern side and Raj Kumar caught his head on the western side and northern side Siyaram and on the southern side Radhey Shyam was cutting his head. They all made noise and challenged the accused. They were also threatened by them that if they proceeded they will be killed. Radhey Shyam took away the cut head by catching it from his hair by hanging it in his hands along with other accused towards the eastern side. Then, they went near the dead body of Sripal. From the eastern side of the dead body, one Agauncha belonging to accused Radhey Shyam and a piece of cloth of bushirt belonging to accused Siyaram were lying there. Raj Bahadur went to lodge the report at the police station and they remained with the dead body. He identified Agauncha (Ext. 10) and a piece of bushirt coloured (Ext. 21) and has stated that the same lying near the dead body.

In cross-examination, P.W.2-Jaswant Singh deposed that he went from the home for call of nature at 07:00 a.m. His farm is about a furlong away from the house. Rajneesh met him in the chak of Leela where he went to call of nature. Rajneesh had gone to call of nature along with him also. It took 10-15 minutes for easing out. His way is from the side of the farm of Leela. There was no one else to ease out. His farm is 50 steps away from Leela's farm, wherein the groundnut and cowpea crop was there. His farm is at the North-East corner of Leela's farm. There are 4-5 fields in the middle. He deposed that it is wrong to say that his farm is situated about two furlong away from Leela's farm. Thereafter, they came to the place where the incident took place. When he saw the incident, he was at the eastern side of Leela's farm and at the time, Sripal was 110-115 steps away from him. Accused dropped Sripal in the corner of the field of Leela on eastern side.

P.W.2 has further deposed in cross-examination that where he was standing, neither he nor Rajneesh was having any lathi and they were having only lota (a round water pot). Raj Bahadur and Sumnesh were armed with hasiya (sickle) and they were going to cut Urd. They were running 50-60 steps towards the place of the incident when clinging took place. Raj Bahadur and Sumnesh were also running 30 steps towards the place of the incident. Leela was also 30-40 steps ahead. He deposed that accused Radhey Shyam and Siyarm were cutting the head of Sripal with banka by standing and bowing down and both had assaulted three-three, four-four blow of banka and he did not see the blow of banka on earth. Four accused ran towards the east north corner. Blood was falling from his head in Leela's field. They have not chased the accused persons.

P.W.2 has further deposed in cross-examination that after the murder, Madhu did not cry by clinging to Sripal but she stood away and crying. Ram Bahadur went to police station. Police and Ram Bahadur came from police station to the place of the incident and at that time, Ketuka and his members were not coming there. Rajneesh was residing in his village. Police went from the place of the occurrence at about 3-4 p.m. Raj Bahadur did not go along with the police.

(18) In the statement under Section 313 of the Code of Criminal Procedure, the accused persons have denied all the allegations made against them. Accused Radhey Shyam has stated that his brother Onkar stood witness against Pradhan Jaswant Singh and Raj Bahadur; and his

brother was a witness against Raj Bahadur, informant of this case and due to that enmity, they falsely deposed against them and this case has been falsely launched against them. Accused Raj Kumar has also stated that due to enmity, he has been implicated by the informant in this case. The same has also been stated by accused Jagdish. Accused Siyaram has also stated that due to enmity with his brother-in-law Jagdish, has been falsely implicated in this case. He has denied that he had any illicit connection with Smt. Madhu said to be the wife of Sripal. It is also denied that to grab the land and Madhu, they committed this offence. Accused Siyaram has also stated that he did not know that Sripal had married Madhu before this occurrence. Jagdish had denied that Madhu was married to Sripal. Raj Kumar and Radhey Shyam have also denied that Madhu had married with Sripal.

(19) The learned trial Court believed the evidence of Raj Bahadur (P.W.1) and Jaswant Singh (P.W.2) and found the appellants Radhey Shyam and Siyaram guilty for the offences punishable under Sections 302 and 201 I.P.C., whereas appellants Jagdish and Raj Kumar for the offences punishable under Section 302 read with Section 34 I.P.C. and 201 I.P.C. and, accordingly, convicted and sentenced the appellants in the manner stated in paragraph-2.

(20) As mentioned earlier, aggrieved by their convictions and sentences, appellants preferred the instant appeal and during the pendency of this appeal, appellant nos. 1, 3 and 4 died and their instant appeal stand abated. The present appeal is surviving on behalf of the appellant no.2-Raj Kumar, thus, this Court proceeds to hear the appeal on behalf of the appellant no.2-Raj Kumar.

(C) APPELLANTS' CASE

(21) On behalf of appellant no.2-Raj Kumar, Sri Jai Pal Singh, learned Amicus Curiae has argued that :-

A) P.W.1-Ram Bahadur and P.W.2-Jaswant Singh are interested witnesses as the brother of accused Radhey Shyam, namely Onkar stood witness against Pradhan Jaswant Singh (P.W.2) and Raj Bahadur (P.W.1) and his brother was a witness against Raj Bahadur (P.W.1) and due to that enmity and just to take revenge, P.W.1-Ram Bahadur and P.W.2-Jaswant Singh gave false evidence against the appellants. According to him, P.W.1-Ram Bahadur and P.W.2-Jaswant Singh are not the eye-witness. Moreso, both P.W.1 and P.W.2 have criminal record. In this regard, learned Amicus Curiae appearing on behalf of the appellants has placed reliance upon **Shaikh Nabab Shaikh Babu Musalman and others Vs. State of Maharashtra : 1993 Supp. (2) SCC 217; Vijaysing Dharamdas Thakar Vs. State of Gujarat** : 1996 Crl. L. J. 2932; **Surendra Pratap Chauhan Vs. Ram Nail and others : 2001 Crl. L. J. 98.**

B) The medical evidence is not corroborated with the statement of the prosecution witnesses. P.W.2-Jaswant Singh, in his examination-in-chief, in paragraph-8 has stated that "मुल्जिमान राधेश्याम व सियाराम खडे हुए झुककर बांका से श्रीपाल का सर काट रहे थे। तीन–तीन, चार–चार बांका दोनो ने चलाये ही थे। मैने बांका के निशान जमीन पर नही देखे।" Whereas P.W.5 Dr. J.V. Singh, who conducted the post-mortem of head less body of the deceased Sripal, has categorically deposed in paragraph-11 that "चोट नं0 1 एक ही वार से पहुचायी हुई थी। अधिक वार से पहुंचाई हुई नही थी।" In these backgrounds, his submission is that this itself belies the prosecution case.

C) P.W.5-Dr. J.V. Singh, who conducted the post-mortem of the head less body of the deceased Sripal, has stated in his examination-in-chief in para-5 that on internal examination, it was found that on the seventh cervical vertebra, both carotid arteries were cut across; the swallowing tube was also cut across the seventh cervical; the stomach was empty; in the small intestine, there was liquid faecal matter and gas; and there was faecal matter and gas in the large intestines. PW.5, in cross-examination, has stated that there may be a difference of six hours here and there of the death of the deceased. Thus, this belies the prosecution case and perhaps the deceased Siyaram was assaulted sometime in the night while gone for call of nature.

D) The incident occurred on 19.09.1981 at 07:00 a.m. The inquest of the head less body was conducted on 19.09.1981. The head was recovered on 27.09.1981 on the pointing out of Sumkesh Chandra, who is the brother of informant P.W.1-Ram Bahadur, by the police. P.W.6-B.L. Sahani, who conducted the post-mortem of the head on 28.09.1981, has stated that he could not tell that as to how and in what manner, the lower portion of the neck was being cut. This witness was also shown the post-mortem report of the head less body of the deceased Sripal (Ext.Ka.2) prepared by Dr. J.V. Singh (P.W.5) and a specific question was asked from him as to whether the unknown recovered head had in any manner related to the headless body of the deceased Sripal, he (P.W.6) has stated that it could not be ascertained because in the post-mortem report (Ext. Ka.2), 7th cervical vertebra was cut, whereas in his report, only bones of 4th cervical vertebra was present and 5th, 6th and 7th vertebra were not present. Further, the head was of a man of about 45 years. In his cross-examination, P.W.6 has stated that the unknown recovered head could be of a man of 36 years and the maximum age of that man could be 60 years or 65 years. His submission is that the investigation is tainted and both P.W.1 and P.W.2 had prejudiced the mind of the Investigating Officer by fixing the identity of the head of Sripal after nine days of the incident but no D.N.A. test report or no expert opinion was obtained to the effect that Head and Headless body belong to the same person, even though the head was found in a decomposed position.

E) Madhu, the so-called wife of the deceased Sripal and Rajneesh, who is the nephew of the deceased Sripal, have not lodged the F.I.R. nor produced them before the Court for recording their evidence by the prosecution, although they have been made a witness in the charge-sheet.

F) Appellant-Raj Kumar has no motive to kill the deceased Sripal. According to the prosecution, the only allegation against appellant-Raj Kumar is that he and Jagdish caught hold of the deceased Sripal and there is no allegation against them of causing injuries to the deceased Sripal. According to him, after the death of Sripal, Madhu along with her mother and brother left the village Akohara. He has stated that no marriage was taken place of Madhu with the deceased Sripal. The deceased Sripal was aged about 45 years and Madhu was aged about 14-15 years only at the time of the incident. If Madhu was the wife of the deceased Sripal, then after the death of the deceased Sripal, definitely, she will stay at the village and inherited the property of the deceased Sripal as a wife but the land of the deceased Sripal was inherited by Ketuka

(sister of Sripal), which shows the motive against Ketuka and her son Rajneesh to kill the deceased Sripal to get the property of Sripal.

G) As per the prosecution, deceased Sripal along with so called wife Madhu was going to the doctor for taking medicine but after the incident, only 45 paise was recovered from the possession of the deceased Sripal. It is highly improbable that a person going to the doctor only has 45 paise.

(D) STATE/RESPONDENT ARGUMENT

(22) On behalf of the State/respondent, Sri Arunendra, learned Additional Government Advocate, while supporting the impugned judgment, has vehemently argued that the trial Court, after relying upon the version of the eye-witnesses, namely, P.W.1 Raj Bahadur, Jaswant Singh (P.W.2), has rightly held guilty to the appellants for the offences punishable under Sections 302/34 and 201 I.P.C. It has been argued that under the penal code, a person is responsible for his act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicarioulsy responsible. As per the prosecution case, the appellants, with common intention, came out from the Jawar's field of Ram Prasad and thereafter, appellants clinging the deceased Sripal and after laying down Sripal on the chakroad, accused Siyaram and Radhey Shyam cut the neck of the deceased Sripal with Banka, whereas other accused Raj Kumar and Jagdish caught hold the deceased Sripal. The medical evidence has also supported the prosecution story as the injuries of banka and lathi were in the ante-mortem injuries sustained by the deceased Sripal. Therefore, the trial Court has rightly punished the appellants under Section 302/34 and 201 of the Indian Penal Code. There is no illegality or infirmity in the impugned order.

(E) ANALYSIS / DISCUSSION

(23) We have heard Sri Jai Pal Singh, learned Amicus Curiae appearing on behalf of the appellants and Sri Arunendra, learned AGA for the State/respondents at length and have carefully gone through the judgment and order of conviction and sentenced passed by the learned trial Court. We have also re-appreciated the entire evidence on record, more particularly the depositions of PW1 Ram Bahadur and PW2 Jaswant Singh and have also considered the injuries found on the headless body of the deceased as well as injuries found on the unknown recovered head.

(24) The crucial question in this appeal is whether the evidence of the two eye-witnesses viz, P.W. 1 Raj Bahadur and P.W. 2 Jaswant Singh inspires confidence or not.

(25) A perusal of the statement of Raj Bahadur P.W.1 shows that on the date of the incident i.e. on 19.09.1981 at about 7 a.m., he along with his brother Sumnesh were going to cut Urd in their field situated near the chak road and the deceased Sripal and his wife Madhu were also going ahead of them on the same chak road. When they (P.W.1 and his brother Sumnesh) reached on chak road near the eastern field of Leela, they heard a noise and on hearing the noise,

they saw that four accused persons came out from the Junhari's field of Ram Prasad and challenged Sripal. Sripal and his wife Madhu, thereafter, raised alarm and at that time, accused Radhey Shyam and Siyaram were armed with Banka and accused Raj Kumar and Jagdish were armed with lathies and they all clung to Sripal and thereafter they dropped the Sripal (deceased) on the earth of chak road and accused Radhey Shyam and Siyaram cut the neck of Sripal with banka and accused Raj Kumar and Jagdish caught hold Sripal. Apart from them, Jaswant Singh Pradhan (P.W.2), Rajneesh and Leela were also coming there and thereafter, they all challenged the accused persons, upon which accused persons threatened them. Thereafter, accused Radhey Shyam took away the head of the deceased Sripal and ran along with other accused persons towards the eastern side from there. Thereafter, he went to the police station alone and on his dictate, the Munshi of the police wrote down the FIR (Ext.Ka.1) and read it to him and got his signature thereon.

(26) P.W.2-Jaswant Singh has deposed that on the date of the incident, at about 07:00 a.m., he went towards the Southern side of his village for call of nature and Rajneesh was also with him. After easing themselves, they were near the field of Leela and they saw that Sripal was going on chakroad towards northern side and behind him, his wife Madhu was going and at the same time, they saw that four persons came out from the Jawar's field of Ram Prasad and they all began clinging with Sripal. Sripal and his wife made noise. All the witnesses saw this occurrence. Raj Bahadur and Sumnesh were on the chakroad. All the four accused fell down Sripal and began cutting his head. Jagdish had caught his feet on the eastern side and Raj Kumar caught his head on the western side and the northern side Siyaram and on the southern side Radhey Shyam was cutting his head. They all made noise and challenged the accused. They were also threatened by them that if they proceeded they will be killed. Radhey Shyam took away the cut head by catching it from his hair by hanging it in his hands along with other accused towards the eastern side. Then, they went near the dead body of Sripal. In cross-examination, P.W.2-Jaswant Singh deposed that he went from the home for call of nature at 07:00 a.m. His farm is about a furlong away from the house. Rajneesh met him in the neighbour chak of Leela where he went to call of nature. Rajneesh had gone to call of nature along with him also. It took 10-15 minutes for easing out. His way is from the side of the farm of Leela.

(27) From the aforesaid statements of P.W.1 and P.W.2, it transpires that when accused persons armed with Banka and lathies came out from the Jonhari's field of Ram Prasad and challenged the Sripal, neither deceased Sripal nor his wife Madhu tried to save themselves by running here and there and also there were no scuffled happened between the accused persons and the deceased Sripal nor with the wife of the deceased Madhu. As per the statement of P.W.1 and P.W.2, after coming out from the Jonhari's field of Ram Prasad, accused persons clinging to Sripal. It is quite unnatural that a group of persons armed with the deadly weapon came and challenged a person, then, the person instead of trying to save himself by hook and crook, standing there and waiting for the group persons to come nearer to him and kill him. Herein, it is not the case of the prosecution that the accused persons after coming out from the field of Jonhari of

Ram Prasad had immediately all of a sudden assaulted the deceased with banka and lathies but the prosecution case is that after coming out from the field of Jonhari of Ram Prasad, accused persons first challenged the deceased Sripal and then they all clinging the Sripal and then they all dropped the deceased on the earth and then two accused persons namely Radhey Shyam and Siyaram cut the neck of the deceased Sripal with Banka, whereas accused Raj Kumar and Jagdish caught hold the deceased Sripal.

(28) Herein, it is pertinent to mention that P.W.2 in his statement has categorically stated that Jagdish had caught feet of the deceased Sripal on the eastern side and Raj Kumar caught his head on the western side, whereas on northern side Siyaram and on southern side Radhey Shyam were cutting his head with Banka and both of them must have used banka blow three to four times and there was no mark of blow of banka on the earth. Even if it is assumed the statement of P.W.2 is true and perfect, then, it is beyond imagination that when four persons tried to kill deceased Sripal, out of which, one person caught hold the head of Sripal and one person caught hold the feet of Sripal and two accused persons cut the neck of the deceased, no tussle took place from the accused persons and the deceased Sripal and the deceased Sripal did not try to save himself from the accused persons. Normally, in such a situation, the person(s) should try to save himself from the accused persons but the prosecution right from the inception has only tried to say that only the deceased and his wife raised alarm and nothing was done to save himself by the deceased. It is quite improbable.

(29) The prosecution has not produced any evidence on record to the effect that when two accused persons were caught holding the feet and head of the deceased and when two accused persons were cutting the neck of the deceased by banka, what was the position of the hands of the deceased Sripal. The evidence of both of the eye-witnesses i.e. P.W.1 and P.W.2 shows that no effort was made by the deceased and his wife Madhu to save the deceased Sripal and also during cutting the neck, the deceased did not make any agitation by hand. This creates doubt on the evidence of P.W.1 and P.W.2.

(30) One more important aspect is that prosecution has right from the beginning has stated that Madhu is the wife of the deceased Sripal and on the date of the incident, she was going along with the deceased Sripal for her medical treatment at Sirsa village. Both P.W.1 and P.W.2 have stated that when the deceased Sripal was challenged by the accused persons; when the deceased Sripal was clinging by the accused persons; when the deceased Sripal was dropped by the accused persons; when the neck of the deceased Sripal was cutting by the accused persons; and when the cut neck of the deceased Sripal was taken away by the deceased, the wife of the deceased Sripal, namely, Madhu was at a distance of 10-15 steps and seen the incident by standing at a distance of 10-15 steps because P.W.1-Raj Bahadur, in his cross-examination, has deposed that Madhu did not run to save Sripal. It is quite unnatural that the accused persons were killing the deceased Sripal and his wife Madhu kept mum standing 10-15 steps behind them and saw the whole incident from the distance of 10-15 steps and did not make any effort to save the deceased from the accused persons. Normally, in such situation, wife would try to save his husband's life from the accused persons.

(31) As per the prosecution case, the whole incident was seen by P.W.1-Raj Bahadur, his brother Sumnesh, Leela, P.W.2-Jaswant Singh, Rajneesh, who is the nephew of the deceased Sripal and Madhu, who is the wife of the deceased Sripal but the FIR was neither lodged by Madhu nor lodged by the nephew of the deceased Rajneesh even though they saw the incident as per the prosecution case but the FIR was lodged by P.W.1-Raj Bahadur.

(32) P.W.1-Raj Bahadur has tendered an explanation in this regard in his statement that Rajneesh, who is the nephew of the deceased Sripal, has told him that he would safeguard the headless body of the deceased Sripal and, he (P.W.1) would go to lodge the report. P.W.1-Raj Bahadur had gone to the police station to lodge the report alone. Even if the explanation of P.W.1 is accepted, the prosecution has failed to show why other witnesses i.e. Madhu, Leela, Rajneesh, Sumnesh had not been produced for examination. The entire record of the case is silent on the issue.

(33) In the aforesaid connection it would be useful to refer to the decision of the Apex Court S**hivaji Dayanu Patil v. State of Maharashtra : 1989 AIR 1762.** In that case the wife of the deceased was a witness who had kept mum for two days. Castigating her conduct as highly unnatural and improbable, the Apex court in paragraph 11 observed as follows :

"A wife, who has seen an assailant giving fatal blows with a stick to her husband, would name the assailant to all present and to the police at an earliest opportunity."

(34) In this case also, Madhu is said to be the wife of the deceased Sripal and was 10-15 steps behind the deceased and she had recognized the assailants, whereas Rajneesh is the nephew of the deceased. But their conduct in not reporting to the police the incident, although they were at the place of the incident and seen the whole incident, was highly unnatural and improbable. The prosecution has failed to show any reason or evidence to justify the conduct of Madhu and Rajneesh.

(35) We feel that in the instant case it was essential for the prosecution to examine Madhu, Leela, Rajneesh, Sumnesh. Their evidence was essential to the unfolding of the narrative. No reason has been assigned by the prosecution for not producing them. This circumstance also goes against the prosecution. In this connection, it would be essential to reproduce the observations of the Apex Court in the decision The **State of U.P. v. Jaggo alias Jadgish : AIR 1971 SC 1586.** In paragraph 15, the Apex Court observed thus :

(36) "15. ..... it is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called. This statutory principle in criminal trials has been stressed by this Court in the case of **Habeeb Mohammad v. The State of Hyderabad : 1954 AIR 51**, for eliciting the truck."

(37) In that, one Ramesh with whom the deceased was talking at the time of the incident had not been examined and the Apex Court held that he should have been examined for his evidence was essential to the unfolding of the narrative. It also held that mere presentation of an application by the prosecution that since Ramesh had been

won over he was not examined was not good enough and that he should have been examined in the court and it was for the court to decide as to whether he was won over.

(38) Another circumstance which militates against the claim of both the eye-witnesses of having seen the incident is the delay in their interrogation under Section 161 Cr.P.C. P.W.1 admitted in his cross-examination that after lodging of the F.I.R. he was not straight away interrogated at the Police Station by the Inspector. He states that after lodging the report, he met with Inspector and by that time, copy of chik was supplied to him. He along with the Inspector and other Constables came on the spot at 11:00 a.m. through a Jeep and he stayed on the spot till 02:00 p.m. and between 11:00 a.m. to 02:00 p.m., no talk was happened with the Inspector about the incident. The evidence of the Investigating Officer P.W.7 -Shiv Murti Singh, however, shows that on the date of the incident, he recorded the statement of the informant and then proceeded to the place of occurrence. No cogent explanation has been offered by the prosecution for this contradiction in the statement of P.W.1 and P.W.7 in recording the statements of witnesses under Section 161 Cr.P.C. In this context it would be useful to refer to the observations of the Apex Court in paragraph 15 and 18 of the judgment Ganesh **Bhawan Patel v. State of Maharashtra : 1979 AIR 135**, which are to the following effect :-

"15 ..... Delay of a few hours, simpliciter, in recording the statements of eye-witnesses may not by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced."

"18. ..... Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses."

(39) The next submission of the learned Amicus Curiae appearing on behalf of the appellant no.2-Raj Kumar is that both P.W.1-Ram Bahadur and P.W.2-Jaswant Singh are interested witnesses and inimical to the accused persons, hence their testimony cannot be believed. According to him, the informant Raj Bahadur (P.W.1) is inimical to convict/ appellants Jagdish and Raj Kumar on account of the fact that they were the witnesses against the whole family of Raj Bahadur (informant) including Raj Bahadur himself in an occurrence held on 26.08.1979 for the offence lodged under Section 147, 323 I.P.C. In support of this submission, the learned Amicus Curiae appearing on behalf of the appellant no.2-Raj Kumar has drawn our attention to the copy of the charge-sheet of that case showing these details (Ext. Kha. 26 to Ext. Kha. 30).

(40) P.W.1-Raj Bahadur, in his cross-examination, has specifically deposed that Kanchan Pasi resident of village Sirsa had lodged a report against him, his brother Sumnesh and other family members and the police filed charge-sheet against them. However, he did not know if Raj Kumar (appellant no.2) and Jagdish (appellant no.3) were the prosecution witnesses in that case or not. He admitted the fact that this case was pending at the time of incident.

(41) According to the appellants, Onkar, who is the real brother of accused Radhey Shyam and Raj Kumar, stood witness against Jaswant Singh in a forgery and embezzlement case pending since 1970 and he was examined on 15.09.1978. A copy of the statement of Onkar has been filed as Ext. Kha.2.

(42) P.W.2-Jaswant Singh has deposed that Onkar did not give statement against him prior to this occurrence but Ext. Kha.2 proves that Onkar, who is the real brother of accused Radhey Shyam and Raj Kumar, stood as a witness on 15.09.1978. The trial Court, after considering the aforesaid and also the fact that no cross-examination was made to Onkar and also one could not remember if he stood witness long ago in 1978, observed that there was no question of implicating the brother of Onkar, namely, Radhey Shyam and Raj Kumar, in such a henious crime of murder.

(43) From the aforesaid, it transpires that enmity persisted between the family members of accused persons and the informant's side prior to the incident and both informant side and accused persons have known to each other very well.

(44) The prosecution has come out with the case of motive, namely, so called illicit relation of accused/appellant no.4-Siyaram was having with wife of the deceased Sripal, namely, Madhu and deceased Sripal was alone and he had a lot of agricultural land, hence in order to grab the agricultural land of Sripal and his wife Madhu, accused/appellant Siyaram colluded with other accused persons and committed the murder. These assertions have been stated by P.W.1 and P.W.2 in their statement. In the statement under Section 313 Cr.P.C., accused/appellants have categorically stated that Madhu is not the wife of the deceased Sripal. This denial of the accused/appellant has not been contradicted by the prosecution. There is no any other evidence except the testimony of P.W.1 and P.W.2 that Madhu is the wife of deceased Sripal. P.W.2 have admitted in his statement that at the time of incident, deceased Sripal was aged about 50-55 years, whereas the age of Madhu was 14-15 years and Madhu used to reside with his mother Sarojini at the place of Sripal.

(45) It is an admitted fact that Smt. Ketuka has also filed an application for mutation of her name on the land belonging to Sripal. It is also admitted that she is living in this village and property belonging to Sripal is in her possession. In these backgrounds, the contention of the appellants is that there was no question of getting property belonging to Sripal because it was to go her sister in absence of any other heir.

(46) Both P.W.1 and P.W.2 have stated in their depositions that at the time of the incident, apart from them, Madhu, Leela, Rajneesh and Sumkesh were also present there and they all saw the incident. But the prosecution has failed to produce Madhu, Leela, Rajneesh and Sumkesh in the witness box. There is no explanation on behalf of the prosecution as to why so called wife of the deceased Sripal, namely, Madhu, who was present 10-20 steps from the deceased at the time of the incident, was not produced before the trial Court for adducing evidence. There is also no proper explanation as to why Rajneesh, who is the nephew of the deceased Sripal, did not go to lodge FIR nor any close relative such as Madhu and Ketuka, who is the sister of the deceased and is residing at the same village

at the time of the incident, did not go to lodge the report of the incident, rather the FIR was lodged by P.W.1-Raj Bahadur, who is not related to the deceased Sripal and only relation with the deceased Sripal was a villager.

(47) It is pertinent to mention here that there is no cogent evidence indicating illicit relations or reason for the accused/appellants to reasonably assumed about likelihood of unchaste relations. The statements made by the P.W.1 and P.W.2 on the basis of inference, impression, chimera, imagination or conjecture cannot be regarded as proof of illicit relations. It may be stated that many people when hear about relations between a man and a woman, or even their public meeting, they jump to the loose conclusions, or assume or interpret loosely and nastily and for them every rumour is gospel truth. On the basis of the above statements made by P.W.1 and P.W.2, it will not be just, proper and safe to conclude about illicit relations and consequently about the same being the motivating factor. In short, there is no satisfactory evidence about motive insofar as if Madhu was the wife of Sripal, then after the death of Sripal, definitely she will stayed at village and inherited the property of Sripal as wife but land of Sripal was inherited by Ketuka, who is the sister of deceased Sripal.

(48) The statement of P.W.2-Jaswant Singh shows that accused Radhey Shyam and Siyaram were cutting the head of Sripal by standing and bow down with Banka. Both of them were said to be used banka three-three, four-four times upon the deceased and he did not see the mark of banka on the earth. Meaning thereby as per the aforesaid statement that both Radhey Shyam and Siyaram assaulted the deceased Siyaram three and four times with banka and there was no mark of banka on the earth. The evidence of P.W.5-Dr. J.V. Singh, who conducted the post-mortem the headless body of the deceased Sripal, have categorically stated that injury no.1 is attributable by one blow and not by several blow. The aforesaid statement of P.W.2 and P.W.5 shows that the statement of P.W.2 with regard to assault of the deceased Sripal with Banka three and four times is contrary to the report of the post-mortem of headless body of the deceased Sripal.

(49) It also come on record that the inquest report of the head recovered on 27.09.1981 has been prepared by the Investigating Officer which bears the signatures of Raj Bahadur (P.W.1), his brother Sumnesh Chandra and Jaswant Singh (P.W.2) but the P.W.1-Raj Bahadur denied the same in his statement and even the recovery of this head before him has been denied. P.W.1 had failed to explain as to how his signature on the inquest report of the head was mentioned. The trial Court, after considering the entire evidence on record, has rightly observed that the conduct of the Investigating Officer is not above board and also observed that the head could not be connected with the dead body of Sripal and this is only due to negligence of the Investigating Officer.

(50) It appears that the weapon of assault i.e. Banka and lathies was not recovered by the Investigating Officer nor unknown recovered head was sent for D.N.A. test nor any expert opinion was obtained by the Investigating Officer which raises doubt that head and the headless body belong to the same person even though the head was found in a

decomposed position. Thus, it can be safely said here that the investigation of the case appears to be tainted and not as per law.

(51) Pursuant to the aforesaid discussion, we feel that the prosecution has failed to bring home the guilt of the appellant no.2-**Raj Kumar** beyond reasonable doubt and this is a fit case in which he deserves the benefit of doubt.

(52) In the result, the instant criminal appeal so far as it relates to appellant no.2-**Raj Kumar** is **allowed.** The judgment and order dated 02.12.1982 passed in Sessions Trial No. 791 of 1981 so far as it relates to the **appellant no.2-Raj Kumar** is hereby set aside. The appellant no.2-Raj Kumar is acquitted from the charges levelled against him. The appellant is in jail. He shall be set at liberty forthwith if no longer required in any other criminal case.

(53) **Appellant no.2-Raj Kumar** is directed to file personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

(54) Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

(2022)02ILR A633
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.01.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No.1114 of 2015

Prem Nath Yadava & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
H.S. Tiwari

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/34, 504, 506 - U.P. Gangster & Anti-Social Activities (Prevention) Act 1986-Section 3(1)-challenge to-conviction-incident took place on account of old rivalry-motive stood proved -gun shot injury according to injury report-as per statement of PW-1 and other facts the appellants could not produce any evidence to show that they are entitled to the benefit of alibi -Investigation officer ought to have examined the defence witness in relation to plea of alibi-Moreso, the dying declaration was recorded by the police personnel-no cross-examination conducted by the defence on the question of dying declaration- defects in the investigation cannot ipso facto be a ground to hold that the appellants are not guilty-dying declaration cannot be merely discarded on the ground that the same has been recorded by the police personnel or certificate of fitness was not obtained-there was no clinching evidence adduced by the appellants to hold otherwise-defects in the investigation by itself cannot be a ground for acquittal-Thus, trial court rightly appreciated the evidence and the findings do not suffer from error.(Para 1 to 60)

B. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial.(56,57)

C. Nemo moriturus praesumitur mentire-No one at the time of death is presumed to lie. there is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. A certification by the doctor is essentially a rule of caution.(Para 42 to 49)

D. Plea of alibi-When an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime, the burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. Such pleas need be considered only when the burden has been discharged by the prosecution satisfactorily. (Para 34 to 39)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Mahraj Singh Vs St. of U.P. (1994) 5 SCC 188

2. Ram Sanjiwan Singh & ors. Vs St. of Bih. (1996) 8 SCC 552

3. Kunwarpal @ Surajpal & ors. Vs St. of UK & anr. (2014) 16 SCC 560

4. Inder Singh & ors. Vs St. of Raj. (2015) 2 SCC 734

5. Jagtar Singh Vs St. of Har. (2015) 7 SCC 675

6. Saddik @ Lalo Gulam Hussein Shaikh & ors. Vs St. of Guj. (2016) 10 SCC 663

7. Raj Gopal Vs Muthupandi @ Thavakkalai & ors. (2017) 11 SCC 120

8. Dudh Nath Pandey Vs St. of U.P. (1981) 2 SCC 166

9. Binay Kumar Singh Vs St. of Bih. (1997) 1 SCC 283

10. Jayantibhai Bhenkarbhai Vs St. of Guj. (2002) 8 SCC 165

11. Shaikh Sattar Vs St. of Mah. (2010) 8 SCC 430

12. Jitendra Kumar Vs St. of Har. (2012) 6 SCC 204

13. Jumni & ors. Vs St. of Har. (2014) 11 SCC 355

14. Paras Yadav & ors. Vs St. of Bih. (1999) 2 SCC 126

15. Laxmi (Smt) Vs Om Prakash & ors. (2001) 6 SCC

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

17. Kaliya Vs M.P. (2013) 10 SCC 758

18. St. of M.P. Vs Dal Singh & ors. (2013) 14 SCC 159

19. Gulzari Lal Vs St. of Har. (2016) 4 SCC 583

20. Amar Singh Vs Balwinder Singh & ors. (2003) 2 SCC 518

21. C.Muniappan & ors. Vs St. of T. N. (2010) 9 SCC 567

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal has been preferred against the judgment and order dated 11.09.2015 passed by Additional Sessions Judge/Special Judge Gangster Court No. 5 Sultanpur, in Gangster Case No. 379 of 2012 (State Vs. Prem Nath and Another) arising out of case crime no. 157/2002, u/s 302/34, 504, 506 IPC, and Section 3(1) of the U.P. Gangster & Anti-Social Activities (Prevention) Act 1986, P.S. Kotwali Dehat,

District Sultanpur whereby the appellants have been convicted u/s 302 of IPC for life imprisonment and a fine of Rs. 10,000/- and in default of fine one year additional imprisonment, u/s 506 IPC for 2 years rigorous imprisonment and fine of Rs. 1,000/- each and in default of fine one month additional imprisonment.

2. The brief facts of the case is worded in the present appeal are that the FIR was registered on 15.02.2002 at 08:10 a.m. on the basis of the information provided by the complainant Sri Haivat Ram Yadav S/o Ramaudaan alleging that on 15.02.2002 at 7 O' clock in the morning Sri Haivat Ram along with his brother Latheru Ram had gone to the field to answer the nature's call and when they reached the garden/field then besides the tree the appellants who are two in number being Prem Nath Yadav S/o Mahaveer Yadav and Sanjay Yadav S/o Ram Niwas were hiding who are resident of the same village where the complainant is residing. On account of old rivalry, they suddenly came out from the place where they were hiding behind the tree and hurled abuses and threatened to kill the complainant and his brother Latheru Ram S/o Ramaudaan Yadav and thereafter, they took out their country made pistol and with the intention of killing the complainant and his brother fired on account whereof the complainant lie down on the surface but the brother of the complainant being Latheru Ram sustained bullet injuries on his stomach as well as left hand and thereafter he became totally unconscious and fell down. Witnessing the said incident, the complainant started screaming for help and on that point of time Sher Bahadur S/o Bhagirathi and one Sri Mahendra Pratap S/o Ram Bahore who were coming on motorcycle came there and by that time the villagers also came at the place of occurrence and thereafter, both the accused had ran away from there while waving country made pistol in air hurling abuses and threatening to kill all of them.

3. Consequent to the same, FIR was lodged being case crime no. 157/2002, u/s 504, 506, 307 IPC against the appellants in P.S. Kotwali Dehat, District Sultanpur.

4. As per the records, it reveals that the time of the incident was somewhere at 7 O' clock in the morning on 15.02.2002 and thereafter, the informant brought the deceased who was in injured condition, in his house whereat number of villagers got assembled and he waited 20-25 minutes for the police to come, however, as nobody has come, so the complainant accompanied the victim and proceeded for the police station at 07:30 in the morning in a jeep and the distance of the police station from the house of the complainant/victim was 8 kms. Thereafter, the FIR was lodged and the criminal case as referred to above was registered. It has also come on record that the victim/deceased was put to medical examination on the same day i.e. 15.02.2002 at 09:20 a.m. in the police station itself wherein the Blood Pressure was found to be not recordable, pulse found not palpable and the cause of injury was found to be fire arm injury, serious in nature. Therefore, the deceased was sent to District Hospital at Sultanpur as his condition was quite critical wherein he succumbed to the armed injuries at 09:45 a.m. As the victim died so section 302 of the IPC was also added and during the course of the investigation however, Section 3(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 was also put to motion. S.I. Indra Prakash Singh was handed over the

investigation. During the course of investigation he recorded the statement of the witness, prepared the site plans and also recorded the statement of the deceased and also got recorded the victim's dying declaration. After the death of the victim, the inquest report was prepared and all the formalities relating to postmortem also conducted.

5. After concluding the investigation, the investigating officer submitted a charge sheet against the accused Prem Nath Yadav and Sanjay Yadav being the appellants. The file of the appellants was committed to the court of Session being Gangster Case No. 379 of 2012 arising out of case crime no. 157 of 2002. The learned trial court framed charges against the appellants u/s 302/34, 504, 506 IPC and Section 3(1) U.P. Gangster Act and Anti Social (Prevention) Act, 1986 accused denied the charges and claimed to trial.

6. To bring home the charges, the prosecution produced following witnesses, namely:-

1.	Haivat Ram Yadav	PW1
2.	Sher Bahadur Singh	PW2
3.	Dr. M.J. Sharma	PW3
4.	Genda Lal Tiwari Head Constable	PW4
5.	Dr. Anil Kumar Gupta	PW5
6.	S.I. Sharafat Hussain	PW6
7.	S. I. Indraprakash Singh	PW7
8.	Jagdamba Prasad Mishra	PW8
9.	Daljit Singh	PW9

7. Apart from the aforesaid witnesses the prosecution submitted following documents which were proved by adducing the evidence.

1	Recovery Memo of blood stained sand	Ex.Ka 1
2	Recovery Memo of plain sand	Ex.Ka 2
3	Postmortem Report	Ex.Ka 3
4	Document Showing Information to Hospital	Ex.Ka 4
5	Chik FIR	Ex.Ka 5
6	G.D.	Ex.Ka 6
7	G.D. (Gangster Act)	Ex.Ka 7
8	Letter of Victim	Ex.Ka 8
9	Report of Dr. Anil Kumar Gupta examining the victim	Ex.Ka 9
10	Information about the death of the victim in G.D. Carbon Copy	Ex.Ka 10
11	Panchayatnama	Ex.Ka 11
12-16	Photographs Letters Specimen Seal	Ex.Ka 12-16
17	Site Plan	Ex.Ka 17
18	Gang Chart	Ex.Ka 18
19	Document pertaining to the cases so litigated between the parties	Ex.Ka 19
20	Papers of case crime no. 331/1998	Ex.Ka 20
21	Chargesheet	Ex.Ka 21
22-	Document of case	Ex.Ka 22-

28	crime no. 175/1995, 378/2001, 356/1996, 113/1996, 133A/1986, 206/2021	28

8. Heard Sri Arun Kumar Mishra, learned counsel for the appellants and Sri Dhananjay Kumar Singh, learned A.G.A. for the State-respondents. However, none appeared on behalf of the complainant to oppose the present appeal.

9. Learned counsel for the appellants had made manifold submissions namely:

(a) Appellants cannot be held to be guilty of committing of offences u/s 302/34, 504, 506 IPC and section 3(1) of U.P. Gangster & Anti-Social Activities (Prevention) Act, 1986, as the very basis for putting the proceedings into motion culminating into conviction is an FIR, which is admittedly ante-timed.

(b) As the prosecution has failed to discharge its onus to prove that there was motive attributable for commission of the offences thus, the conviction of the appellants is thoroughly unjustified and the appellants are entitled to be acquitted.

(c) Even, if the version of the prosecution is taken into its face value, then the nature of the injuries vis-a-vis the site of the occurrence pursuant to the gun shot, does not in any manner, whatsoever, co-relate with the offences so sought to be alleged to have

(d) Once the appellants have substantiated their defence with respect to *alibi* that they were not present at the time when the alleged occurrence took place while discharging their burden then in absence of proving it even otherwise there was no occasion to convict the appellants.

(e) The theory so propounded by the prosecution while relying the alleged dying declaration cannot be made the basis to convict the appellants particularly when the certificate of fitness has not been obtained from the doctor and the said statement is alleged to have been taken by the police, which makes it doubtful in nature.

(f) Lastly, defective investigation itself destroys the case of the prosecution and thus in any eventuality the appellants ought to have been acquitted in respect of the charges in question.

10. Learned counsel for the appellants, while elaborating his first submission with regard to the fact that the FIR so lodged by the complainant being Haivat Ram S/o Ramaudaan is ante-timed, has sought to argue that in any case, the time of the occurrence of the incident dated 15.02.2002 cannot be 7 O' clock in the morning, but it is between 4-5 O' clock in the morning. Further submission has been made that the real story is, that the occurrence relating to the death of the deceased was in between 4-5 O' clock in the morning of the unlucky day dated 15.02.2002 whereon the deceased died and at that point of time, there was nobody present and thereafter, the FIR was being sought to be lodged. In order to buttress the said submission, learned counsel for the appellants has tried to convince this Court with regard to the fact that it is hardly possible that once the case of the prosecution, narrated in the FIR, is taken into its face value, then the sequence of the events would match so as to implicate the appellants, particularly, in view of the fact

that the FIR is dated 15.02.2002 and in the statement of PW-1/ informant, it has been mentioned that at the time 7 O' clock in the morning, the victim along with the deceased had gone from their house to answer the nature's call and when they were in the garden/field, the appellants were alleged to have been hiding behind the tree and when the complainant and the deceased came within the vicinity of the tree, then suddenly armed with the country made pistol, the appellants, who are two in number, started firing and pursuant thereto, the victim/deceased sustained gunshot injuries in stomach and in the left hand and he fell down. According to learned counsel for the appellants, in the statement of PW-1, this much has come that from the field, the complainant brought his brother and he was stationed in the main door of their house and thereafter, they waited 20-25 minutes in anticipation that police would come, but as it did not come, so the complainant took the victim in a jeep at about 07:30 a.m. to the police station, which is approximately 8 Kms away from the house and they reached there at 08:00-08:10 a.m. and got the FIR registered. In nutshell, the argument of the counsel for the appellants is to the extent that the entire story is cooked up story and the FIR in question is ante-timed, as the death itself has occurred between 4-5 a.m, but in order to falsely implicate the appellants, it is being shown to be at 7 O' clock.

11. Learned A.G.A. has drawn the attention of the Court towards the statement of PW 5 being Dr. Anil Kumar Gupta who has conducted the medical examination of the deceased and according to him, in his statement so recorded on 18.10.2011, he has specifically stated that the injuries so sustained by the deceased was at 07:00 AM. According to learned AGA the chain of event supports the prosecution case as admittedly at 07:00 a.m. of 15.02.2002 injuries were sustained by the deceased consequent thereto he was brought to his house and after waiting for 20-25 minutes the complainant proceeded to take injured/victim to the police station which was 8 Kms away, in a jeep and the FIR was registered at 08:10 a.m. and the medical examination being the injury report was also prepared at 09:20 a.m. and at 09:45 a.m, the deceased died, which is mentioned in the postmortem report. According to the learned AGA, there is no inconsistency or contradiction in the statement so as to suggest that the FIR in question is ante-timed and merely making the said allegation without proving the same the appellants cannot absolve themselves.

12. We have considered the submissions so raised by the appellants with relation to the theory, so propounded by them relatable to FIR being ante-timed. The learned counsel for the appellants has also sought to argue the issue of FIR being ante-timed, but he could not convince the Court as to how and under what circumstances, the FIR is ante-timed, merely on asking the same cannot said to be ante-timed, as for that very purpose, chain of events has to be proved so as to contend that the FIR is ante-timed. This Court while delving only the question of ante-timed FIR finds that the chain of the sequence of the events itself depicts that there is no contradiction or inconsistency in the statements of the prosecution witnesses and the narration of the allegations in the FIR so as to suggest that there is ante-timed FIR as even otherwise this Court finds that the allegation so made in the FIR itself goes to show that at about 7 O' clock in the morning, on 15.02.2002, the victim sustained gunshot injuries, thereafter, he

was brought to his house as already discussed above and after waiting for 20-25 minutes, he was taken in a jeep to the police station, wherein at 18:10 a.m. the FIR was lodged. It is a matter of common sense that whenever there happens any causality or any emergent situation occurs then, obviously, a distance of 8 Kms can easily be covered within half an hour, particularly in a rural area during early morning hours. The Court further finds that theory of the FIR being ante-timed has been engineered by the appellants just in order to save their skin as merely making references to certain facts, there is nothing on record to link anything, which could suggest that the FIR is ante-timed particularly when the chain of events and the sequence itself shows that the injures were sustained by the injured/victim at 7 O' clock in the morning and at 07:30, after waiting for 20-25 minutes, he was proceeded to police station and at 08:10 a.m, the FIR was lodged and the fact regarding the death of the deceased at 07:00 a.m, also finds place in the statement of PW 5, Dr. Anil Kumar Gupta. The Court further finds that there is nothing to show in the inquest report that the FIR is ante-timed, however, rather to the contrary, the inquest report supports the prosecution version. Hence, there is no reason to disbelieve or discard the conclusion drawn by the trial court that the FIR is not ante-timed.

13. The Hon'ble Apex Court in the case of **Mahraj Singh Vs. State of U.P. reported in (1994) 5 SCC 188** in paragraph no. 12 has observed as under:-

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was

then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8."

14. Yet in the case of **Ram Sanjiwan Singh and Others Vs. State of Bihar** reported in **(1996) 8 SCC 552** the Hon'ble Apex Court in paragraph nos. 9 and 10 has observed as under:-

"9.While referring to the main features of the prosecution case in earlier part of this judgment we have indicated how the assault on deceased Ramchandra Singh is said to have been mounted by the accused and how the said incident was allegedly witnessed by the eye-witnesses. To recapitulate, the prosecution case hinges on the eye-witness account of P.W.1 Rameshwar Prasad, P.W.3 Gazraj Singh, P.W.4 Shankar Singh and P.W.5 Sunil Singh. P.Ws.1 and 3 were the body guards of the deceased while P.W.4 was his nephew and P.W.5, the first informant, was his grandson. We have been taken through the evidence of these witnesses. We may state that evidence of these eye-witnesses has been relied upon by the Trial Court as well as by the High Court by giving cogent reasons. Having given our anxious consideration to the said evidence once again we find that their evidence has well stood the test of cross examination and was rightly accepted by both the aforesaid courts. These witnesses have supported the prosecution case in all material particulars. The picture which has been projected from this eye-witness account is to the effect that on 24th May 1972 at about 6.15 p.m. in front of the co-operative store in Sakchi Bazar, Jamshedpur while the deceased who was looking after that store was sitting on the western side of the verandah and was having a shave from a barber, he became the target of pistol shots and number of bullets were pumped in his body and in this assault all the present appellants are clearly indicted by the eye-witness account. It is also shown that the eye-witnesses who were standing on the eastern side of the verandah rushed on spot on witnessing this assault the accused who had come in company with other accused who were ultimately acquitted and for whose involvement we may not say anything further. Then the deceased in a profusely bleeding condition was taken to the Tata Memorial Hospital by P.W.4 Shankar Singh and informant Sunil Singh P.W.5. The Police Sub-Inspector incharge of Sakchi Police Station who had already received information regarding the firing in Sakchi Bazar had in the meantime rushed to the hospital where the deceased was removed and in the hospital at the earliest opportunity by about 7.00 p.m. he recorded the FIR given by the informant P.W.5 Sunil Singh. It has to be kept in view that the incident had taken place by about 6.15 in the evening and thereafter the deceased profusely bleeding had to be taken in a taxi after getting a taxi from the taxi stand and on reaching the hospital the deceased was examined by Dr. Saroj Kumar Das P.W.33 at 6.42 p.m. and he was declared 'Brought dead'. The doctor had found nine bullet injuries on the person of the deceased. Under these circumstances the evidence of P.W.44 Prayag Narain who was Office-In-charge of Sakchi Police Station has to be appreciated. He had broadly supported the prosecution version in connection with the prompt recording of FIR at the hospital . His evidence fully supports the version of complainant P.W.5 Sunil Singh. Prayag Narain P.W.44 stated that from April 1971 to June 1973 he was Officer In-charge, Sakchi Police Station and on 24th May 1972 at

about 6.20 p.m. at the Police Station he got a telephonic message that there had been firing in the Sakchi Bazar which had led to chaos. He made a station diary about it and then left the police station at about 6.30 p.m. and reached near the TISCO Co-operative Store which he found deserted although the store was open. He found lot of blood on the verandah and an upturned chair besmeared with blood. He also found a small 'katori' meant for shaving and a brush there. He left Ranjit Singh, Sub-Inspector of Police to guard that place and himself proceeded at 6.55 p.m. to the Tata Memorial Hospital where he met Sunil Singh and got recorded the 'fardbeyan' of Sunil Singh by Lala Prasad Srivastava. It has to be appreciated that when Dr. Das P.W.33 declared that the deceased was brought dead in the hospital it was quite natural on the part of the police witness P.W.44 to enquire from the complainant Sunil Singh P.W.5 as to how the incident bed happened and as Sunil Singh had by that time came to know that his grandfather was already dead he would naturally give his version about how the incident occurred without being required to further atrend upon the deceased. Under these circumstances recording of the 'fardbeyan' at 7.00 p.m. is rightly held by both the courts below a prompt recording of the First Information Report regarding the incident. In this connection we may also note one strong exception taken by learned senior counsel Shri Rajender Singh about the recording of FIR. He submitted that in fact FIR was recorded two days' late, that is, on 26th May 1972 because by that time a copy of the said FIR is said to have reached the Court of Judicial Magistrate, 1st Class and, therefore, the alleged recording of the FIR at 7.00 p.m. in the hospital is a concocted version and an attempt is made by the prosecution to ante-time and ante-date the FIR. It is not possible to agree with this contention for the simple reason that nothing substantial could be brought out in the cross examination either of Sunil Singh P.W.5 or the witness Prayag Narain P.W.44 to support such a contention. That apart, there are available on record positive checks by way of contemporaneous record indicating that the FIR must have been recorded by 7.00 p.m. in the hospital. It is the evidence or Prayag Narain P.W.44 that after the 'fardbeyan'was taken down at the hospital at 7.00 p.m. a formal FIR was registered immediately thereafter in the Police station and it is in evidence that the said case was registered as Crime Case No.15/72. The evidence of witness Prayag Narain P.W.44 further shows that after he reached the hospital and after he recorded the 'fardbeyan' he went to the morgue and he got performed the inquest Exh.4 over the dead body in presence of P.W.9 Bharat Singh Mohan Singh P.W.10 and Saatan Mukhi P.W.23. He found that the beard of the dead body was partly shaved. So far as the inquest report is concerned it is at Page 518 of the Paper Book. It is in form No.38 and in the reference column Sakhi Police Station Case No.15 of 24.5.72 under Sections 148, 149 and 302 IPC and Sections 25(a) and 27 of the Arms Act is clearly mentioned. This shows that by the time the inquest report was prepared in the morgue of the hospital itself Criminal Case No.15 was already got registered in the police station on the basis of 'fardbeyan' of P.W.5 Sunil Singh. This is one positive check of contemporaneous nature which shows that 'fardbeyan' had seen the light of the day prior to the preparation of the inquest report itself in the morgue of the hospital on that night.

10. The second positive check for lending credence to the 'fardbeyan' recorded at the hospital is supplied by another evidence of contemporaneous nature being seizure memo which is found

at page 538 Of the Paper book. Evidence of witness prayag Narain P.W.44 shows that from the hospital he had gone to the site and had got the articles lying on the scene of offence seized. That seizure list Exh.3 also clearly refers to Sakchi Police Station Case No.15 dated 24.5.72 on the same lines on which the inquest report refers to the police case and the nature of the offences for which the case was registered. The time and date of seizure is shown to be 24th May 1972 at 12.30 o'clock at night. Nothing could be alleged against the preparation of the seizure list at that time. This also indicates that investigation which was triggered off pursuant to the recording of the FIR had resulted in all these subsequent steps during the course of investigation on the night of 24th May itself and were taken out pursuant to the recording of the FIR, first 'fardbeyan' at the hospital and then the formal FIR at Sakchi Police Station. Consequently it could not be said that the FIR was ante-timed or that it was not recorded as it was tried to be suggested by the prosecution. If it was registered only on 26th May, 1972 as suggested by the learned senior counsel for the appellants all the steps taken by the police pursuant to the recording of the FIR in the evening and night of 24th May, 1972 and which have clearly referred to the recording of the FIR and registering of the Criminal Case No.15 of 24.5.72 at the police station on the evening of that day itself would not have transpired at all. It was then submitted that this FIR had reached the Magistrate's Court only on 26th May 1972. It is easy to visualize that after all necessary immediate steps were taken after the recording of the FIR on the evening of 24th May 1972 if the FIR was sent on the next day to the Magistrate's Court it could not be said that it was in any way delayed. The fact that it was placed before the Magistrate on 26th May would only indicate that the clerk concerned must have brought it to the notice of the Magistrate on 26th May 1972 but that would not necessarily mean that copy of the FIR had not reached the Magistrate's office on the next day. Consequently it must be held that the First Information Report was promptly registered at the Police station hot on the heels of the happening of the incident on the evening of 24th May at Sakchi Bazar and that FIR reflected almost a contemporaneous account of what had taken place on spot. That recitals in this FIR clearly indicate that an assault was mounted on deceased Ramchandra Singh by accused including the present appellants nos.2 and 5 in Criminal Appeal No.348 of 1985. It had also indicate the involvement of appellants in Criminal Appeal No.387 of 1985 original accused no.10 Ram Sanjiwan Singh who is said to have fired pistol shot in air to scare away the public. It is true that FIR did not mention presence of accused no.6 Ganesh Gwala. But this circumstance which was heavily relied upon by the learned senior counsel for the appellants cannot advance the case of the accused any further for the simple reason that the FIR itself mentioned that there were two other persons whose names the first informant Sunil Singh did not know. This version of his in the 'fardbeyan' was fully supported by him at the stage of trial and nothing substantial could be brought out in his cross examination to shake this version. Consequently it must be held that the FIR fully corroborated the eye- witness account deposed to by first informant Sunil Singh P.W.5 and other eye-witnesses."

15. The Hon'ble Apex Court in the above noted judgments has clearly observed that in order to hold the FIR to be ante-timed or not, it is to be proved beyond

doubt and merely on asking, the same cannot be held to be ante-timed, particularly when the chain/sequence of the events itself link so as to suggest that there is no possibility of the FIR to be ante-timed. As discussed above, the Court finds its inability to subscribe the argument of the counsel for the appellants that the FIR is ante-timed.

16. Learned counsel for the appellants has next contended that there was no motive behind commission of the offence culminating into conviction and thus, the appellants are entitled to be acquitted. Learned counsel for the appellants have though made an argument on the said issue but nothing has been brought on record to substantiate the same. On the other hand, learned AGA has invited the attention of this Court towards the discussion made by the trial court while giving specific finding that there was enmity and rivalry between the parties, which became the basis of commission of offence.

17. We have heard the argument of the appellants as well as learned AGA and perused the record in question and we find that it has come on record that the father of the complainant and the deceased had been inherited certain properties from the maternal side of his mother as per the statements available on record of the appellant no. 1 being Prem Nath Yadava, who was related to the father of the complainant from the maternal side as complainant's grandfather (maternal) were 5 brothers, one of them, whose son was the applicant no. 1 and when certain landed property was inherited by father of the complainant, then the same became eyesore of Prem Nath Yadav being appellant no. 1. It has also come on record that the father of the appellant no. 1 being Sri Mahaveer, was murdered and criminal proceedings for the offence of murder was lodged and prosecuted against the deceased, Ram Sumiran and the complainant and others, which was pending at that point of time and thereafter, the conviction was made while punishing with 7 years rigorous imprisonment. One of the issues, which also assumes much importance, is relatable to the fact that the murder of the father of the appellant no. 1 being Mahaveer was committed in the year 2001 and the incident relatable to lodging of the FIR for committing offence against the appellants is of the year 2002, meaning thereby, it is a clear cut case of motive being attributed to the appellants, as it is a matter of common knowledge that whenever a person receives a blow on account of death of his blood relative, then obviously enmity starts residing in the heart. Meticulously analyzing the said issue, the trial court has come to the conclusion that merely because conviction was done in the year 2008 and the same will not matter at all, as what is to be seen is the fact that the father of the appellant was murdered in the year 2001 and the brother of the complainant was murdered in the year 2002, which is within a period of one year approximately.

18. In the statement, so made u/s 233 (2) Cr.P.C, the appellants themself have come up with the stand that there is a rivalry with the victim/complainant and once the same being the position coupled with the surrounding factors, the entire theory so sought to be propounded by the learned counsel for the appellants that there were no motive assigned behind the said offence, is patently misconceived, as this Court has no hesitation to accept the view taken by the court below and there is no reason to disbelieve or discard the same.

19. The Hon'ble Apex Court in the case of **Kunwarpal @ Surajpal And Ors. Vs. State of Uttarakhand And Anr. reported in** 2014 (16) SCC 560 in paragraph no. 16 has observed as under:-

"According to the complainant there was litigation between them and the accused persons leading to enmity. PW3 Atmaram has also stated that there was litigation between them and it culminated in the occurrence. Animosity is a double edged sword. While it can be a basis for false implication, it can also be a basis for the crime [Ruli Ram & Anr. Vs. State of Haryana (2002) 7 SCC 691; State of Punjab Vs. Sucha Singh & Ors. (2003) 3 SCC 153]. In the instant case there is no foundation established for the plea of false implication advanced by the accused and on the other hand evidence shows that enmity has led to the occurrence. The conviction and sentence imposed on the appellants is based on proper appreciation of evidence on record and does not call for any interference."

20 . In the case of **Inder Singh And Ors. Vs. State of Rajasthan** reported in **2015 2 SCC 734** the Hon'ble Apex Court in paragraph no. 19 has observed as under:-

*"In that view of settled law, the facts of the present case as alleged in the FIR and as proved in the court leave no manner of doubt that the group of persons who chased deceased no.1-Inder Singh and caused his death and thereafter chased, surrounded and caused death of three more persons besides causing grievous injuries to the informant-Amar Singh was an assembly of five or more persons rightfully deserving to be designated as an unlawful assembly because by its action it showed that its common object was to commit offence. The subsequent acts clearly show that the unlawful assembly carried out its common object of committing serious offence of murder of four persons and grievous injuries to the informant. This Court, therefore, finds that the courts below committed no error in applying Section 149 of the IPC and convicting the members of the unlawful assembly for offences under Sections 302 and 307 of the IPC (with the aid of Section 149 IPC). Some argument was advanced on there being lack of any clear motive but that is not at all necessary or material whe*n the offences have been proved by clear and cogent evidence including eye-witnesses."

21. In the case of **Jagtar Singh Vs. State of Haryana** reported in **2015 7 SCC 675** the Hon'ble Apex Court in paragraph nos. 17 and 20 has observed as under:-

"17.Now so far as the issue relating to existence of motive is concerned, we consider it apposite to reproduce the finding of the High Court on this issue.

"There also, Jagtar Singh appellant is not on firmer footing. There is plethora of evidence available on record to prove that the first informant had filed an application for correction of Girdawari entries and the adjudication announced on the relevant date by the revenue officer was favourable to him. There is also material available on record that first informant had improved the land which he exchanged with the appellant to redress the grievance of the latter that the quality of the land which fell to their share in a partition was inferior. It was after the further exchange, as between the appellants on the one hand and PW-3 Harbans Singh on the other hand, that the latter had improved the

quality of that land. It was obvious that the appellants entertained a feeling of envy towards the first informant and they had an eye upon the improved land under the cultivation of first informant. The favourable announcement of the Girdwari correction provided the proverbial combustible material to the appellants who have been proved on record to have announced thereafter that announcement of the verdict of the revenue officer notwithstanding, they would not allow the first informant to enter upon the land qua which Khasra girdwaries entries had been ordered to be corrected. It cannot, thus be said with any justification that the appellant had no motive to commit the impugned crime."

20.In the light of these facts, which are duly proved by the prosecution with the aid of their eyewitnesses, we find no good ground to differ with the finding of the High Court and accordingly hold that there was a motive to commit the offence. We accordingly hold so."

22. In the case of **Saddik @ Lalo Gulam Hussein Shaikh And Ors. Vs. State of Gujrat** reported in **2016 10 SCC 663** the Hon'ble Apex Court in paragraph no. 21 has observed as under:-

"21. It is settled legal position that even if the absence of motive, as alleged, is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [See: Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91; State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73; and Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91]."

23. Yet the Hon'ble Apex Court in the case of **Raj Gopal Vs. Muthupandi @ Thavakkalai And Ors**. reported in **2017 11 SCC 120** in paragraph no. 14 has observed as under:-

"14.Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."

24. The proposition of law so culled out by the Hon'ble Apex Court leads to an inescapable proposition that even lack of any clear motive is not the material, when the offences are proved by a clear and cogent evidence including eye witness, and the fact that when there are enough evidences, both ocular as well documentary, to prove existence of motive for commission of crime.

25. Thirdly, the learned counsel for the appellant has laid much emphasis upon the nature of the wounds of the deceased so as to contend that not only there is a great inconsistency in the medical examination of the deceased qua the postmortem report but also in the statements of PW-3 and PW-5 being the persons, who conducted the postmortem and prepared the injury report.

According to the learned counsel for the appellant, the injury report, so prepared by PW-5 being Dr. Anil Kumar Gupta does not show any blackening or sign of any burning/pealing of the skin, as whereas the report of PW-3 being Dr. M. J. Sharma, who conducted the postmortem, itself shows that there was blackening or charring. In nutshell, the argument of the learned counsel for the appellants is to the extent that once there is no conclusive opinion and the injury report and postmortem report are self-contradictory, then the said fact itself shows that the version contained in the FIR itself is false, concocted and has no basis whatsoever.

26. Learned AGA on the other hand submitted that the trial court had analyzed the issue in right perspective and there is no contradiction in the medico legal report vis-a-vis postmortem report.

27. We have heard the learned counsel for the parties and perused the documents available on record and we find that the view taken by the court below cannot be faulted, particularly, in view of the fact that the court below had meticulously analyzed each and every aspect of the matter and has come to the conclusion that the distance between the place, where the victim sustained firearm injures and fell down vis-a-vis the place, where the complainant was present was only four steps being a short distance and the distance between the place, where the victim sustained firearm injuries and fell down qua the place, where accused were hiding, was six steps and similarly, the distance between the place, where witness, who saw the incident, was present, vis-a-vis the place, where victim fell down and sustained injures was 40 steps. Though the court below has taken the view that distance cannot be measured by the steps as the steps may differ from person to person according to his height but the logic so advanced by the court below while taking clue from the site plan, which was prepared by the Investigating Officer was with relation to the fact that when gun shot injuries are sustained from the closeness of the person who has fired then blackening occurs near the injuries.

28. Here, in the present case, record reveals that there was burning and blackening, which was noticed by PW-3 being Dr. M.J. Sharma, who conducted the postmortem and this becomes a crucial fact that it was a gun shot injury. Even though, much reliance has been placed upon the injury report, which was prepared by PW-5 being Dr. Anil Kumar Gupta, but in the opinion contained in the report, it has been mentioned that the cause of the injury was a firearm injury. Even otherwise, the injury report cannot be read in isolation, however, the same has to be read in-conformity and in consonance with the surrounding factors, evidences including the statements of the witnesses.

29. Learned counsel for the appellants have argued that there is a great inconsistency in the version of the prosecution vis-a-vis the receiving of the injuries, as according to the learned counsel for the appellants, it has been alleged in the FIR and in the statement in support thereof, that the deceased sustained injuries in front however, the deposition of PW 5 Dr. Anil Kumar Gupta who prepared the injury report reveals that the injury no. 3 was sustained at back, thus, the entire basis of hold the appellants guilty of commission of the said offence while convicting, has no legs to stand.

30. The argument so raised by the learned counsel for the appellants though appears to be attractive but it is not liable to be accepted as it has come on record that the deceased was accompanied with the complainant when the occurrence took place and the distance between the deceased and complainant was a short distance which was measured to be four steps and when the complainant saw the appellants with the country made pistol then the complainant lied down on the surface and the deceased/victim in order to save himself would have turned around just to run away while being confronted with the appellants, who are two in number standing in front of them in close vicinity. Thus, by no stretch of imagination, the theory propounded by the counsel for the appellants, can be accepted to be correct, as it is a matter of common knowledge that once a person is confronted with a dangerous situation, which is not usual, then it is reflex, which matters and in order to save the life, human being just tries to run away. The court below has meticulously analyzed the said issue, while recording the specific finding that once the complainant tried to save himself while lying down on the ground then he cannot exactly say as to on which position either front or back, the gun shot injury were put to motion. Even otherwise, there is no reason to disbelieve and discard the finding recorded by the court below, which stands substantiated by facts based upon the ocular and documentary evidence.

31. Learned counsel for the appellants has next contended that the court below has not considered the plea of alibi, as at the time of occurrence, the appellants were not present. In order to buttress the said submission, learned counsel for the appellants has argued that the appellant not no. 1 who happens to be a railway employee and on the unlucky day, he was engaged in railway station at Haidargarh in connection with repairing work of electricity along with three other employees. In order to set up the plea of alibi, the appellants had produced DW-1 being Sri Surendra Chand Dwivedi Senior Section Engineer Electricity Northern Railway, Sultanpur, Sri B.S. Singh, Station Superintendent DW-2 and Dayashankar Singh, Technical one Northern Railway Power House, Sultanpur DW-4 and DW-5 Shyam Bihari Dubey Electrical Fitter Grade-I, Railway Station, Sultanpur. Learned counsel for the appellants, while substantiating the plea of alibi, had argued that from the statement of DW-2 itself, it is clear that he has deposed that from 13.02.2002 to 15.02.2002, he was posted as Station Master, Haidargarh and his duty was from 22:00 p.m in the night till 07:30 a.m, however, the electricity in the station colony became disrupted accordingly, information to the said effect was made to the Electricity Section, Sultanpur through phone and from Sultanpur four persons came including the appellant no. 1, arrived at Haidargarh in the morning on 13.02.2002 and worked from 13 to 14 February, 2002 and they proceeded to go back to their parent place of posting on 15.02.2002 after getting the certificate on 15.02.2002 at about 07:10-07:15 a.m. Learned counsel for the appellants has next contended that the statement of DW-2 itself proves that appellant no. 1 was not present when the occurrence took place. Learned counsel for the appellants has made further submission that the certificate, being Ex.Ka-3, issued by the railways, itself shows that the appellant no. 1 left the workplace at Haidargarh Railway Station on 15.02.2002 at 07:10-07:15 a.m.

32. On the other hand, learned AGA has sought to argue that the plea of alibi so

set up by the appellants, is not substantiated as even otherwise, the applicants were seen to have committed the crime by the complainant and further the same stands proved through the dying declaration of the deceased.

33. We had the occasion to consider the statement of DW-2 as well as the judgment of trial court and we find that a detailed discussion has been made by the court below in negating the plea of alibi taken by the appellants. We find that though DW-2 has deposed that the appellant no. 1 had come to Haidargarh in connection with electricity problem, but the said statement does not in any manner, whatsoever, support the appellants, particularly, in view of the fact that the Ex. Kha-3 happens to be the certificate. It has come on record that the same is a certificate, which is prepared by the respective employee (Appellant no. 1) and further DW-2 only signed the same. DW-5, in his statement, has also stated that the certificate is prepared by the concerned employee and not by railway officers. There is a very important issue, which needs to be noticed that Ex.Kha 3 had been filled by the appellant no. 1 showing the fact that he had worked at Haidargarh from 13.02.2002 to 14.02.2002 and on 15.02.2002, he proceeded from Haidargarh through S.L. Train, which commenced its journey from Haidargarh at 07:47 and reached Akbarganj at 08:28. This Court finds that once a certificate is being filled by an employee at Haidargarh then how could he give the time when the train is to reach at Akbarganj as it is not a case of the appellant that the certificate being Ex.Ka3 was issued in Akbarganj. However, rather to the contrary, the same was filled in Haidargarh itself. The vital document, which could have proved the fact as to whether the appellant was at Haidargarh in connection with an official work so deputed to him, is a document being the pay sheet. The said document is also prepared by the official of railways duly verified at all levels. It has also come on record that the pay sheet was weeded out with the passage of time. It is not a case also that the appellant was not aware about the rules/orders/practice prevailing about the time frame of weeding of document. Here in the present case admittedly the occurrence took place on 15.02.2002 and it also within the knowledge of the appellant that criminal case was also going on. Thus, no attempts were made despite the fact that there is a provision for getting the records preserved in the wake of practice of being weeded out. The plea of alibi only succeeds if it is shown that the accused was far away from the place of occurrence at the relevant point of time and thus, he could not be present at the place, where the crime was committed.

34 . The Hon'ble Apex Court in the case of **Dudh Nath Pandey Vs. State of U.P.** reported in **(1981) 2 SCC 166** in paragraph no. 19 has observed as under:-

"*Counsel for the appellant pressed hard upon us that the defence evidence establishes the alibi of the appellant. We think not. The evidence led by the appellant to show that, at the relevant time, he was on duty at his usual place of work at Naini has a certain amount of plausibility but that is about all. The High Court and the Sessions Court have pointed out many a reason why that evidence cannot be accepted as true. The appellant's colleagues at the Indian Telephone Industries made a brave bid to save his life by giving evidence suggesting that he was at his desk at or about the time*

when the murder took place and further, that he was arrested from within the factory. We do not want to attribute motives to them merely because they were examined by the defence. Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses. Granting that D. Ws. 1 to 5 are right, their evidence, particularly in the light of the evidence of the two Court witnesses, is insufficient to prove that the appellant could not have been present near the Hathi Park at about 9-00 A.M. when the murder of Pappoo was committed. The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. The evidence of the defence witnesses, accepting it at its face value, is consistent with the appellant's presence at the Naini factory at 8-30 A.M. and at the scene of offence at 9.00 A.M. So short is the distance between the two points. The workers punch their cards when they enter the factory but when they leave the factory, they do not have to punch the time of their exit. The appellant, in all probability, went to the factory at the appointed hour, left it immediately and went in search of his prey. He knew when, precisely, Pappoo would return after dropping Ranjana at the school. The appellant appears to have attempted to go back to his work but that involved the risk of the time of his re-entry being punched again. That is how he was arrested at about 2- 30 P.M. while he was loitering near the pan-shop in front of the factory. There is no truth in the claim that he was arrested from inside the factory."

35. In the case of **Binay Kumar Singh Vs. State of Bihar (1997) 1 SCC 283** the Hon'ble Apex Court in paragraph nos. 22 and 23 has observed as under:-

"22. We must bear in mind that alibi not an exception (special or general) envisaged in the Indian Penal code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (A) given under the provision is worth reproducing in this context:

"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant."

23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far sway from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi to prove it with

absolute certainty So as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide Dudh Nath pandey vs state of Utter Pradesh (1981) 2 SCC 166; state of Maharashtra vs Narsingrao Gangaram Pimple AIR 1984 SC 63)."

36. The Hon'ble Apex Court in the case of **Jayantibhai Bhenkarbhai Vs. State of Gujrat (2002) 8 SCC 165** in paragraph no. 18 and 19 has observed as under:-

"18. Section 11 of the Evidence Act, 1872 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable. Illustration (a) of Section 11 reads as under :

Illustrations

(a) The question is, whether A committed a crime at [Calcutta], on certain day. The fact that, on that day A was at [Lahore] is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) xxx xxxxxx

19. The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence (Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means "elsewhere". It is a convenient term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception (a special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilty on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plead of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has

succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligations is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to the see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court."

37. In the case of **Shaikh Sattar Vs. State of Maharashtra** reported in **(2010) 8 SCC 430** the Hon'ble Apex Court in paragraph nos. 34, 35, 36 has observed as under:-

"34. Except for making a bald assertion about his absence from his rented premises, the appellant miserably failed to give any particulars about any individual in whose presence, he may have read the Namaj in the morning. He examined no witness from Chikalthana before whom he may have read the Koran in the evening prior to the incident. He examined nobody, who could have seen him in the masjid during the night of the incident. Therefore, the trial court as also the High Court concluded that this plea of being away from the rented premises at the relevant time was concocted.

35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in the case of Gurpreet Singh Vs. State of Haryana, (2002) 8 SCC 18 as follows:

"This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact".

36. But it is also correct that, even though, the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the

appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be proved by the prosecution beyond reasonable doubt. Being aware of the aforesaid principle of law, trial court as also the High Court examined the circumstantial evidence to exclude the possibility of the innocence of the appellant."

38. In the case of **Jitendra Kumar Vs. State of Haryana** reported in **(2012) 6 SCC 204 t**he Hon'ble Supreme Court has observed in paragraph no. 64 as under:-

"64. The mere fact that the accused were residents of a village at some distance would be inconsequential. As per the statement of the witnesses, both these accused were seen by them in the house of Ratti Ram where the deceased was murdered. We are also unable to accept the contention that presence of PW10 and PW11 at the place of occurrence was doubtful and the statements of these witnesses are not trustworthy."

39. In the case of **Jumni and Others Vs. State of Haryana** reported in **2014 11 SCC 355** the Hon'ble Supreme Court has observed in paragraph no. 20 as under:-

"20. It is no doubt true that when an alibi is set up, the burden is on the accused to lend credence to the defence put up by him or her. However the approach of the court should not be such as to pick holes in the case of the accused person. The defence evidence has to be tested like any other testimony, always keeping in mind that a person is presumed innocent until he or she is found guilty."

40. While analyzing the plea of alibi so sought to be raised by the appellants, this Court finds that the appellants have not been able to prove beyond doubt that nobody was present there at the time when the unlucky occurrence took place, as the circumstances prove otherwise, which has been already discussed in detail.

41. Much emphasis has been laid down by the learned counsel for the appellants that the dying declaration of deceased is not reliable and the same cannot be put into motion while convicting the appellants. Elaborating the said submission, learned counsel for the appellants had argued that in the present case in hand, dying declaration was recorded by the police personnel and further the certificate of fitness was also not obtained from the doctor and there is a cloud regarding the fact that as to whether dying declaration was recorded or not, as according to the learned counsel for the appellants, the deceased was in a critical condition and he might have died before recording of the dying declaration.

42. Dying declaration gets its root from Section 32 (1) of the Evidence Act, 1872, which reads as under:-

"when it relates to cause of death. --When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

43. As per Section 32 (1) of the Evidence Act 1872, whenever the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction, which resulted in his death, such statements are relevant whether the person, who made them was or was not, at the time when they were made, under expectation of death.

44. The Hon'ble Apex court in the case of **Paras Yadav and Others Vs. State of Bihar** reported in **1999 2 SCC 126** had the occasion to consider the contingency, wherein the statement so recorded by the Sub-Inspector, has been treated as valid dying declaration, the Hon'ble Apex Court in paragraph nos. 5, 8, 9 and 10 has observed as under:-

"5. The learned Counsel referred to the evidence of P.W. 1, Basgeet Yadav who has stated that at 8.00 p.m., he rushed to the newly built bridge and saw Sambhu Yadav lying there and he was bleeding. Sambhu, on being asked, informed that Paras Yadav, Tulsi and Munshi surrounded him and Paras gave a chhura blow. Similarly, P.W. 2, Bachu Das stated that he alongwith Jagannath was going home on bicycle and when they reached at the distance of 200 yards from Ghogha Chowk, they saw five persons going away. They were Paras, Munshi, Tulsi and Satan and fifth person could not be identified. At Ghogha Chowk, they saw Sambhu falling down in an injured condition. On inquiry, Sambhu told that Munshi, Tulsi and Satan caught hold of him and Paras gave a Chhura blow. The statement to the aforesaid effect was made by Sambhu to Sub- Inspector. Similarly, P.W. 4, Ramchander Raut also stated that he rushed to the place of occurrence after hearing the noise and found that Sambhu had fallen down on the pitch road. On inquiry, Sambhu told that he was stabbed by Paras while Tulsi, Munshi and Satan had caught hold of him. P.W. 5 Kanchan Yadav, deposed similarly and has stated that Sambhu told him that he was surrounded by Munshi, Tulsi, Satan and Paras and Paras stabbed him on abdomen. He also deposed it with regard to the enmity between Sambhu and others accused on account of the land dispute.

8.It has been contended by the learned Counsel for the appellants that the Investigating Officer has not bothered to record the dying declaration of the deceased nor the dying declaration is recorded by the Doctor. The Doctor is also not examined to establish that the deceased was conscious and in a fit condition to make the statement. It is true that there is negligence on the part of Investigating Officer. On occasions, such negligence or ommission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to the hospital by bus. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of number of witnesses who rushed to the scene of offence at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence. In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the

prosecution evidence is required to be examined de hors such ommissions to find out whether the said evidence is reliable or not. For this purpose, it would be worthwhile to quote the following observations of this Court from the case of Ram Bihari Yadav v. State of Bihar and others, J.T. (1998) 3 SC

290. "In such cases, the story of the prosecution will have to be examined de hors such ommissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

9. In this view of the matter with regard to Paras Yadav, in our view, there is no reason to disbelieve the oral dying declaration as deposed by number of witnesses and as recorded in farbdeyan of deceased Sambhu Yadav. The farbdeyan was recorded by the Police Sub-Inspector on the scene of occurrence itself, within few minutes of the occurrence of the incident. Witnesses also rushed to the scene of offence after hearing hulla gulla. The medical evidence as deposed by p.w. 11 also corroborates the prosecution version. Hence, the courts below have rightly convicted Paras Yadav for the offence punishable under Section 302 I.P.C.

10. The next question would be with regard to the conviction of accused nos. 2 and 3. that is Satan Yadav and Tulsi Sonar under Section 302 read with Section 34 I.P.C. In our view the learned Counsel for the appellants rightly pointed out that the prosecution version with regard to the part played by accused nos. 2 and 3 is inconsistent. Some witnesses deposed that the deceased informed that accused nos. 2 and 3 surrounded him while other witnesses deposed that the deceased told that they gave fist blows or slaps while some witnesses state that the deceased told that Tulsi Sonar and Satan Yadav caught hold of the deceased. Considering, the aforesaid inconsistencies in the dying declaration as deposed by the witnesses with regard to the part played by accused nos. 2 and 3, and as there is no direct evidence in our view, it cannot be said that prosecution has proved beyond reasonable doubt that accused nos. 2 and 3 are guilty for the offence punishable under Section 302 read with Section 34, I.P.C.

45. In the case of **Laxmi (Smt) Vs. Om Prakash and Others** reported in **2001 6 SCC** in paragraph nos. 1 and 30 has observed as under:-

"1. Nemo moriturus praesumitur mentire __ No one at the point of death is presumed to lie. A man will not meet his Maker with a lie in his mouth __ is the philosophy in law underlying admittance in evidence of dying declaration. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it

becomes a very important and a reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration__is the statement of law summed up by this Court in Kundula Bala Subrahmanyam Vs. State of A.P., (1993) 2 SCC 684. The Court added - such a statement, called the dying declaration, is relevant and admissible in evidence provided it has been made by the deceased while in a fit mental condition. The above statement of law, by way of preamble to this judgment, has been necessitated as this appeal, putting in issue acquittal of the accused respondents from a charge under Section 302/34 IPC, seeks reversal of the impugned judgment and invites this court to record a finding of guilty based on the singular evidence of dying declaration made by the victim. The law is well settled: dying declaration is admissible in evidence. The admissibility is founded on principle of necessity. A dying declaration, if found reliable, can form the basis of conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. It is, as if the maker of the dying declaration was present in the court, making a statement, stating the facts contained in the declaration, with the difference that the declaration is not a statement on oath and the maker thereof cannot be subjected to cross-examination. If in a given case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances coming to its notice, the court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying declaration so infirm as to prick the conscience of the court, the same may be refused to be accepted as forming safe basis for conviction. In the case at hand, the dying declarations are five. However, it is not the number of dying declarations which will weigh with the court. A singular dying declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand if every individual dying declaration consisting in a plurality is found to be infirm, the court would not be persuaded to act thereon merely because the dying declarations are more than one and apparently consistent.

30. A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by investigating officer has been discouraged and this Court has urged the investigating officers availing the services of Magistrate for recording dying declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the investigating officer or the police officer later on relied on as dying declaration. In Munnu Raja and Anr. Vs. The State of Madhya Pradesh - AIR 1976 SC 2199, this Court observed - investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of an

investigation ought not to be encouraged. The dying declaration recorded by the investigating officer in the presence of the doctor and some of the friends and relations of the deceased was excluded from consideration as failure to requisition the services of a Magistrate for recording the dying declaration was not explained. In Dalip Singh Vs. State of Punjab AIR 1979 SC 1173 this Court has permitted dying declaration recorded by investigating officer being admitted in evidence and considered on proof that better and more reliable methods of recording dying declaration of injured person were not feasible for want of time or facility available. It was held that a dying declaration in a murder case, though could not be rejected on the ground that it was recorded by a police officer as the deceased was in a critical condition and no other person could be available in the village to record the dying declaration yet the dying declaration was left out of consideration as it contained a statement which was a bit doubtful."

46. Yet in another decision in the case of **Laxman Vs. State of Maharashtra** reported in **(2002) 6 SCC 710** the Hon'ble Apex Court in paragraph nos. 3 and 5, has observed as under:-

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

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

5.The court also in the aforesaid case relied upon the decision of this court in Harjeet Kaur VS. State of Punjab 1999(6) SCC 545 case wherein the magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh 1999 (7) SCC 695 t*o the effect that "in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind where-after he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh 1999 (7) SCC 695 must be held to be not correctly decided and we affirm the law laid down by this court in Koli Chunilal Savji & Another vs. State of Gujarat 1999(9) SCC 562 case."*

47. In the case of **Kaliya Vs. Madhya Pradesh** reported in **2013 10 SCC 758** the Hon'ble Apex Court in paragraph no. 10, has observed as under:-

"10. This Court has examined the issue of putting a thumb impression on the dying declaration by 100% burnt person in State of Madhya Pradesh v. Dal Singh & Ors. *AIR 2013 SC 2059, and after considering a large number of cases including Mafabhai Nagarbhai Raval v. State of Gujarat, AIR 1992 SC 2186; Laxmi v. Om Prakash & Ors., AIR 2001 SC 2383; and Govindappa & Ors. v. State of Karnataka, (2010) 6 SCC 533 came to the conclusion as under:-*

"The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed

form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

*Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look f*or corroboration of a dying declaration, unless the declaration suffers from any infirmity.

So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact."

48. In the case of **State of Madhya Pradesh Vs. Dal Singh And Ors.** reported in **2013 14 SCC 159** the Hon'ble Apex Court in paragraph nos. 20, 21 has observed as under:-

"20. The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

21. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity. "

49. Recently also the Hon'ble Apex Court in the Case of **Gulzari Lal Vs. State of Haryana** reported in **2016 4 SCC 583** in paragraph no. 21, 24 has observed as under:-

"21.We find no infirmities with the statements made by the deceased and recorded by the Head Constable Manphool Singh (PW-7). A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a medical officer. The law regarding the same is well-settled by this Court in the decision of Laxman v. State of Maharashtra, AIR 2002 SC 2973, wherein this Court observed thus:

"3. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a

dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

22. Further, clarity on the issue may be established by the judgment of this Court in the case of Paras Yadav & Ors. v. State of Bihar, 1999(1) SCR 55, wherein this Court addressed the question regarding the dying declaration that was not recorded by the doctor and where the doctor had not been examined to say that the injured was fit to give the statement. It has been held by this Court as under :

"8....In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not."

23. In reference to the position of law laid down by this Court, we find no reason to question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by Head Constable, Manphool Singh (PW-7),he was found to be mentally fit to give his statement regarding the occurrence. Further, evidence of Head Constable Manphhol Singh (PW-7) was shown to be trustworthy and has been accepted by the courts below. The view taken by the High Court does not suffer from any infirmity and the same is in order.

24. The conviction by the High Court was based not only on the statements made by Maha Singh (deceased) but also on the un-shattered testimony of the eye-witness Dariya Singh (PW-1) and the statement of the independent witness Rajinder Singh (PW-11)."

50. Addressing the issue of dying declaration in the light of law propounded by the Hon'ble Apex Court as extracted hereinabove, it will reveal that the incident occurred at 7 O' clock in the morning on 15.02.2002 and the deceased sustained two firearm injuries, one is on the stomach and the second is in the left hand. As per the prosecution case, the deceased was brought to his house and after waiting 20-25 minutes thereafter, they proceeded for the police station, which was 8 kms away from the house, in a jeep and then the FIR was lodged at 08:10 a.m. From the analysis of the statement so recorded by the prosecution witness, it has come on record that PW-7 being the Sub-Inspector Indraprakash recorded the dying declaration and according to him, the deceased named the appellants with respect to commission of the offence. Much argument has been raised from the side of the appellants that first of all, any statement recorded as a dying declaration by the police is totally unworthy and secondly, the certificate of doctor was obtained, thirdly, the deceased was not in a condition to give the statement and fourthly, no statement had been given by the deceased as dying declaration.

51. So far as the question of dying declaration to be recorded by the police

personnel is concerned, the same cannot be outrightly ruled out, as the Hon'ble Apex Court in a judgment, so extracted hereinabove, has clearly observed in categorical terms that there is no prescribed form, format or procedure for recording of dying declaration, but the only condition is that the person, who records dying declaration, is satisfied that the maker is in a fit state of mind, capable of making such statement irrespective of issuance of certificate of fitness by the doctor. Even otherwise, there is no prohibition that the police personnel should not record dying declaration, as the position is even otherwise that the dying declaration was recorded by a police officer is also admissible in evidence.

52. The Court finds from the record that the deceased was brought to the police station at 08:00-08:10 a.m. on 15.02.2022 and medico legal report was prepared at 09:20 a.m. and between 09:20 and 09:45 a.m, the dying declaration was recorded by the police personnel being PW-7, when the deceased named the appellants, who had committed the offence. The time for recording the dying declaration was too short to wait for the Magistrate to arrive or take certificate of fitness from the doctor as in the case in hand, PW-7 waited either for the doctor or for the Magistrate to arrive, then by that time, it would have been too late for recording the dying declaration. This Court has to adopt a pragmatic approach as this Court cannot travel into the mind of the person, who was recording the dying declaration, as he was the best suited person to take decision for recording the dying declaration. Nonetheless, there is nothing on record to suggest that there was any animosity of PW-7 with the appellants. There is also no cross-examination conducted by the defence on the question of dying declaration, particularly, in view of the fact that the deceased was brought to the police station at 08:00-08:10 a.m. and medico legal examination was conducted at 09:20 a.m. on the same day giving 25 minutes time to PW-7 to get the dying declaration recorded and thereafter, victim succumbed at 09:45 a.m.

53. Dying declaration cannot be merely discarded on the ground that the same has been recorded by police personnel or certificate of fitness was not obtained. The court below has thoroughly examined each and every aspect of the matter and thereafter proceeded to record the clear cut finding convicting the appellants. Even otherwise, it has come on record that the deceased sustained gunshot injuries and further the fact that there is no clinching evidence adduced by the appellants to hold otherwise.

54. Lastly, learned counsel for the appellants has argued that there have been inherent defects in the investigation so conducted by the Investigating Officer, which go into the root of the matter and thus, the investigation of the appellants is not sustainable in the eyes of law. Elaborating the said submission, learned counsel for the appellants has drawn the attention of the Court towards the fact that first of all, it was within the knowledge of the Investigation Officer that the plea of alibi was taken by the appellants in relation to the fact that on the date of occurrence, the appellants were not present and they were far away at Haidargarh then the Investigation Officer ought to have examined the defence witness. Secondly, it was argued that the investigation is thoroughly defective and has not been conducted as per the provisions contained under the Cr.P.C., 1973 and read with

provisions contained under the Evidence Act and thus, the appellants are entitled to the benefit of the same while acquitting from the aforesaid charges.

55. Though, the argument so raised by the learned counsel for the appellants appears to be attractive, but it cannot detain the Court any further as defect in the investigation by itself cannot be a ground for acquittal and it is the legal obligation of the Court to examine the prosecution evidence de hors such lapses carefully to find out whether the said evidence is reliable or not.

56. The Hon'ble Apex Court in the case of ***Amar Singh vs. Balwinder Singh and Others 2003 (2) SCC 518*** in paragraph no. 15 has observed as under :-

"15. Coming to the last point regarding certain omissions in the DDR, it has come in evidence that on the basis of the statement of PW4 Amar Singh, which was recorded by PW14 Sardara Singh, S.I. in the hospital a formal FIR was recorded at the Police Station at 9.20 p.m. In accordance with Section 155 Cr.P.C. the contents of the FIR were also entered in the DDR, which contained the names of the witnesses, weapons of offence and place of occurrence and it was not very necessary to mention them separately all over again. It is not the case of the defence that the names of the accused were not mentioned in the DDR. We fail to understand as to how it was necessary for the investigation officer to take in his possession the wire gauze of the window from where A-1 is alleged to have fired. The wire gauze had absolutely no bearing on the prosecution case and the investigating officer was not supposed to cut and take out the same from the window where it was fixed. It would have been certainly better if the investigating agency had sent the fire arms and the empties to the Forensic Science Laboratory for comparison. However, the report of the Ballistic Expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the fire arms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eye-witnesses whose presence on the spot cannot be doubted as they all received gun shot injuries in the incident. In Karnel Singh v. State of M.P. *(1995) 5 SCC 518 it was held that in cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. In Paras Yadav & Ors. v. State of Bihar (1999) 2 SCC 126 while commenting upon certain omissions of the investigating agency, it was held that it may be that such lapse is committed designedly or because of negligence and hence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. Similar view was taken in Ram Bihari Yadav v. State of Bihar (1998) 4 SCC 517 when this Court observed that in such cases the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials, otherwise, the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of*

justice. In our opinion the circumstances relied upon by the High Court in holding that the investigation was tainted are not of any substance on which such an inference could be drawn and in a case like the present one where the prosecution case is fully established by the direct testimony of the eye-witnesses, which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief."

57. In the case of ***C. Muniappan & Ors. Vs. State of Tamil Nadu*** reported in ***2010 (9) SCC 567,*** the Hon'ble Apex Court in Paragraph no. 55 has observed as under :-

"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. (Vide Chandra Kanth Lakshmi v. State of Maharashtra, AIR 1974 SC 220; Karnel Singh v. State of Madhya Pradesh, *(1995) 5 SCC 518; Ram Bihari Yadav v. State of Bihar, AIR 1998 SC 1850; Paras Yadav v. State of Bihar, AIR 1999 SC 644; State of Karnataka v. K. Yarappa Reddy, AIR 2000 SC 185; Amar Singh v. Balwinder Singh, AIR 2003 SC 1164; Allarakha K. Mansuri v. State of Gujarat, AIR 2002 SC 1051; and Ram Bali v. State of U.P., AIR 2004 SC 2329)."*

58. Analysing the factual and legal position as laid down by the Hon'ble Apex Court while applying the same on the facts of the case, this Court finds that there might be certain defects in the investigation so conducted by the Investigating Officer, but the same cannot ipso facto be a ground to hold that the appellants are not guilty, as even otherwise, there exists ocular and documentary evidence, which proves that the appellants have committed the said offence. Notably, there exists dying declaration of the deceased, statement of PW-1 (complainant) as well as the relevant fact that the appellants could not produce any evidence to show that they are entitled to the benefit of alibi and other crucial fact that the motive stood proved, as it also acted as a catalyst for commission of the crime.

59. We are of the opinion that the finding and the conclusion recorded by the trial court are based on correct appreciation of evidence and do not suffer from error.

60. Accordingly, the present appeal fails and is **dismissed** and the judgment and order dated 11.9.2015 passed by Additional Sessions Judge/Special Judge Gangster

Court No. 5 Sultanpur, in Gangster Case No. 379 of 2012 (State Vs. Prem Nath and Another) arising out of case crime no. 157/2002, u/s 302/34, 504, 506 IPC, and Section 3(1) of the U.P. Gangster & Anti-Social Activities (Prevention) Act 1986, P.S. Kotwali Dehat, District Sultanpur, whereby the appellants have been convicted u/s 302 of IPC for life imprisonment and a fine of Rs. 10,000/- and in default of fine one year additional imprisonment, u/s 506 IPC for 2 years rigorous imprisonment and fine of Rs. 1,000/- each and in default of fine one month additional imprisonment is confirmed.

61. The appellants shall undergo and serve the remaining sentence awarded by the trial court concerned.

62. Let a copy of this order along with original record be transmitted to the trial court concerned for necessary information and its compliance

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(2022)02ILR A663
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 1253 of 2008

Rajpal ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sushil Kumar Pandey, Sr Atul Tej Kulshrestha, Sri D.S. Tewari, Sri Rahul Pandey, Sri Rang Nath Pandey, Sri Sukhvir Singh, Sri Vijay Kumar, Sri Vijay Singh Khokher

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Section 302-challenge to-conviction-circumstantial evidence-victim was found dead in the tractor trolley which belongs to the appellant-prosecution failed to prove the location of the trolley inside the house of appellant where crime is committed in secrecy-theory of last seen also not get attracted as prosecution failed to lead convincing evidence regarding the fact that the victim was taken away by the appellant from his house-sale deed is a registered document and the victim had accepted therein about receipt of entire sale consideration in advance, thus, this fact that sale consideration of the land was not paid to the victim is totally false-as per medical report victim did not consume liquor-Statement of PW-1 remained inconsistent regarding place of death, blood stain and several other aspects-PW-1 was not satisfied with the sale of land by his father, to the accused-He suspected involvement of the accused, But suspicion however strong, cannot form basis of convicting the appellant in absence of satisfactory proof of his guilt-prosecution failed to prove the guilt of the appellant by circumstantial evidence in the absence of direct evidence-the conviction and sentence of the appellant is set aside.(Para 1 to 40)

B. If a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. 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. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. Where an offence is committed in secrecy inside a house, a corresponding burden on the inmates of the house to give a cogent explanation. 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 an accused to offer any explanation. In the instant case, PW-1 alleged that the trolley was parked inside the house of the appellant, and he kept making improvement in his statement in an effort to prove the place of death was part of the house of the appellant but the site plan as well as statement of Investigating Officer reveals that it was part of road, though in front of the house of the appellant.(Para 31 to 37)

The appeal is allowed. (E-6)

List of Cases cited:

1. Sharad Birdi Chand Sarda Vs St. of Mah. (1984) 4 SCC 116

2. Rai Sandeep @ Deepu Vs St. (NCT of Delhi) (2012) 8 SCC 21

3. St. of W.B. Vs Mir Mohammad Umar (2000) SCC (Cr) 1516

4. St. of Raj. Vs Kashi Ram (2006) 12 SCC 254

5. Trimukh Maroti Kirkan Vs St. of Mah. (2006) SCC 681

6. ViKramjit Singh Vs St. of Punj. (2006) 12 SCC 306

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

1. The appeal is directed against the judgement and order dated 16.2.2008, passed by Additional Sessions Judge, Court No.10, Muzaffar Nagar in S.T. No.64 of 2001, convicting and sentencing the appellant under Section 302 IPC to life imprisonment and fine of Rs.15,000/-, in default of payment of fine, one year's additional simple imprisonment.

2. In brief, according to the prosecution case, Ram Phal (the victim) was father of the first informant Bablu (PW-1). He had sold four bighas of his land to Rajpal (accused-appellant). Appellant did not pay any money for the land but assured the victim that he would later give his tractor, including trolley, a machine and one lakh rupee to him as sale consideration. On 29.6.2001, at about 4:00 p.m. the accused appellant came to the house of the victim and took him alongwith him saying that he would load his tractor with bricks from a nearby brick-kiln and go to Haridwar to sell the same and profit will be apportioned by them equally, as the victim also had half share in the tractor. On 1.7.2001 at about 11:00 p.m. in the night, the accused appellant again came to the informants' house and informed him that his father had consumed excessive liquor and is gasping for breath, so he should rush and bring his father (the victim) alongwith him to their house. The first informant went to the house of the accused appellant at around 2:00 p.m. in the night. He found that his father Rampal (victim) was lying dead in the tractor trolley. He accordingly made a written complaint on 2.7.2001 at 7:30 a.m. stating that he suspects involvement of the accused-appellant in the murder of his father. It came be registered as Crime Case No.146 of 2001 under Section 302 IPC.

3. The investigation of the case was handed over to Sub Inspector P.K. Singh, who during course of investigation, prepared a site plan. Sub Inspector Har Sharan Sharma completed the inquest proceedings and thereafter the body was sent for post mortem. After completing the investigation, a charge sheet under Section 302 IPC was submitted against the appellant.

4. The trial court framed charge of murder u/s 302 IPC against the accused-appellant on 21.9.2002. The charge was to the following effect: -

"यह कि दिनांक 1.7.01 को समय 11 बजे शाम स्थान ग्राम कुटबी इलाका थाना शाहपुर जिला मुजफ्फरनगर में आपने अभियोगी बबलु के पिता रामपाल को जान से मारने की नियत से शराब पिलाकर किसी चीज से उनकी हत्या कारित की। एतदद्वारा आपने धारा 302 भा०दं०सं० के अन्तर्गत दंडनीय अपराध किया जोकि इस न्यायालय के प्रसंज्ञान में है।"

5. During the course of trial, the prosecution examined the first informant Bablu (PW-1) as a witness of fact. He proved the written Tahrir (Ex. Ka-1). Ved Pal Singh (PW2), Clerk Constable proved the chik report (check report) (Ex. Ka-2), G.D. Entries (Ex. Ka-3), Record Keepers report (Ex Ka-4). The doctor who conducted the post mortem i.e. Dr. Shashi Kumar Agnihotri, Senior Orthopedic Surgeon, District Hospital Rampur was examined as PW-3 and he proved the post mortem report (Ex. Ka-5). Sub Inspector P.K. Singh, the Investigating Officer was examined as PW-4 and he proved the site plan (Ex. Ka-6) and charge sheet (Ex. Ka-7). Sub Inspector Har Sharan Sharma, who was examined as PW-5, proved the inquest report, Chitthi R.I., Chitthi CMO, Photo-lash, chalan-lash as Ex. Ka-8 to Ex. Ka-12 respectively.

6. The accused-appellant was confronted with the incriminating facts and evidence. He denied his involvement but did not lead any oral evidence. He placed on record the original sale deed vide list paper no. 78 Kha.

7. The trial court by the impugned judgment and order convicted and sentenced the appellant under Section 302 IPC, aggrieved whereby, the instant appeal has been filed.

8. Learned counsel for the appellant Sri Sukhvir Singh, assailed the impugned judgment by contending that -

(a) The appellant has been convicted on more suspicion. There was no cogent evidence to establish the guilt of the appellant.

(b) There was no direct evidence against the appellant. The prosecution tried to establish the guilt of the appellant by circumstantial evidence, but utterly failed to exclude other possible hypothesis.

(c) The prosecution had failed to establish complete chain of evidence, consequently, there are sufficient grounds for the conclusion inconsistent with the guilt of the accused.

(d) The circumstances itself on basis of which the prosecution tried to establish the guilt were not proved. There is no convincing evidence to establish that the accused had visited the house of the victim on the fateful day i.e. 29.06.2001; that he took him alongwith him; that they stayed together for two days and during this period, the victim did not come in company of others; that the accused came to the victim's house on 1.07.2001 at 11:00 p.m. or any other time to inform PW-1 that his father was lying in tractor trolley at his house.

(e) The prosecution had utterly failed to prove that how the victim has received such injuries and how it was possible for the appellant to inflict such injuries; whether the injuries were inflicted

at the place where tractor trolley was found parked with the body of the victim lying in it or at some other place; if it was at the said place which was in midst of village abadi, how nobody else could come to know of it.

(f) The statement of PW-3 (doctor) itself indicates that such injuries could be sustained by fall from tractor. There was no evidence to indicate whether it was an accidental death or a case of homicidal death.

(g) The charge that the victim was murdered after making him drunk was not proved, as no trace of liquor was found during post mortem nor the viscera was preserved to establish the said charge.

(h) There are material contradictions in the statements of PW-1 and other witnesses regarding various important facts which leads to serious suspicion about the truthfulness of his deposition. The tractor trolley was found parked on public road, accessible to general public, and does not rule out other possibilities being the cause of victim's death.

(i) The presumption under Section 106 of the Evidence Act does not get attracted and the prosecution is not relieved of its burden to prove the guilt of the appellant beyond reasonable doubt.

(j) The prosecution story that appellant came to the house of the victim at 11:00 p.m. in the night on 1.7.2001 to inform the family about the serious condition of victim but still they went to enquire about him after three hours i.e. at 2:00 p.m. in night is wholly unnatural. No person would wait for three hours after coming to know that his family member is in need of urgent medical help.

9. On the other hand, learned AGA Sri S.A. Murtaza submitted that -

(a) the trolley on which the body was lying belonged to the accused, thus the burden was upon him to furnish explanation regarding death of the victim.

(b) as per site plan, the place where tractor trolley was found parked, was barely 30 yards from the house of the appellant. It is admitted by PW-4 P.K. Singh, Investigating Officer that open land in front of house of victim belongs to him. Therefore, the presumption under Section 106 of the Evidence Act would be attracted to the facts of the instant case.

(c) the trial court has rightly held that there was clear motive to eliminate the victim so that the appellant is relieved of the liability to pay sale consideration for the land purchased by him; that the appellant had committed the crime in a most gruesome manner and deserves no sympathy from this Court.

10. We have carefully gone through the record of the case and given thoughtful consideration to the contentions of learned counsel for the parties.

11. The present case is one in which there is no ocular evidence. The prosecution case rests entirely on circumstantial evidence.

12. The law on bringing home the guilt in criminal cases by circumstantial evidence was succinctly laid down by the

Supreme Court in **Hanumant Vs. State of Madhya Pradesh, AIR 1952 SC 343** as follows:-

"12. It is well to remember that in cases where the evidence in of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should 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 pendency 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."

13. The principles enshrined in **Hanumant** have been consistently followed and applied by the Supreme Court in all later decisions. In **Sharad Birdhi Chand Sarda Vs. State of Maharashtra, 1984 (4) SCC 116,** heavily relied upon by learned counsel for the appellant, the Supreme Court summed up the law on the subject by laying down "panchsheel" i.e. five golden principles, as follows:-

"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 and another Vs. State of Maharashtra 1973 2 SCC 793 where the observations were made :

(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."

14. The trial court took into consideration three circumstances in holding the appellant guilty. They are:

(a) The victim Rampal had sold four bigha of his land to accused Rajpal who did not pay any money for the same;

(b) On 29.6.2001 at 4:00 p.m. accused Rajpal took Rampal (victim) alongwith him to Haridwar on the pretext that they would carry bricks from a bhatta (brick-kiln) for sale to Haridwar and will divide the sale proceeds equally; and

(c) On 1.7.2001 at 11:00 p.m. accused Rajpal came to the house of the informant and told him that his father Rampal (victim) had consumed excessive liquor and is breathing with difficulty.

15. The trial court relied predominantly on the testimony of PW-1 (complainant), son of the victim in concluding that the above circumstances stood proved. Under law, there is no impediment in recording finding based on testimony of a single witness in view of Section 134 of the Evidence Act. However, such a witness should fall in the category of "sterling witness'. The Supreme Court in **Rai Sandeep @ Deepu vs. State (NCT of Delhi), (2012) 8 SCC 21**, held that - "the sterling witness" should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it.

16. We, therefore, first proceed to determine whether the deposition of PW-1 is of sterling quality and could be accepted for its face value without any further corroboration.

17. PW-1 stated that he knew the accused as he was resident of same village. His father sold four bigha of his land to the accused. The accused promised to pay rupees one lakh and hand over his tractor including trolley and lawn mover, but did not fulfill his promise. The accused came to his house on 29.6.2001 at 4 p.m. At that time, he, his father, mother and sister were present. He took his father along with him promising to take him to Haridwar to sell bricks there and divide the profit among themselves. On 1.7.2001, at about 11 p.m., he came to his house and told him and his mother that the victim had consumed excessive liquor and was having difficulty in breathing. He was lying on tractor-trolley at his house. They should bring him along. When they went to his house, his father was found lying dead in tractor-trolley. He then reported the matter to police. He proved the written Tahrir (Ext. Ka-1). He stated that his father was murdered by the appellant.

18. In his cross examination, he stated that his father sold 0.2508 hectare of his land on 9.2.2001 to the appellant. He denied that he sold it for Rs. 85,000/-. He did not know the amount at which it was sold. Then said, it was sold for one lakh plus tractor-trolley and lawn machine. The

accused did not pay any sum. He promised to pay in 10-15 days. In this regard, there was no agreement in writing, but was an oral agreement. He could not disclose the reason why the said fact was not mentioned in the sale deed. He denied the suggestion that no such oral agreement took place between the victim and the accused. He admitted that he nor his father, moved any application before any authority nor initiated any legal proceedings even after expiry of the said period of 10-15 days. He stated that the accused promised to pay the amount and the above goods at his house on 29.06.2001. Till night on 29.06.2001 the victim and the accused did not return nor the money and goods were paid/delivered. Even when the victim and the accused did not return on 30.06.2001, he did not give any information in this behalf to the police. He failed to disclose any reason for the above omission on his part. He stated that the tractor trolley was found parked inside the house of the accused. He then stated that tractor trolley was parked in the shahan of the accused's house. In his written complaint, he mentioned that as soon as he received information from the accused, he alongwith his family went to the spot. But why it is not written in the same, he failed to disclose any reason for the said omission. He then stated that he went at the spot at 2:00 O'clock. He then stated that according to his guess, it was about 2:00 O'clock. Tractor trolley was found parked in front of the gate. He denied that tractor trolley was parked on the road. He stated that blood was oozing out of the victim's mouth. There were injuries in his arms and legs. The clothes were stained with blood i.e. kurta and paijama. Blood stains were also there on tractor trolley. Victim's body was taken by the police. He then stated that after leaving the victim's body on the spot, he along with members of his family Chandra Pal S/o Chauhat Singh, Suresh S/o Kabool went to the police station. Thereafter police came on the spot. The police carried the victim's body to the police station in his private jeep. The written complaint was dictated by him to Satendra. The police handed over copy of the chik report to him immediately after it registered the complaint. The police went to the place of post mortem in his private jeep. He thereafter carried the victim's body to the village on the same jeep. The police party did not accompany them to the village. He denied that he had lodged report at police station to take revenge. He denied that the accused had given money or goods as sale consideration for the land sold. He denied that the victim was demanding more money. He stated that the police took in its custody the blood stained kurta and paijama.

19. Here it is apposite to take note of the statement of Investigating Officer, Sub Inspector P.K. Singh (PW-4). He proved the site plan Ext. Ka-6 and charge sheet Ext. Ka-7. He stated that PW-1 did not inform him during course of investigation that when the accused came to his house or that his mother and sister were present in the house. He inspected the spot where the incident took place on 2.7.2001. He stated that in the site plan, the place at which tractor trolley was found parked had been shown with letters XA. He stated that he does not clearly remember whether it was over Kharanja or pucca road but he was sure that tractor trolley was found parked on the road. He stated that he did not record statement of any person in the neighbourhood. He further stated that open land in front of house of victim was owned by him. There was no construction over it. He did not collect any blood from the site. He denied the suggestion that he had not

conducted investigation properly or made entries sitting at the police station. He identified the kurta, paijama and baniyan of the victim (material Ext. 1, 2 and 3 respectively). In his cross-examination, he stated that there was no blood stain on the kurta, paijama and baniyan.

20. Sub Inspector Har Sharan Sharma was examined as PW-5. He conducted inquest proceedings. He stated that at the time of inquest, he noticed blood and saliva coming out from the nose and mouth of the victim. There were six injuries on his body. He stated that the body was sent from the site directly for post mortem and was not carried to the police station. Constable Chhatar Pal and Mohd. Harun took the body for post mortem in the tractor trolley. When he reached the spot, he found the body lying on the tractor trolley. The trolley was not found stained with blood. There was no blood found on the ground. He reiterated that the body was taken by tractor trolley. After inquest proceedings, the Inspector went to arrest the accused. Enquiry was made regarding cause of death but no information could be collected. Apart from inquest witnesses, large number of villagers were also present. He denied that proper investigation was not done.

21. It is worthwhile to note here that when the accused was confronted under Section 313 Cr.P.C. with the incriminating circumstances that he took the victim from his house at 4:00 p.m. on 29.6.2001 and again came to his house on 1.7.2001 to inform his son that his fathers' condition is serious, the accused specifically denied it. According to the first principle laid down in **Hanumant and Sharad Birdhi Chand,** it is of utmost importance that the circumstances from which the conclusion of guilt is to be drawn, are proved beyond reasonable doubt. Thus, it has to be examined whether the prosecution has succeeded in proving the above noted incriminating circumstances or not.

22. According to PW-1, the victim was taken from his house on 29.6.2001 at 4:00 p.m. by the accused on the pretext that he will carry bricks from brick kiln to Haridwar for sale and would divide the sale proceeds in equal share, as the victim also had half share in the tractor. The victim agreed to the proposal and accompanied him. We may note here that this part of the testimony of PW1 is at variance with the stand taken in the FIR in respect of the said transaction, wherein it was alleged that the accused had promised to part with his tractor, trolley, lawn mover machine and rupees one lakh. Again, PW-1 states that accused came to his house at 4:00 p.m. on 1.7.2001 and informed him that his father had consumed excessive liquor and was having difficulty in breathing; he was lying on tractor trolley at his house; and that he should bring him back home. Now as per prosecution story, even after coming to know of the serious condition of his father, PW-1 went to fetch him at 2:00 p.m. in the night i.e. after three hours. PW-1 has not offered any explanation why he went after three hours, despite being informed about the precarious condition of his father and more particularly, when such place is in the same village. It is against normal human conduct.

23. Moreover, PW-1 stated that when accused came to his house at 4:00 p.m. on 29.6.2001, his mother and sister were also present, but none of them was examined. In villages, generally 4:00 p.m. is the time when cattle starts retreating from the fields. At that time, the villagers generally remain outside their house in connection with daily

cores. The prosecution has not examined any villager/neighbour who might have seen the victim in company of the accused.

24. The distance between village Shahpur, which is in district Muzaffar Nagar, is barely 150 km. It would not take more than three hours to reach Haridwar by tractor. Even if the accused and the victim had stayed overnight at Haridwar on 26.9.2001 to materialize sale of bricks, it was expected that they would return on the next date i.e. 30.6.2001. However, it remains unexplained that even when they did not return on the next day, PW-1 did not make any enquiry regarding their whereabouts. The same was position on next day i.e. 1.7.2001 until, as per prosecution version, the accused himself came at 11:00 p.m. in night to inform about the condition of Rampal (victim). The above factors raise suspicion on the truthfulness of the prosecution story. When PW1 was cross-examined on the said aspect, he failed to disclose reason for not making any enquiry. He admitted that he did not even report the matter to the police station. In ordinary course, such behavour seems highly improbable particularly when, as per prosecution story, there was bitterness in relationship between the accused and the victim.

25. Moreover, we find that statements of PW1 on certain important aspects, is not consistent with the testimony of other prosecution witnesses. According to PW-1, he noticed blood stain on the tractor trolley when he reached the place of occurence. He further stated that dead body of his father was taken to police station by the police in his private jeep and thereafter for post mortem in the same jeep and then brought back to the village again in the same jeep. However, according to PW-5 (S.I.), who carried out inquest on the direction of PW-4, there was no blood stain on the tractor trolley or on the ground. He stated that body was sent for post mortem directly without bringing it to the police station. He also stated that it was sent for post mortem on the same tractor trolley in variance to the statement of PW-1 that it was brought to the police station and then sent for post mortem in his private jeep.

26. We thus find that the statement of PW-1 is not beyond doubt. It is not of sterling quality so as to be relied upon without hesitation at its face value. It would not be safe to rely on his sole statement in deciding the truthfulness of the prosecution story.

27. Now, apart from the evidence of PW-1, no other witness of fact was examined to prove the incriminating circumstances noted above. The prosecution has thus failed to prove the most crucial part of its story. It has not been able to establish with certainty that the victim accompanied the appellant to Haridwar on 29.6.2001 or that he informed PW-1 on 1.7.2001 that his father was lying in tractor trolley gasping for breath.

28. As per inquest report, the cause of death was not ascertainable. The post mortem report reveals that there were following ante-mortem injuries:-

"1. Chest flattened anterioposteriorly with abraded contusions on left side of chest and abdomen wound 14x10 cm. On dissection, all ribs from third to tenth on both sides found fractured with badly lacerated pleura, lungs, pericardium also found ruptured with tear in upper part of heart and great vessels. Chest cavity filled with 1.6 litres of blood.

2. Abraded contusions 3x1.5 cm. on back of right shoulder.

3.Lacerated 3x1.5 cm. muscle deep on back of lower side of arm. Clotted blood present.

4. Contusion 29x28 cm. on right side of back of chest and abdomen. On opening liver and spleen found badly lacerated with 1.8 litre of blood in cavity.

5. Abrasion 4x2 cm. contusion on outer part of left hip.

6. Abrasion 7x2 cm. on left buttock.

7. Abrasions 4x2 cm. on front of right knee."

29. The cause of death, according to post mortem report, was haemorrhage and shock due to ante-mortem injuries. The specific charge against the appellant was that he made the victim consume liquor to murder him. The inquest report and post mortem report do not indicate that he consumed liquor. The viscera was not preserved so as to prove the prosecution case that the victim was made to consume liquor before he was done to death. Dr. S.K. Agnihotri (PW3) who conducted the post mortem was not examined on the said aspect. He stated that injuries could be sustained as a result of fall from tractor; that probable time of death could be 3/4 hours on either side from 8:00 p.m. on 1.7.2001. It means that the victim was alive for more than two days after he left his house. The prosecution has not led any evidence as to whether the tractor was taken to Haridwar or not; whether it was got loaded with bricks for sale at Haridwar as per the programme; whether the accused and the victim were having any sale proceed in their possession or not, as the trolley admittedly was found empty with only victim lying in it. The entire rib-cage was found broken. On dissection, the pleura, lungs, pericardium were found badly ruptured with tear in upper part of heart. The injuries were on both sides of the vertebral column. The person inflicting such serious injuries must have known that it would result in death of the victim. It seems doubtful that such serious injuries would have been inflicted by the victim on the road in front of his home, which as per site plan is surrounded on both side by village abadi. If on the other hand, the injuries were inflicted at some lonely place, it is highly improbable that the accused would bring the victim back to village, place his body on his own tractor in front of his house, then himself go and inform his family. If it was as a result of fall from tractor, it could also be accidental. PW4, the investigating officer, states that no blood stain was found on Material Ext. 1, 2 and 3, i.e. kurta, paijama and vest of the victim. The prosecution has failed to explain how it was possible when the victim has received so serious ante mortem injuries. The prosecution story is shrouded with mystery and does not rule out the possibility as contended by learned counsel for the appellant that some one had placed the body of the victim on the tractor trolley of the appellant after committing the crime, knowing that there was bitterness in their relationship and needle of suspicion would point towards the appellant. The prosecution has utterly failed to rule out other possible hypothesis.

30. We now proceed to examine the submission advanced on behalf of the State that Section 106 of the Evidence Act will come into play as the dead body of the

victim was recovered from the tractor trolley of the appellant.

31. Section 106 of the Evidence Act is an exception to the general rule governing the burden of proof. It applies when certain fact is specially within the knowledge of a particular person and is not capable of being known by other persons. In **State of West Bengal Vs. Mir Mohammad Umar, 2000 SCC (Cr) 1516**, the Supreme Court explained Section 106 of the Evidence Act as follows:-

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference."

32. Based on the principle enshrined in Section 106 of the Evidence Act, it was contended by learned A.G.A. that since the appellant was the last person seen in company of the victim, therefore, it would get attracted. It was further submitted that the dead body of the victim was found lying in the tractor trolley which belongs to the appellant and it was found parked inside his house, therefore, burden was upon the appellant to prove his innocence.

33. The theory of 'last seen' in criminal cases propounded in context of Section 106 of the Evidence Act has been explained by Supreme Court in **State of Rajasthan Vs. Kashi Ram, (2006) 12 SCC 254** as follows:-

"23. 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 an explanation as to how and when he parted company. 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. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution."

34. In respect of an offence taking place inside the privacy of a house where the accused had the opportunity to plan and commit the offence, it is difficult for the prosecution to find out what happened inside the house. In such a situation, often recourse is taken to Section 106 of the Evidence Act to weigh the evidence. The inmates of the house cannot get away by simply keeping quiet and offering no explanation. However, the initial burden to establish the case still lies on the prosecution. It is only the nature and amount of evidence to establish the charge that is relaxed as compared to other cases of circumstantial evidence. The said principle has been succinctly laid down by Supreme Court in para 15 in **Trimukh Maroti Kirkan Vs. State of Maharashtra**

reported in (2006) 10 SCC 681 as follows:-

"15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a 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 an accused to offer any explanation."

35. The Supreme Court while elucidating the scope of Section 106 of the Evidence Act in **Vikramjit Singh Vs. State of Punjab, 2006 (12) SCC 306**, sounded a note of caution by observing as follows:-

"14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.

15. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt."

36. In the light of above exposition of law on Section 106 of the Evidence Act, we now proceed to examine its applicability to the facts of the instant case. PW-1 alleged that tractor trolley was parked inside the house of the appellant. He then tried to explain his statement and said that it was parked in the sahan of the house. He then stated that it was parked in front of gate inside his house. When confronted, he said that it is false that it was found parked on the road. As per inquest report (Ext. 8), the body was lying in trolley when the police party arrived at the site. The said place is on Titawi - Kutwi road, about 40 yards from the statue of Martyr Rajendra. In the site plan (Ext. Ka 5), the location of tractor trolley has been shown with 'X'A. The house of the appellant is on the north and then there is open land which, according to the prosecution, is the sahan of the appellant. After open land, there is Titabi Shahpur road. The point 'X'A where tractor trolley was found parked, is located on the patari of the said road. PW-4 could not clarify whether it was part of pucca road or Kharanja. He, however, stated that it was part of the road and thus while on one hand PW-1 kept making improvement in his statement in an effort to prove that point 'X'A was part of the house of the appellant but the site plan as well as statement of the Investigating Officer reveals that it was part of road, though in front of the house of the appellant. Point 'X'A being part of

public road was accessible to the public at large. It is for the said reason that large number of villagers were found standing around the tractor trolley when the Investigating Officer visited the site, as admitted by him in his deposition. Thus, even assuming that place of occurrence of crime was where body was found lying, the said place is not inside of the house of the appellant but was accessible to public at large. Consequently, the burden of proof which lies on a person where crime is committed in secrecy inside a house, is not applicable to the facts of the instant case.

37. On the aspect of the appellant being last seen in company of the victim, it has already been held that the prosecution has failed to lead convincing evidence to establish that the accused had taken away the victim from his house at 4 p.m. on 29.6.2001, or came to his house again on 1.7.2001 at 11 p.m. to inform that the victim was lying near his house in a precarious condition. Consequently, the theory of last seen would also not get attracted, nor the provision of Section 106 of the Evidence Act.

38. The trial court has laid much emphasis on the fact that there is no evidence that any sale consideration was paid by the appellant to the victim for purchasing his land and it constituted the genesis of the crime. However, it has lost sight of the fact that sale deed is a registered document and the vendor (victim) had accepted therein about receipt of entire sale consideration in advance. Second, even if it is assumed that sale consideration was not paid or was promised to be paid as set forth in the prosecution story, the murder of the victim would not wipe out the liability of the appellant. He knew very well that his son (the first informant) and wife would be left to enforce the agreement. Thirdly, the appellant was aware that any such act on his part would land him in much greater difficulty. Had he really committed the crime, there was more likelihood of his destroying evidence relating to the crime by dumping the body at some secret place and very little possibility of himself coming to victim's house to inform his son and wife that they should rush, as the victim needed their help. There are several other possible hypothesis in given situation, which the prosecution has failed to rule out. In the absence of direct evidence, the irresistible conclusion is that the prosecution had failed to prove the guilt of the appellant by circumstantial evidence.

39. No doubt the death took place in a most unfortunate and ghastly manner. But that itself is not sufficient. The prosecution has to establish beyond reasonable doubt that the person being prosecuted is guilty of the crime. The evidence on record reveals that irrespective of the fact whether entire sale consideration was actually paid or not, the first informant (PW-1) was not satisfied with the sale of land by his father, to the accused. Consequently, when he found his father dead, he suspected involvement of the accused. This is also what he stated in the F.I.R. But suspicion, however strong, cannot form basis of convicting the appellant in absence of satisfactory proof of his guilt.

40. In consequence, the appeal has to be allowed and is accordingly allowed. The conviction and sentence of the appellant is set aside. He shall be set at liberty forthwith, if not required in any other case.

41. Office is directed to send copy of this judgment alongwith original record to

the court concerned for necessary action and compliance in accordance with law.

(2022)02ILR A676
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.02.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 1406 of 2021

Satish Verma ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Varun Chandra, Hemant Kumar Mishra, Sunil Dixit

Counsel for the Opposite Parties:
G.A., Abhishek Misra, Satendra Kumar (Singh)

A. Criminal Law - Scheduled Caste & Schedule Tribe (Prevention of Atrocities) Act, 1989-Section 14(A)(1) , Section 3(1) r s & 3(2)(va) - Indian Penal Code, 1860-Sections 406, 419, 420, 448, 323, 354, 504 & 506- dispute regarding purchase of land which was already sold to another person-inordinate delay in FIR-no time, date or place is mentioned in the FIR-several civil disputes between the parties are pending-appellant is in jail for a long time and he is not a previous convict-he is required in a case in which maximum sentence is not more than seven years-Hence, there exist no circumstances/ factors. justifying denial of bail. (Para 1 to 20)

B. Some of such circumstances should keep in mind while granting bail such as nature and gravity of charges, severity of punishment, danger of accused absconding if released on bail, character, behaviour, likelihood of offence being repeated, reasonable apprehension of the witnesses being tempered with etc. (Para 15)

The appeal is allowed. (E-6)

List of Cases cited:

1. State thru C.B.I Vs Amar Mani Tripathi (2005) 8 SCC 21

2. Rajesh Ranjan Yadav @ Pappu Yadav Vs C.B.I. Thru its Director (2007) 1 SCC 70

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

1. Heard Shri Hemant Kumar Mishra, learned counsel for appellant, learned AGA as well as Shri Abhishek Misra, learned counsel for respondent and perused the record.

2. This appeal has been preferred under Section 14 (A) (2) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 against impugned order dated 13.09.2021 passed by Special Judge, (SC/ST Act), Lucknow in bail application 5852 of 2021 arising out of Case Crime No. 575 of 2019, under Sections 406, 419, 420, 448, 323, 354, 504, 506, 120-B IPC and Sections 3(1) r s & 3(2)(va) of SC/ST Act, Police Station-Wazirganj, District- Lucknow, whereby the bail application of the appellant/applicant has been rejected.

3. Learned counsel for appellant submits that the first informant lodged the FIR on 09.10.2019 with allegation that the first informant purchased the plot from Parvatiya Sahkari Awas Samiti in the year 2008 situated in Village Nizamuddinpur, Tehsil and District Lucknow. The real owner of the plot bearing Khasra No.2 was Moharram Ali, who had already sold the whole area of Khasra no.2 to the Samiti by

registered sale deed. After death of Moharram Ali, land grabber-appellant by hatching conspiracy purchased the said land from the legal heirs of late Moharram Ali by forged sale deed. Thus, the F.I.R. was lodged against the appellant and other co-accused under Sections 406, 419, 420, 467, 468, 471, 448, 120-B, 352 IPC. But after arrest of the appellant, remand of the appellant has been taken by the investigating officer under Sections 406, 419, 420, 448, 323, 354, 504, 506, 120-B IPC and Section 3(1) r s and 3(2)(va) of SC/ST Act.

4. Learned counsel for the appellant further submits that the appellant is innocent and has been falsely implicated in this case. Prior to the alleged incident, the appellant is not known to the complainant that she belongs to SC/ST. As per FIR version, no allegation of SC/ST Act is made out against the appellant. It is further submitted that the appellant and other co-accused have purchased parts of the aforesaid land by three different sale deed from the legal heirs of late Moharram Ali namely Mohd. Aleem, Mohd. Majeed and Smt. Jareen. Thereafter, the name of the appellant has been mutated in the revenue records. After mutation, several civil litigation were run between the parties and later on, Additional Commissioner (Judicial), Lucknow has cancelled the name of appellant. Being aggrieved from the order of the Additional Commissioner, Lucknow, the appellant filed a writ petition before this Court bearing No.13741 (MS) of 2019, in which this Court directed that the parties shall maintain status quo vide order dated 29.5.2019 (Annexure-3).

5. Learned counsel for appellant further submits that statement of the complainant was recorded under Section 164 Cr.P.C. on 4.8.2020, in which no specific role is assigned to the appellant and general allegation has been levelled against appellant. The investigating officer further recorded the statement of complainant on 25.8.2020, in which she improved the prosecution case by making several allegations against the accused persons. It is further submitted that after the death of of Moharram Ali, his legal heirs namely Mohd. Aleem, Mohd. Majeed and Smt. Jareen have mutated their name in Khasra No.2 measuring 1.294 hectare and after mutation, they have sold the said land to the appellant and thereafter the name of appellant was also mutated in revenue records.

6. Learned counsel for appellant further submits that on perusal of evidence, it transpires that the appellant is the bonafide purchaser of the land in question. It is further submitted that at the time of purchasing of the land in question, the appellant has no knowledge that the said land has already been sold by late Moharram Ali. Thus, the appellat is also sufferer.

7. Learned counsel for appellant submits that no specific role is assigned to the appellant for hatching any conspiracy. Several civil disputes between the parties are pending. The trial court without appreciating the evidence available on record wrongly rejected the application of the appellant. It is further submitted that the appellant is not a previous convict and he is languishing in jail since 13.8.2021. So, learned counsel prays to set aside the order passed by the trial court and allow the appeal.

8. Learned AGA as well as learned counsel for respondent has vehemently

opposed the prayer made by the counsel for appellant and submitted that the appellant is very well known that the land in question is already sold by Late Moharram Ali. The appellant in connivance with one Gyan Prakash succeeded the land and got their name entered in the revenue records. The appellant along with Gyan Prakash purchased the land from legal heirs of late Moharram Ali, even after the knowledge that the land had already been sold and construction was raised. It is also submitted that the disputed facts have been placed before this Court and the writ petition bearing No.13741 (MS) of 2019 has been dismissed by this Court vide order dated 1.10.2021. It is further submitted that the appellant and their associates have full knowledge that the land in question had already been sold and purchaser and first informant have constructed their houses, but by hatching conspiracy with co-accused succeeded to get entered his name in the revenue records and within one month, the accused-appellant-land grabber got the land.

9. Learned counsel for first informant further submits that appellant withheld the fact that there are several criminal history against appellant and on this account, bail application of appellant is liable to be rejected. Learned counsel has drawn attention of the Court towards order of this Court bearing Bail No.43160 of 2020. The relevant portion of which is reproduced hereunder:

"10. On the point of criminal history, this Court has perused the free copy of the order dated 24.9.2020 passed by the Additional Sessions Judge, Court No. 6, Firozabad in Bail Application No. 1403 of 2020, CNR No. UPFD03867-2020, Uday Pratap urf Dau vs. State of U.P. by which the bail application of the applicant has been rejected by the court below. The same is annexed as annexure no. 11 to the affidavit. The said order does not attend about the criminal history of the applicant. In the said order while mentioning the arguments as raised on behalf of the applicant, it has specifically been mentioned that the applicant is "not a previous convict." There is no discussion by the court about the said argument in the order rejecting bail of the applicant.

11. Not only in this case but in many other cases it is seen that there is an averment made that the applicant/accused is not involved in any other criminal case before this Court. The order rejecting bail by the courts below is silent about the criminal antecedents of the applicant/accused but on the basis of instructions of learned Additional Government Advocate of this Court or on the basis of instruction of learned counsels for the first informant, it transpires that the applicant/accused has previous criminal history. When the learned counsels are countered with the same it becomes embarrassing for them and is also an impediment in deciding the said bail application due to the non-disclosure of the criminal history of the accused. Although the criminal antecedents of the accused are not the sole and decisive factor for decision of bail applications but the same needs to be considered while deciding an application for bail under Section 439 Cr.P.C. as per the legislative mandate of Section 437 Cr.P.C.

12. This Court directs the courts below in the State of Uttar Pradesh to attend the issue of criminal antecedent(s) of accused persons while deciding bail applications under Section 439 Cr.P.C. and

give a complete detail of the criminal antecedent(s), if any, of the applicant(s)/accused before them or record the fact that there are no criminal antecedent(s) of the said person(s) if there are none."

10. Learned counsel for appellant submits that at the time of filing of the appeal, the affidavit is sworn by wife of the appellant and she has no knowledge about criminal history of appellant and also it is not mentioned in the impugned order passed by the trial court. So, learned counsel could not explain the criminal history of appellant.

11. Criminal history of appellant is filed by learned AGA as well as learned counsel for respondent by means of counter affidavit, which is as follows:

"(i) Case Crime No.113/13, under Sections 323/504/506 IPC, Police Station- Indira Nagar, Lucknow.

(ii) Case Crime No.188/13, under Sections 147/452/323/506/392 IPC, Police Station- Indira Nagar, Lucknow.

(iii) Case Crime No.235/13, under Sections 323/504/506 IPC, Police Station- Indira Nagar, Lucknow.

(iv) Case Crime No.121/13, under Sections 444/427/504/506 IPC, Police Station- Indira Nagar, Lucknow.

(v) Case Crime No.449/16, under Sections 419/420/467/468/471/406/504 IPC, Police Station- Indira Nagar, Lucknow.

(vi) Case Crime No.590/16, under Sections 406/420/467/468/471 IPC, Police Station- Indira Nagar, Lucknow.

(vii) Case Crime No.503/18, under Sections 406/420 IPC, Police Station- Indira Nagar, Lucknow.

(viii) Case Crime No.687/18, under Sections 406/420 IPC, Police Station- Indira Nagar, Lucknow.

(ix) Case Crime No.695/18, under Sections 504/506 IPC, Police Station- Indira Nagar, Lucknow.

(x) under Section Gunda Act, Police Station- Indira Nagar, Lucknow.

(xi) Case Crime No.49/19, under Sections 406/420 IPC, Police Station- Indira Nagar, Lucknow.

(xii) Case Crime No.40/19, under Sections 323/504/447 IPC, Police Station- Indira Nagar, Lucknow.

(xiii) Case Crime No.281/20, under Sections 406/420/120B/427 IPC, Police Station- Wazirganj, Lucknow.

(xiv) Case Crime No.575/19, under Sections 406/ 419/ 420/ 448/ 323/ 504/506/354/120B IPC and 3(1)da, dha, 3(2)a of SC/ST Act, Police Station- Wazirganj, Lucknow."

12. Learned counsel for appellant submits that all the above-mentioned cases are pending before the trial court and on the basis of criminal history, the appeal cannot be rejected.

13. I have heard learned counsel for the parties and perused the record. On perusal of the FIR, it transpires that the FIR is lodged after inordinate delay. No time, date or place is mentioned in the FIR. On perusal of the entire record, it

reveals that several civil disputes between the parties are pending. The appellant is languishing in jail since 13.8.2021 and the maximum sentence provided in this Section is not more than seven years. All the criminal cases against the appellant as mentioned by learned AGA as well as learned counsel for respondent are pending. Apart from this, the appellant is not a previous convict.

14. Although, learned A.G.A. as well as learned counsel for respondent opposed the prayer for bail but could not place anything before this Court so as to bring any circumstance existing, justifying denial of bail to accused-applicant when he is already in jail for a long time.

15. Supreme Court in ***State though C.B.I. Vs. Amar Mani Tripathi 2005 (8) SCC 21*** has also observed that normally bail should have been granted unless there exist circumstances/factors justifying denial thereof. Some of such circumstances have been stated as under:

"(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the charge;

(iii) severity of the punishment in the event of conviction;

(iv) danger of accused absconding or fleeing if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being tampered with; and

(viii) danger, of course, of justice being thwarted by grant of bail."

16. In ***Rajesh Ranjan Yadav @ Pappu Yadav vs Cbi Through Its Director, 2007 (1) SCC 70*** while recognizing that personal liberty is a valuable constitutional right recognized under Article 21, Court observed that while considering question of bail, judicial approach balancing personal liberty as well as interest of the society and also other relevant factors must be observed. Court further held that personal liberty of an accused or convict is also a fundamental right but if the circumstances so justify, it can be eclipsed. The length for which an accused has remained in jail before conviction, i.e., during investigation or trial, is a relevant consideration for the reason that in case ultimately the incumbent is found not guilty, i.e. having not committed any offence, it would be a travesty of justice to keep such a person in jail for years together and denial of personal liberty in such a case though may be mitigated by awarding appropriate compensation but cannot appropriately be compensated at all. Simply because Court takes a long time in trial, it will not be justified to keep a person in jail on the ground that Court or the prosecution is not efficient enough in completing trial in a reasonably short period and the incumbent must remain in jail, even though ultimately he may be found innocent. In fact, if a person is acquitted after a long and delayed trial, though incumbent was throughout in jail, even Judicial Officer would be having a feeling of contrition facing a situation where a person has served sufficiently a long term in imprisonment though, is found innocent and ultimately acquitted. No

uniform principle can be laid down since every matter would depend on the circumstances of each case and it cannot be said that a person has remained in jail for long time, for that reason alone bail must be granted, but the period during which an incumbent has been remained in jail, during investigation or trial is a relevant factor. These are certain guidelines laid down in ***State through C.B.I. v. Amar Mani Tripathi (supra)*** were reiterated in ***Rajesh Ranjan Yadav @ Pappu Yadav vs CBI (supra).***

17. In view of above and looking to the facts and circumstances of the case, without expressing any opinion on merits of the case, I think it appropriate to release appellant/applicant on bail.

18. Impugned order dated 13.9.2021 is set aside.

19. The appeal is hereby allowed.

20. Let appellant- **Satish Verma** be enlarged on bail in the aforesaid case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following additional conditions, which are being imposed in the interest of justice:-

(i) The appellant shall not tamper with the evidence of witnesses and shall not commit any offence.

(ii) The appellant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iii) The appellant shall remain present before the trial court on each date fixed, either personally or through her counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iv) In case, the appellant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the appellant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(v) The appellant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the appellant 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.

(vi) The accused/appellant shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

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

(viii) The concerned Court/ Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2022)02ILR A682
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.01.2022

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE JAYANT BANERJI, J.

Criminal Appeal No. 5949 of 2010

Bhao Prakash ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Krishna Gopal, Sri Prabhat Pandey, Sri Suneel Kumar Tiwari, Sri Gyan Singh

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860-Section 376-challenge to-conviction- delay in FIR-prosecutrix (minor) had been raped by her own father-testimony of PW-4(victim) proved beyond reasonable doubt according to injury report and the same has been corroborated by PW-3(mother) and PW-5(grand-mother)-an application for altercation was moved by PW-3, she kept mum on the rape issue, but in the compelling circumstances she lodged FIR against the appellant as she had been thrown away out of the house-She tried to hide this occurrence being made public, there was no ulterior motive behind it-The testimony of PW-3(mother) and PW-4(victim) had withstood wrath of strenuous cross-examination by the defence but held its foot firmly to the ground-non-description of commission of rape in earlier application would not cause any adverse impact to the case of prosecution-Trial court rightly recorded findings of conviction and awarded appropriate sentence.(Para 1 to 32)

The appeal is dismissed. (E-6)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard learned counsel for the appellant, learned A.G.A. for the State and perused the record of this appeal.

2. By way of instant criminal appeal, challenge has been made to the judgment and order of conviction dated 05.08.2010 passed by Additional Sessions Judge, Court No.5, Bareilly, in Session Trial No.174 of 2008, State Vs. Bhao Prakash, arising out of Case Crime No.964 of 2007, under Section 376 I.P.C., Police Station Nawabganj, District Bareilly whereby the appellant has been sentenced to imprisonment for life coupled with fine Rs.1,00,000/- with default stipulation to suffer additional imprisonment for one year.

3. Facts as incarnated refers to the context that the first information report was lodged by one Veerwati (mother of the victim) and (wife of the accused-appellant), resident of Bahor Nagla, Police Station Nawabganj, District Bareilly against the accused-appellant on 14.09.2007 at 2:25 p.m. regarding the incident of rape having been committed by the accused-appellant who is none other than father of the victim wherein it was described that on 03.08.2007 around 11:00 p.m. up to 12:00 in the midnight, the accused-appellant came to the house in drunken condition and took away forcibly his daughter in his room who was sleeping with her grand-mother Durga Devi, and committed rape upon her. The incident was witnessed apart from the informant by the grand-mother Durga Devi.

It so happened that the accused-appellant (husband of the informant) did not let her go to the police station for lodging the first information report instead beat the informant and ousted from his house in the following morning due to which the informant along with her children began to reside at her parental home at Mudiya Gagroop, Police Station Bhuta, District Bareilly and she did not whisper about the incident to anyone on account of public disrepute but she has been compelled by circumstances to lodge the first information report against the accused-appellant at this stage, which was scribed by Harish Kumar son of Lal Ram. This written report is Ext. Ka-1.

4. Record reflects that contents of this written report (Ext. Ka-1) were taken down in the concerned Check FIR at Case Crime No.964 of 2007 under Section 376 I.P.C., Police Station Nawabganj, District Bareilly, on 14.09.2007 at 2:25 p.m. Check FIR is Ext. Ka-4. Consequently, relevant entries were made in the concerned general diary at Serial No.30 at 2:25 p.m. on 14.09.2007 and case was registered on 14.09.2007 under the aforesaid section of I.P.C. at aforesaid case crime number against the accused-appellant. G.D. entry is Ext. Ka-5.

5. Record further reveals that the investigation ensued and during course of the investigation, the victim was produced for medical examination before Dr. P.L. Sharma, Medical Officer, on 15.09.2007 wherein upon internal medical examination, no mark of injury was seen on the private part of the victim. Vagina admitted one finger, rarely admitted two fingers, apart from other symptomatic analysis, no definite opinion could be given regarding commission of rape upon the victim. The age of the victim was assessed to be around 15 years. The medical examination report is Ext. Ka-2. Supplementary medical report which has been proved by Dr. P.L. Sharma PW-2 is Ext. Ka-3.

6. As the investigation proceeded it was taken over by Ram Prakash Singh Rathore PW-9, who took note of the relevant entry made in the Check FIR, concerned general diary and recorded statement of Constable Vijay Pathak, the informant Veerwati, prosecution witnesses and visited the place of occurrence at village Vahornagala, Police Station Nawabganj, District Bareilly.

7. Besides, Ram Prakash Singh Rathore PW-9 recorded statement of various other persons and prepared site plan Ext. Ka-8 at the pointing out of the victim. He perused and noted contents of the medical examination report pertaining to the victim. After completing the investigation, he filed charge sheet Ext. Ka-9 against the accused-appellant under Section 376 I.P.C.

8. Thereafter, the case of the accused-appellant was committed to the court of Sessions from where it was madeover for trial and disposal to the court of the aforesaid Additional Sessions Judge, who after hearing the prosecution and accused-appellant on the point of charge, was prima facie satisfied with the case and framed charge under Section 376 I.P.C. Charge was readover and explained to the accused-appellant who abjured charge and claimed to be tried.

9. The prosecution was asked to adduce its testimony whereupon the prosecution produced in all ten witnesses.

A brief sketch of the same requires mention at this stage as *ut infra:-*

10. PW-1 is Harish Kumar, scribe of the written report. PW-2 is Dr. P.L. Sharma who has medically examined the victim on 15.09.2007 and also proved the medical examination report as well as supplementary medical examination report. PW-3 is Veerwati, informant (mother of the victim and wife of the accused-appellant). PW-4 is the victim. PW-5 is Durga Devi, grand-mother of the victim who is witness of fact. PW-6 is Constable Vijay Pal Singh who prepared check F.I.R. and noted contents thereof in the concerned general diary of date 14.09.2007. PW-7 is Dr. Virendra Kumar, Pathologist who examined vaginal slide pertaining to this offence and proved the pathological report as Ext. Ka-6. PW-8 is Dr. Ram Manohar, Radiologist who conducted radiological test on the person of the victim and has proved the radiological report as Ext. Ka-7 and x-ray plate as material Exts. 1 and 2. PW-9 is Ram Prakash Singh Rathore, Investigating Officer. He investigated the case and filed charge sheet Ext. Ka-9 against the accused-appellant. PW-10 is M.M. Khan, S.H.O. who, in fact, arrested the accused-appellant on 15.09.2007 at 8:30 p.m. and prepared arrest memo Ext. Ka-11 and has proved the general diary entry Ext. Ka-12 numbered as 55 at 21:15 hours of the aforesaid date at Police Station Nawabgaj, District Bareilly.

11. Thereafter, evidence for the prosecution was closed and statement of the accused-appellant was recorded under Section 313 Cr.P.C. wherein he denied his implication in this incident and claimed to have been falsely implicated in this case on account of jealously and enmity nurtured by the informant and also questioned the investigation of this case. In reply, he has submitted in writing that his wife and his mother on the basis of false case were trying to grab his property. In fact, Durga Devi PW-5 is his mother and has associated herself with his father-in-law Lala Ram and is residing with him and at the instance of Lala Ram, she has sold 11 'bighas' land to his wife Veerwati (informant). The mutation proceedings mooted at the instance of Veerwati were subsequently rejected after it was objected by other family members.

12. An application regarding the present incident was moved before the Senior Superintendent of Police, Bareilly, dated 08.08.2007 wherein the fact of the informant being ousted from his house on 03.08.2007 was alleged, whereas, the application does not point out about commission of the rape by the accused-appellant upon the victim. In fact, the entire exercise has been done to grab the property of the appellant and false case of rape has been set up against him. He is innocent and cannot think of committing rape upon his daughter and the victim was cleverly cajoled and influenced by the informant (wife of the accused-appellant) and Durga Devi (mother of the accused-appellant), due to which she is not telling the truth before the trial court.

13. Noticeable that during course of the cross-examination, typed application addressed to the Senior Superintendent of Police, Bareilly, dated 08.08.2007 containing description of the incident on 03.08.2007 is available on record and is marked as Ext. Kha-1.

14. As a sequel to it, the case was posted for extending arguments pros and cons by the parties and after vetting the

case on merits, the learned trial court returned finding of conviction against the accused-appellant under Section 376 I.P.C. and sentenced him with imprisonment for life coupled with fine Rs.1,00,000/- with default stipulation, ut supra.

15. Consequently, this appeal.

16. Learned counsel for the accused-appellant has contended that it is a false case. The first information report is highly belated and manipulated and is outcome of deliberation and consultation. There is no explanation as to how and why the first information report was lodged by the informant on 14.09.2007, whereas, the fact is that some altercation hassling between both the sides took place and the accused-appellant being on the one side and the informant, his daughter and his mother being on the other side conspired with Lala Ram, father-in-law of the accused-appellant for grabbing the land of the accused-appellant and sending him behind the bars by levelling false allegation of commission of rape being committed upon his own daughter by the accused-appellant.

17. Further contended that in case any offence of rape was committed by the accused-appellant then the informant should have communicated the same fact to the Senior Superintendent of Police, Bareilly, while she moved an application dated 08.08.2007 before the Senior Superintendent of Police, Bareilly but this application which is Ext. Kha-1 reflects that not a single word has been spelt about commission of offence being committed by the accused-appellant upon his own daughter.

18. Next contended that the first information report is highly motivated and the victim was under influence of her grand-mother and mother due to which she has not been telling truth and the trial court has not taken serious view of the matter and has ignored the application of the informant addressed to the Senior Superintendent of Police, Bareilly and has wrongly recorded the finding of conviction and thus passed the sentence, which is not justified.

19. While retorting to the aforesaid facts, learned A.G.A. has submitted that there is no point in claiming false accusation, for the reason that the victim in all genuineness has come with a case of rape being committed upon her by her father. It is the case of the prosecution that out of public disrepute, the matter was tried to be suppressed by the informant herself. It so happened that the informant being ousted from the house by the accused-appellant was pressurized to disclose real cause that she had to come with actual incident which in fact occurred on 03.08.2007 and offence was committed by the accused-appellant.

20. The statement of the victim on the point of commission of rape is conspicuous, clinching, consistent and the same inspires confidence. Moreso, on point of rape being committed upon the victim by the accused-appellant, two witnesses namely wife and mother of the accused-appellant have also corroborated testimony of the victim and have narrated the very beginning of the incident and behaviour of the accused-appellant during course of the occurrence. Learned trial Judge after considering the entire gamut of testimony on record vis-a-vis facts has justifiably returned the finding of conviction and has passed appropriate sentence against the accused-appellant.

21. We have also considered rival submissions - ut supra - of the parties.

22. After considering the rival submissions and perusing record of this case, the moot point that arises for adjudication of this appeal relates to the fact whether the prosecution has been able to prove the charge under Section 376 I.P.C. against the accused appellant beyond reasonable doubt and the incident was, in fact, witnessed by Durga Devi PW-5 ?

23. Now insofar as the merit of the case is concerned, we upon careful perusal of the written report Ext. Ka-1 gather that in this case, clear cut allegation regarding rape being committed by the accused-appellant upon her own daughter, aged 13 years has been made in innocuous term and as per description contained in the first information report, it so happened that it was around 11:00 p.m. up to 12:00 in the midnight of 3/4.9.2007, the accused-appellant is stated to have come to his house in drunken condition and took away forcibly the victim (his daughter) to his room who was sleeping with her grand-mother, Durga Devi.

24. Now the argument has been extended by learned counsel for the appellant to the extent that this accusation has been done just to grab the property of the accused-appellant but it is not so, insofar as the property that has been sold out to the informant by the mother of the accused-appellant, is concerned that being subject matter of the dispute on the civil side cannot have any relevance as the motive for false implication in this case, particularly, for the reason that the property belonged to family members itself and Durga Devi has sold out her share of the property to her daughter-in-law (informant Veerwati). To raise claim that mother of the accused was being guided by his father-in-law has been categorically denied both by PW-3 Veerwati and PW-5 Durga Devi.

25. Testimony of the victim PW-4 is innocuous on the point of rape and she is minor and she has given every detail of the occurrence. She has corroborated fact that she sustained some injury although blood did not ooze out. She has testified to the ambit that the accused-appellant is her father and committed rape upon her in the sense that he acted like husband with his wife. She has been parried question as to how she can say so whereupon she explained that after her marriage, she came to know about cohabitation between husband and wife. Noticeable that the victim was examined before the trial court as PW-4 when she had been married with someone after the occurrence.

26. Now the point worth consideration is that not only the wife of the accused-appellant is claimed by the accused to be hostile to him but also the mother and daughter of the accused-appellant have not supported him who stand in closest relationship with him. Each and every aspect of the occurrence has been consistently supported by the prosecution. At some stray point, the victim has deviated and perhaps improved while she testified to the ambit that some firing was also done by the accused-appellant, whereas, that aspect does not find corroboration from testimony of the other two witnesses of fact - say Veerwati PW-3 and Durga Devi PW-5 but that improvement or embellishment appearing in the testimony of the victim would not adversely effect the point of commission of the offence because on the point of commission of rape upon the victim by the

accused-appellant who is none other than the father of the victim, is clinching and consistent and version of the victim is fraught with truthfulness.

27. Coming back to the meritorial aspect of this case, as disclosed above we may obverse that in catena of cases, this Court (High Court) as well as Hon'ble Apex Court have elaborately laid down law that in cases involving accusation of rape where testimony of the prosecutrix appears to be clinching, inspiring confidence and consistent with the version of the prosecution case then testimony so forthcoming is to be relied and acted upon by the Courts and finding of guilt based on such testimony can be recorded.

28. So far as the testimony on point of commission of rape is concerned the same has been proved beyond reasonable doubt by testimony of the victim (PW-4), and corroborated by Veerwati PW-3 and Durga Devi PW-5. The defence could not make any dent in it. The testimony of the victim and the two witnesses of fact regarding the occurrence of rape when read as a whole proves beyond shadow of doubt the charge brought against the accused.

29. Contention raised to the extent that prior to the lodging of the report the informant had moved an application before the Senior Superintendent of Police, Bareilly, on 08.08.2007 wherein altercation described was relating to 3rd August, 2007 - the very day on which rape was allegedly committed by the accused, but this application does not whisper about any rape being committed upon victim by the accused-appellant. The contention sounds well to reason but falls short of, to invoking our favourable response for the reason that the informant Veerwati PW-3 has stated in categorical terms that she tried to hide this occurrence being made public but compelling circumstances forced her to lodge the report. This testimony of Veerwati (PW-3) has withstood wrath of strenuous cross examination by the defence but held its foot firmly to the ground. Therefore, non-description of commission of rape in the application dated 08.08.2007 by the informant would not cause any adverse impact to the case of the prosecution.

30. Moreso, there is no plausible reason or circumstance either apparent or implicit which may give credence to any theory of false implication with ulterior motive. In this way, we also notice that learned trial Judge has taken just and consistent view of testimony on record and has justifiably recorded finding of conviction and awarded appropriate sentence against the accused-appellant which judgment of conviction and imposition of sentence need not be interfered with by us in this appeal.

31. Accordingly, we uphold the judgment and order of conviction dated 05.08.2010 passed by Additional Sessions Judge, Court No.5, Bareilly, in Session Trial No.174 of 2008, State Vs. Bhao Prakash, arising out of Case Crime No.964 of 2007, under Section 376 I.P.C., Police Station Nawabganj, District Bareilly.

32. In the result, the instant appeal being devoid of merit is dismissed.

33. In this case, appellant Bhao Prakash is in jail. He shall serve out the remaining sentence imposed upon him by the trial court.

34. Let a copy of this judgment/order be certified to the court concerned for

necessary information and follow up action.

(2022)02ILR A688
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 6969 of 2008

Satya Prakash ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ashok Kumar Singh, Sri Chandra Narayan Mishra, Sri Imran Mabood Khan, Sri J.S. Sengar, Sri Prashant Kumar Srivastava, Jag Narayan, Sri Ramesh Chandra Agrahari, Sri Rishav Paney, Sri Kmal Krishna (Senior Counsel)

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Section 302-challenge to-conviction-solitary eye witness-statement of PW-1 remained insconsistent and unreliable-PW-4(eye-witness) examined who stated he saw the accused running away but this deposition is at variance with his statement u/s 161 CrPc, PW-4 testimony is also not reliable-no evidence, either documentary or oral, of any kind in respect of treatment or admission of the deceased in an injured condition in the hospital-no evidence to demonstrate that the murder weapon was recovered and connected with empty cartridge found on the spot-PW-5 stated that the nature of the injuries were such that the deceased would have died instantaneously- PW-8 (I.O.) arrived without any delay and he saw the spot where deceased was shot, including site plan, is proved to be public road whereas statement of the PW-1 stated the deceased was shot inside the house where they were sitting on the cot-Hence, prosecution has failed to prove its case beyond the pale doubt and therefore, the appellant is entitled to the benefit of doubt.(Para 1 to 26)

The appeal is allowed. (E-6)

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is against the judgment and order dated 18.09.2008 passed by the First Additional Sessions Judge, Kannauj in S.T. No.57 of 1998 convicting the appellant (Satya Prakash) under Section 302 IPC and sentencing him to imprisonment for life with fine of Rs.5,000/- and a default sentence of additional one month.

Introductory Facts

2. In a nutshell, the prosecution story as narrated in the first information report (FIR) is that, on 28.06.1998, at about 9 pm, the informant Harish Chandra (PW-1) and his brother Phool Chandra (the deceased) were sitting at the door of their house when Satya Prakash (the appellant), Kanhaiya (who died during trial), both sons of Shiv Balak Tripathi, Bahadur son of Jaijram Yadav and Ramu Tripathi son of Kailash Nath Tripathi came armed with country made pistols and, on exhortation of Kanhaiya, the appellant (Satya Prakash) fired from his country made pistol at the deceased, with a view to take his life, which hit the deceased. On raising alarm, Mool Chand Raidas (PW-2), Ram Kumar Tripathi (not examined), and Shiv Sharan Tripathi (not examined) and various other persons came and witnessed the incident. The accused ran away by extending threats. The written report (Ex. Ka-1) of the

incident, alleging as above, was submitted by PW-1 by adding that the brother of the informant, namely, Phool Chandra (the deceased), has been taken to the hospital and after getting him admitted in the hospital, the informant has come to lodge the FIR. This written report was registered as Case Crime No.410 of 1998 at P.S. Kannauj, District Kannauj, vide G.D. Entry No.30 (Ex. Ka-5), dated 28.06.1998, at 23.10 hrs, of which the Chik FIR (Ex. Ka-4) was prepared and both were proved by PW-6 (retired Head Constable Chhedi Lal Gupta). Initially, the case was registered under Section 307, 504, 506 IPC but, later, vide report No.3, dated 29.06.1998, at 2.15 am, the case was converted to one punishable under Section 302, 504, 506 IPC. The carbon copy of the G.D. Entry No.3 in respect of alteration of the charging section was proved by PW-6 and exhibited as Ex. Ka-6. In the meantime, a seizure memo (Ex. Ka-2), dated 28.06.1998, signed by Mool Chand Tripathi (PW-3) and Atul Kumar Tripathi (PW-4), in respect of lifting blood stained earth and plain earth as well as one empty 12 bore cartridge from the spot, was prepared which was proved by PW-3, PW-4 and the first investigating officer (I.O.) (PW-8). On 28.06.1998 itself, site plan (Ex. Ka-8) was also prepared by PW-8 and, on 29.06.1998, at about 11 am, inquest was completed at Dixit Hospital, Kannauj of which inquest report (Ex. Ka-9), witnessed by PW-1, amongst others, was prepared. Thereafter, at about 6.20 pm, on 29.06.1998, autopsy on the body of the deceased was carried out at District Hospital, Fatehgarh of which, post-mortem report (Ex. Ka-3) was prepared and proved by Dr. S.K. Saxena (PW-5).

3. The post-mortem report (Ex. Ka-3) reveals: (i) that Rigor Mortis had passed away on upper extremities though present in lower extremities; (ii) that there was a multiple pellets entry wound on front of the head, forehead and face including both eyes and upper part neck with margins inverted lacerated and ecchymosed; and (iii) that internal examination disclosed presence of 150 gm of pasty matter in the stomach; trachea and larynx lacerated; frontal bone of the skull (occipital region) and nose fractured. The estimated time of death was half a day before.

4. After completing the investigation, the second investigating officer Om Prakash Sharma (PW-7) submitted charge sheet (Ex. Ka-7). On which, cognizance was taken and the case was committed to the court of session. All the accused were charged under section 302 read with section 34 IPC and section 506 IPC. The accused pleaded not guilty and claimed for trial.

5. In the trial, the prosecution examined:- Harish Chand Tripathi (PW-1- the informant - the brother of the deceased) as an eye witness; Mool Chand Raidas (PW-2), as an eye witness but he was declared hostile; Mool Chand Tripathi (PW-3 - the other brother of the deceased) as witness of the seizure memo (Ex. Ka-2); Atul Kumar (PW-4 - the son of the deceased), another witness of the seizure memo (Ex. Ka-2); Dr. S.K. Saxena (PW-5), who conducted the post-mortem examination of the deceased; Head Constable Chhedi Lal Gupta (PW-6), who made GD entry of the written report of the incident as well as alteration in the charging section; Om Prakash Sharma (PW-7), the second investigating officer, who completed the investigation and submitted charge sheet; and Ganesh Bajpai (PW-8), the first investigating officer (I.O.), who proved various steps of

investigation including collection of blood stained earth, plain earth and empty 12 bore cartridge from the spot; preparation of site plan; inquest proceedings; preparation of photo nash, chalan nash, etc; and the steps to arrest the accused.

6. The incriminating circumstances appearing in the prosecution evidence were put to the accused persons including the appellant for recording their statement under Section 313 CrPC. The accused claimed that they are innocent; the prosecution story is false; and that they have been implicated on account of previous enmity.

7. The trial court by placing reliance on the ocular evidence of PW-1 and upon finding that no specific role was attributed to other accused except the present appellant, convicted and punished the appellant and acquitted the remaining accused.

8. We have heard Sri Kamal Krishna, learned Senior Counsel, assisted by Sri Chandra Narayan Mishra, for the appellant; Sri Rajendra Prasad Mishra and Ms. Arti Agrawal, learned AGA, for the State; and have perused the record.

Submissions on behalf of the Appellant

9. The learned counsel for the appellant has submitted as follows:-

(a) That no serious motive for the crime has been proved as against the appellant to kill the deceased because the motive, if any, to commit crime was as against PW-1 (the informant), inasmuch as informant's wife's niece, who was married to the appellant, had left the appellant and, therefore, the appellant bore a grudge against the informant as, despite requests, he failed to ensure restitution of appellant's conjugal rights.

(b) That the presence of the informant i.e. sole eye witness of the incident (PW-1) at the spot appears doubtful because if he had been present, the motive being against him, he would not have been spared; that PW-3 is not an eye witness; and that though, PW-4, in his deposition in Court, stated that he saw 4 persons including the appellant running away from the spot but, that was an improvement on what he stated under section 161 CrPC. Thus, no one witnessed the incident.

(c) That the testimony of PW-1 does not inspire confidence for the following reasons:

(i) In his examination-in-chief he states that he and the deceased were sitting on a *Takhat* (wooden cot) placed in the verandah of their house when the accused arrived with pistol and, on exhortation of Kanhaiya, the appellant fired at the deceased, which hit the deceased on the face and he fell on the spot whereas, the body of Phool Chandra was not found inside the house but on the road. This suggests that the deceased had not witnessed the incident. However, later, to make his testimony in sync with the spot position, during cross examination, by way of improvement, he stated that when the accused arrived and were abusing, the deceased went out and thereafter, shot was fired. This improvement was during the course of trial and that too, after examination-in-chief, whereas, such stand was not there even in the statement recorded under section 161 CrPC.

(ii) PW-1 stated that after the deceased was hit by gunshot, the deceased was rushed, in an injured condition, to Vinod Hospital in a cart. There, the doctor, seeing deceased's condition, advised to take him to Kanpur, upon which, while PW-3, the other brother of PW-1, was making arrangements to take the deceased to Kanpur, PW-1 came to the police station to lodge the FIR. This story narrated by PW-1 is at variance with the statement of PW-4, the son of the deceased, who stated that when he heard the gunshot he came out to the spot, saw a gathering of people at the spot and his father lying on the road; the police arrived within half an hour, and took away his father. PW-4 also stated that he had gone to the police station with the body of his father and from there, they had taken the deceased to Vinod Dixit Hospital where Dr. Vinod told that his father is no more alive; thereafter, they all waited with the body at the police station and in the morning, the inquest report was prepared and the body was sent for postmortem. If PW-4 testimony, which finds corroboration in the testimony of PW-8, is to be accepted, the deceased had died at the spot therefore, rushing the deceased to the hospital and, thereafter, returning back to the police station to lodge the FIR appears to be a ploy to buy time to explain the delay in lodging the FIR as this delay was utilised to contrive the prosecution story.

(iii) PW-1's testimony is unreliable also for the reason that in his statement made during cross examination on 15.02.2005, he stated as follows:-

"मैने रिपोर्ट में यह बात नही लिखायी थी कि फूलचंद तखत से उतरकर सड़क पर गये। मैने दरोगा जी को भी यह बात नही बतायी। न मैने 4.6.01 को मैने न्यायालय में भी यह बात नही बतायी। जैसा कोर्ट साहब ने समझा वैसा लिखवाया। मैने न्यायालय में दिनांक 4.6.01 के बयान में यह बात नही कही कि ''मैं व मेरे भाई फूलचंद मकान के बाहर तखत पर बैठे थे तभी चार अभियुक्त ..... इतना कहते ही सत्यप्रकाश ने फूलचंद पर तमंचे से फायर कर दिया। जो मेरे भाई के चेहरे पर लगा व मेरे भाई तुरंत लड़खड़ाकर गिर गये।'' सही बात यही है कि मेरे भाई गोली लगने पर सड़क पर गिरे थे। सत्य प्रकाश के अलावा किसी ने न कोई फायर किया न कोई बात कही। फूलचंद से सत्यप्रकाश के कोई रंजिश नही थी। जो भी रंजिश थी वह सत्यप्रकाश की मुझसे थी। सत्यप्रकाश के पिता ने मेरे पिता को लाठियों से मारा था। यही पुरानी रंजिश थी। इसी रंजिश की वजह से मनमुटाव थे।''

The above extracted statement of PW-1 reflects that PW-1 narrated what he was tutored to narrate and not what he actually witnessed.

(d) That not only the FIR but all police papers prior to inquest appear to have been prepared at one go therefore, the FIR appears ante-timed. This is so, because the FIR, as per record, was registered at 23.10 pm on 28.06.1998 under Sections 307, 504, 506 IPC but the fard recovery of blood-stained earth, plain earth and the empty cartridge, which is stated to have been prepared on 28.06.1998, at about 9.30 pm, not only bears the details of the case i.e. Case Crime No.410 of 1998, but, also Sections 302/307/504/506 IPC, which means that the GD entry made on 29.06.1998 at 2.15 am converting the case into one punishable under Section 302 IPC from Section 307 IPC is a sham document. This suggests that the deceased was killed by an unknown assailant, he died at the spot and, later, the entire prosecution story that the deceased was rushed to the hospital and, on return from the hospital, the FIR was lodged has been contrived on guess-work and past enmity.

(e) The learned counsel for the appellant further submitted that, according

to the doctor (PW-5), the deceased ate his meal about 3 to 4 hours before; therefore, testimony of PW-1 that he and the deceased have had dinner 15 minutes before is falsified. Further, PW-1 is an interested witness as, admittedly, his wife's niece, married to the appellant, had left the appellant and therefore, he had a motive to implicate the appellant. Thus, looking to the circumstances narrated above, in absence of corroboration from an independent witness, his testimony is not of that unimpeachable category as to form basis of conviction. Further, there is no recovery of the murder weapon to connect the appellant to the crime. Hence, it is a fit case where the appellant be extended benefit of doubt and acquitted. More so, when he has already suffered incarceration of over 15 years.

Submissions on behalf of the State

10. **Per contra,** learned AGA submitted that it is well settled that the first information report need not be an encyclopaedia therefore, even if PW-1 (the informant) had not stated in the FIR that the deceased went out and was shot when he was on the road, the substratum of the prosecution story that the deceased was shot by the appellant remaining intact, and the medical evidence indicated that the appellant died on account ante-mortem gunshot injury, the prosecution story is not liable to be disbelieved merely because all the details of the manner in which the incident occurred were neither disclosed in the FIR nor in the statement recorded under section 161 CrPC. He further submits that the site plan prepared by the I.O. refers to the spot as the place where the injured was found lying, which means that the deceased was not dead at the spot. Thus, the story that he was rushed to the hospital and on return therefrom, the FIR was lodged appears natural and not contrived. Otherwise also, when a person is injured, even if he may be dead, there is always an attempt to rush him to the hospital to save him, even if there is no possibility of him surviving the injury. Hence, the statement of PW-1 that the deceased was rushed to the hospital does not at all dents the reliability of PW-1's testimony. Learned AGA further submits that assuming that in the seizure memo prepared on 28.06.1998, case crime number and section 302 IPC is mentioned at the top that, by itself, is not sufficient to discard the first information report as ante-timed or bogus because it could be possible that the seizure memo may have been completed afterwards. He further submits that assuming that there may be some lapses in the investigation and due care was not taken while filling the papers that, by itself, is not a ground to discard the ocular testimony of PW-1 whose presence in the house has not been questioned and no suggestion has been put to PW-1 that he was not present in the house at the time of the incident. He further submits that the testimony of PW-1 is reliable and the conviction recorded by the trial court is justified, more so, because the testimony of PW-1 finds corroboration from the medical report. Hence, he prayed that the appeal be dismissed.

11. Having noticed the rival submissions, before we proceed to analyse the weight of the respective submissions, it would be appropriate to notice the testimony of the prosecution witnesses in brief.

Testimony of Prosecution Witnesses

12. **PW-1 (Harish Chandra)**. In his examination-in-chief, on 04.06.2001, stated

that the accused Satya Prakash and Kanhaiya are real brothers. The accused Ramu is cousin of Satya Prakash whereas accused Bahadur is Satya Prakash's neighbour. Satya Prakash is married to PW-1's wife's niece. As Satya Prakash used to ill treat his wife, she left her matrimonial home and went to her Maika (parents house); to have her back, Satya Prakash used to pressurise PW-1. For that reason, Satya Prakash had a grudge against PW-1 and his family.

In respect of the incident, in his examination-in-chief, PW-1 stated that on 28.06.1998, at about 9 pm, he and the deceased were sitting in their verandah on a Takhat (wooden cot) when all the four accused came with country made pistols and, on exhortation of Kanhaiya, Satya Prakash fired at the deceased, which hit him on the face, as a consequence whereof, the deceased fell on the spot. Upon which, PW-1 raised alarm, where after Mool Chand Raidas (PW-2), Shiv Sharan (not examined) and Ram Kumar Tripathi (not examined) arrived and the accused escaped by extending threats. Thereafter, PW-1 made arrangement for a cart to carry the deceased to Vinod Dixit Hospital where he was admitted for treatment. There, the doctor told that his condition is serious therefore he be taken to Kanpur. While PW-1's brother Mool Chandra Tripathi (PW-3) was making arrangement to take the deceased to Kanpur, PW-1 went to lodge the FIR. PW-1 also stated that PW-3 took the deceased to Kanpur but on way, near Chaubeypur, the deceased died therefore, he returned with the body to the hospital. On receipt of information regarding death of the deceased, oral information thereof was given to the police. Next day, inquest was conducted. He stated that in the night of the incident itself, the I.O. had come to the spot; recorded his statement; inspected the spot; and recovered blood stained earth and empty cartridge. He stated that at the time of the incident, there was light from electricity bulb.

In his cross examination, held on 14.02.2005, he disclosed the dimensions of the verandah where PW-1 and the deceased were sitting on a Takhat at the time of the incident. He also disclosed that the main door of his house opens towards east on that very verandah; whereas, just after the verandah there is road.

In his cross-examination, held on 15.02.2005, he disclosed that the marriage of Satya Prakash (the appellant) with PW-1's wife's niece was held in the year 1996 and that Satya Prakash's wife remained in her matrimonial home for about two years. Describing the spot, he stated that outside the door there was bulb, which had been shown to the investigating officer and that in the street also, there was an electricity pole having a bulb; and he had informed the investigating officer about the source of light, though, it was not written in the report or in his statement. He also stated that at the time of the incident, the deceased was sitting on right side of PW-1 and that no other person was present at that time. On suggestion that he was sleeping inside the house, he stated that though, they used to sleep inside the house but, as they had meal (dinner) 10-15 minutes before, they (i.e. PW-1 and the deceased) were sitting on the wooden cot in the verandah. On further cross-examination, in respect of the manner in which the incident occurred, he stated that Satya Prakash and the other accused came hurling abuses and when he first saw the accused, they were at a distance of 4-5

meters from the verandah. Leading them was Satya Prakash. PW-1 stood there at the verandah whereas the deceased stood up from the wooden cot and came out on the road; there, the deceased was shot at from a distance of about 3 meters. Before the shot was fired, hot words were exchanged for 1-2 minutes. As soon as the gunshot hit the deceased, PW-1 raised alarm. On raising alarm, several neighbours arrived. The first three to arrive were Ram Kumar Tripathi, Shiv Sharan and Mool Chand Raidas (PW-2). When they arrived, the deceased was lying injured; they all lifted the deceased and took him on a cart to the hospital. Atul (PW-4) also arrived at the hospital. They reached the hospital at about quarter to 10 pm. At the hospital, doctor gave some treatment and told that the condition of the deceased is serious and he should be taken to Kanpur. At this stage, PW-1 stated as follows:-

"मैने रिपोर्ट में यह बात नही लिखायी थी कि फूलचंद तखत से उतरकर सड़क पर गये। मैने दरोगा जी को भी यह बात नही बतायी। न मैने 4.6.01 को मैने न्यायालय में भी यह बात नही बतायी। जैसा कोर्ट साहब ने समझा वैसा लिखवाया। मैने न्यायालय में दिनांक 4.6.01 के बयान में यह बात नही कही कि ''मैं व मेरे भाई फूलचंद मकान के बाहर तखत पर बैठे थे तभी चार अभियुक्त ..... इतना कहते ही सत्यप्रकाश ने फूलचंद पर तमंचे से फायर कर दिया। जो मेरे भाई के चेहरे पर लगा व मेरे भाई तुरंत लड़खड़ाकर गिर गये।'' सही बात यही है कि मेरे भाई गोली लगने पर सड़क पर गिरे थे। सत्य प्रकाश के अलावा किसी ने न कोई फायर किया न कोई बात कही। फूलचंद से सत्यप्रकाश के कोई रंजिश नही थी। जो भी रंजिश थी वह सत्यप्रकाश की मुझसे थी। सत्यप्रकाश के पिता ने मेरे पिता को लाठियों से मारा था। यही पुरानी रंजिश थी। इसी रंजिश की वजह से मनमुटाव थे।''

In addition to above, PW-1 stated that 45-46 years before also, some incident had taken place as a result of which there was enmity between the families of the deceased and Satya Prakash.

In respect of light, PW-1 stated that it was a dark night and the Moon had come out late.

On further cross examination, he stated that he had not gone to Kanpur with the deceased; that the police informed him between 1.30 am to 1.45 am that his brother (Phool Chandra) i.e. the deceased is not alive. On receiving this information, he again went to the hospital at about 2 am where the police and the body of his brother was there. Thereafter, he returned back home and delivered information to the family. Next day, the body was taken for postmortem. On further cross examination, he stated that he gave information to the police about half an hour after his brother (the deceased) was taken to Kanpur. PW-1 also stated that his other brother Mool Chandra (PW-3) and two police personnel had accompanied his brother (the deceased) to Kanpur.

In respect of time of arrival of the I.O. at the spot, PW-1 stated that before his brother (the deceased) was taken to the hospital, though, the I.O. had not arrived but two constables had come. PW-1 denied the suggestion that he lodged the FIR after the death of his brother on the suggestion of the police personnel. He, however, he admitted that the written report was prepared at the hospital. He also denied the suggestion that it was a dark night and some unknown person had killed his brother and that no one witnessed the incident and that with the help of police on the basis of past enmity, false implication was made.

13. **PW-2 (Mool Chand Raidas)**. He stated that he did not witness the incident.

Consequently, the prosecution declared him hostile. During his cross-examination by the public prosecutor, he stated that in the night of the incident he was at his in-laws place at Bilgram, District Hardoi and that he returned after five days. When confronted with his previous statement recorded under Section 161 CrPC, he denied having given any such statement. In his cross examination by the defence, he stated that when he returned from his in-laws place, he came to know that some unknown miscreants had killed Phool Chandra (the deceased).

14. **PW-3 (Mool Chandra).** He is brother of the deceased. He stated that at the time when the incident took place he had gone to Bazaar. When he returned back, he came to know that his brother Phool Chandra (the deceased) has been shot by Satya Prakash and that Phool Chandra's family members have taken him to the hospital. He stated that the police had arrived at the spot and had collected plain earth and blood stained earth in two separate boxes and had also lifted one empty cartridge. PW-3 stated that the inquest was conducted at the hospital and he was a signatory to the inquest report. He reiterated what PW-1 had stated in respect of the motive for the crime.

In his cross examination, PW-3 reiterated that when he arrived, just after the incident, Phool Chandra (the deceased) had already been taken to the hospital. He stated that at 9.30 p.m. the police had arrived on a Jeep. He could not tell whether I.O. was there or not, but constables were there; and a seizure memo was prepared. The police had stayed there for half an hour and had visited the house of Satya Prakash (the appellant) and had enquired from the neighbours there. He stated that his brother (the deceased) was in the hospital; and that he had taken him to Kanpur with 3-4 other persons including police men. He admitted his signature on Ex. Ka-2 and also admitted that in Ex. Ka-2, case crime No.410 of 1998 was written. He, however, denied the suggestion that the first information report was lodged after the death of Phool Chandra.

15. **PW-4 (Atul Kumar).** He is the son of the deceased. He stated that at the time of the incident, at about 9 pm, he was having dinner. His uncle (PW-1) and his father (the deceased) were having talks. A bulb was lit there. On hearing noise and gunshot, he went out and saw four persons, namely, Satya Prakash, Kanhaiya, Bahadur and Ramu, running away. His father was lying on the road and his uncle (PW-1) and others told him that those were the four persons who have killed PW-4's father. He stated that his uncle (PW-1) had written the report. He stated that the police had arrived at the spot and had lifted the empty cartridge, blood stained earth and plain earth from the spot. He stated that he had signed the seizure memo (Ex. Ka-2). He reiterated the same motive as narrated by PW-1.

In his cross examination, he stated that at the time of the incident, he was eating food inside the house. He heard a gunshot and on noise coming from outside, he went out immediately and saw that crowd had gathered and his father (the deceased) was lying on the road, at a distance of 10 paces from the verandah. Police came within half an hour and lifted his father and before lifting his father, they lifted blood stained earth and plain earth from the spot as also the empty cartridge and got his signature on the memorandum. On being confronted with his previous

statement recorded under Section 161 CrPC, PW-4 admitted that earlier he had not made a statement that he saw Satya Prakash, Kanhaiya, Bahadur and Ramu running away.

On further cross examination, he stated that he had gone with his father to the police station and from there, he went to Vinod Dixit Hospital. Where, Vinod Dixit told him that his father had died. Upon getting that information, he took back the body to the police station. He remained with the body at the police station through the night and in the morning, inquest report was prepared and the body was sent for post-mortem. PW-4 stated that they had taken the body to the police station at 10 pm. He denied the suggestion that on suggestion of the police he made the statement that he saw the accused running away. He also denied the suggestion that seizure memo was prepared on the next day at the police station.

16. **PW-5 (Dr. S.K. Saxena).** He proved the post-mortem report, which has already been noticed above, and stated that the injury sustained by the deceased could have been caused at 9 pm on 28.06.1998 and as there was no blackening, charring or tattooing, the shot must have been fired from a distance of 6 feet or more. He also stated that he found 12 pellets embedded in the brain and the shot could have resulted in instantaneous death. He added that the nature of injuries were such that the victim could not have survived for long without medical support. He also stated that the deceased may have had his meals 2 to 3 hours before.

17. **PW-6 (retired Head Constable Chhedi Lal Gupta).** He prepared the GD entry of the first information report. He also proved that at 2 am on 29.06.1998, upon receipt of information with regard to the death of Phool Chandra, the case was converted to that of murder.

In his cross examination, he stated that initial investigation of the case was handed over to S.I., M.D. Verma, who was present at the Thana when the report was lodged. He denied the suggestion that the deceased was killed by miscreants and information in respect of his death having been received earlier, the GD was kept vacant to enter the case later.

18. **PW-7 (Om Prakash Sharma**, **retired Deputy Superintendent of Police)**. He was the second Investigating Officer who, after completing the investigation, submitted charge sheet which was proved by him as Ex. Ka-7.

In his cross examination, he stated that he had not visited the spot.

19 . **PW-8 (Ganesh Bajpai, Sub-Inspector, Police Lines, Lucknow)**. He stated that he was the Station House Incharge of Police Station Kannauj on the date and time of the incident. Initially, the investigation was handed over to M.D. Verma but as the injured died in the night, he took over the investigation. He proved various stages of investigation such as collection of blood-stained, plain earth and empty cartridge from the spot vide Ex. Ka-2; preparation of site plan vide Ex. Ka 8; and preparation of inquest report (Ex. Ka 9), photo nash (Ex Ka-10), challan nash (Ex. Ka10) under his direction by S.I. M.D. Verma as well as arrest /surrender of the accused persons.

In his cross examination, he stated that he received information about

the incident on RT set while he was on round in the area. Though he could not remember the time of receipt of such information but stated that immediately, thereafter, he had arrived at the spot and when he reached the spot, he saw the body there. Immediately, he inspected the spot. Existence of bulb in the verandah was not shown to him. He did not record the statement of Atul, which was recorded by O.P. Sharma. He denied the suggestion that FIR was written after inquest.

Analysis

20. On a conspectus of the entire prosecution evidence, the features that stand out are as follows:-

(i) PW-1 is the only eye witness of the incident because, though, PW-4 claims that he saw the accused running away but, the fact that he saw the accused running away was not disclosed by him in his statement recorded under section 161 CrPC with which he was confronted during his deposition. PW-2, the other eye witness turned hostile and stated that he was elsewhere and not at the spot. In so far as PW-3 is concerned, he arrived at the spot, after the body was lifted.

(ii) PW-1 states that the deceased was rushed to the hospital for treatment; there he was advised to be taken to Kanpur but, on way to Kanpur, he died. In between, PW-1 lodged the report. Whereas, PW-4, the son of the deceased, states that within half an hour of the incident, the police had arrived, they lifted the body of his father. He also accompanied the body to the police station and from there the body was taken to Vinod Dixit Hospital. There Vinod Dixit declared him dead and, thereafter, the body was taken back to the police station where it was kept overnight and in the morning, inquest was conducted; whereafter, the body was sent for postmortem.

(iii) PW-1, neither in the written report (FIR), nor in the statement recorded under section 161 CrPC, stated that the deceased, during the course of the incident, went out of the house and was shot at on the road, whereas, the site plan, as well as the evidence, suggests that the deceased was shot at on the road just outside his house. Notably, even in his statement-in-chief, during his deposition in court, it was not disclosed by PW-1 that the deceased had gone out and was shot at on the road. Rather, he stated that PW-1 and the deceased were sitting on the wooden cot (Takhat) when the accused arrived and, on exhortation of co-accused Kanhaiya, Satya Prakash (the appellant) fired at the deceased which hit the deceased on his face and he fell on the spot. Importantly, in his statement-in-chief, PW-1 did not disclose that the deceased went out on the road and, there, was shot by the accused. Interestingly, to explain this major lacuna, in the cross examination, he made an improvement by stating that the shot was fired after a brief altercation, which lasted 1 to 2 minutes; and, when the accused party arrived and hurled abuses, the deceased stood up from the wooden cot and went out on the road, where he was shot at. To further explain his improved stand during cross-examination, he stated that what he stated earlier on 04.06.2001 was as was told to him by "Court Sahab". We inquired from the learned counsel for the parties as to what Court Sahab means, to which they responded by saying that it is a colloquial term for public prosecutor. Be that as it may, the improvement in the eye witness account noticed above, was for the first time during the course of PW-1's

deposition in court and that too, at the time of cross examination.

(iv) The FIR is stated to have been lodged at 23.10 hrs on 28.06.1998 while the deceased was in an injured state though not dead; and the conversion of the case into one punishable under Section 302 IPC is post midnight i.e. on 29.06.1998, whereas, the seizure memo (Ex. Ka 2) and the site plan (Ex. Ka 8), both dated 28.06.1998, prepared immediately on arrival of the police at the spot at 9.30 p.m., reflects not only the case crime number but also section 302 IPC. This indicates that the seizure memo as well as the site plan was not prepared at the spot as is also the finding of the trial court. But, what is interesting is that PW-4, the witness to Ex Ka-2, states that it was prepared before the body was lifted by the police, whereas, according to the PW-3, this was prepared at about 9.30, when the deceased, in an injured condition, had already been taken to the hospital. What assumes importance is that, in any case, Ex. Ka-2 and Ex Ka-8 though, on record, were prepared before lodging the FIR yet, they reflect the entry of the case crime number of the case as also the charging Section 302 IPC suggesting that these papers were prepared when the deceased was dead. It also suggests that the investigating agency had not been meticulous and it had been preparing the records at its convenience.

(v) PW-8, the investigating officer, states that he had received information of the incident through RT set; and that he arrived at the spot without any delay and saw the body at the spot. This suggests that the deceased was dead on the spot.

(vi) PW-5, the doctor, who conducted post-mortem, on suggestion, admitted that the nature of the injuries were such that the deceased would have died instantaneously and could not have survived for long without medical support.

(vii) No evidence, either documentary or oral, of any kind in respect of treatment or admission of the deceased in an injured condition in the Hospital has been brought on record to demonstrate that the deceased in an injured condition was taken to the hospital for treatment or medical attention.

(viii) That there does not appear any evidence to demonstrate that the murder weapon was recovered and connected with the empty cartridge found on the spot.

21. Having noticed the aforesaid key features in the prosecution evidence, the issue that arises for our consideration is whether the testimony of solitary eyewitness (PW-1) is confidence inspiring and whether it could form the basis of conviction. To test the credibility of a witness, first, it has to be seen whether the presence of the witness from where he witnessed the incident at the spot is natural or is duly proved. In the instant case, the spot where the deceased was shot, by cogent evidence including the site plan, is proved to be a public road, in front of the house of the deceased. The time of the incident is also proved to be at 9.00 pm from the testimony of the witnesses to which there is no challenge. Further, there is no challenge to the presence of PW-1 in the house where he, his family and the deceased used to reside. In fact, there is no suggestion to PW-1 that he resided elsewhere or that he was at some other place when the incident occurred. The defence did, however, make suggestion to

PW-1 that no one witnessed the incident, which occurred in the darkness of night; and that some unknown person did the act; whereas, the accused were falsely implicated on the basis of past enmity. So far as enmity is concerned, that is admitted with PW-1, inasmuch as, PW-1's wife's niece had deserted the appellant; as a result whereof, the appellant had been pressurising PW-1 to send her back. This might be a reason for being inimical towards the deceased as well but not to the extent the enmity was with PW-1. Be that as it may, what needs to be ascertained is whether PW-1 was with the deceased at the time of the incident or was inside the house, like other members, and only when gun shot was heard, he, with others, rushed out to witness the deceased lying injured or dead, as the case may be.

22. To test whether a witness is trustworthy and reliable; and whether he is speaking the truth, there are no cut-and-dry formulae. Ordinarily, reliability of a witness is to be tested after going through his entire testimony and weighing it in conjunction with other material/ evidence on record so as to find out whether it has a ring of truth about it or is contrived. While testing the reliability and credibility of a witness, minor contradictions or omissions in his deposition which have no material bearing on the substratum of the prosecution case are to be overlooked, if, otherwise, the testimony is intrinsically natural, reliable and trustworthy. But where the witness appears to be lying on material particulars and making improvements to fill up lacunae, credibility of that witness gets hit. Another important test, though not conclusive, is whether the witness at the first opportunity to make a disclosure of what he knows, has made that disclosure. Because, where, even on opportunity, the disclosure is withheld, or delayed, a doubt arises as to whether the story is contrived, based on guess-work or ill motives, particularly, where several persons are implicated with either no role or ornamental role.

23. In the instant case, the ocular account rendered by PW-1 that the deceased in an injured condition was rushed to the hospital and, there, the doctor advised to take him to Kanpur and, while that process was on, PW-1 came to lodge the first information report does not appear truthful. Rather, the deceased appears to have died on spot. This we say so, because, according to PW-4, the son of the deceased, the police had arrived at the spot within half an hour and had taken the body of the deceased to the police station and, thereafter, the body was taken to the hospital. It appears the body was taken to the hospital not for treatment or saving the life but to confirm the death. This fact gains probability also from the statement of PW-8, who states that when he arrived at the spot, the body was there on the road. The time of arrival of the police at the spot can be gathered from the testimony of PW-3 and PW-4. PW-3 fixes the time of arrival at 9.30 pm whereas PW-4 says half an hour after the incident. As, according to the prosecution story, incident occurred at 9.00 pm, police must have arrived by or about 9.30 pm. This means that the informant (PW-1) as well as deceased's son (PW-4), both had opportunity to lodge the FIR when the body was taken to the police station. Once we accept this position, then why the FIR was not lodged then? Answer to this, holds the key to this case. To give an answer to this, by way of explanation, PW-1 takes the stand that the deceased was alive and was rushed to the hospital and there it was advised to take him to Kanpur.

Under these circumstances, the explanation rendered was a material aspect on which we have found PW-1 not speaking the truth. But, this throws up another question, that is, whether the FIR was lodged at 23.10 hours or later, as suggested by the defence.

24. Ordinarily, ante-timing of an FIR is to be established by gruelling cross-examination with reference to the entries made in the General Diary of the date to demonstrate that there was no case registered in between, enabling interpolation; and that the police papers prepared subsequent to the purported time of registration of the FIR bear no details of the case. Be that as it may, in this case, the defence though have made suggestion with regard to the FIR being ante-timed but have not been able to demonstrate that the FIR was ante-timed. But, what assumes importance is that according to the prosecution evidence, seizure memo (Ex. Ka-2) and site plan (Ex. Ka 8) were prepared when the police arrived at the spot, which means on or about 9.30 pm, whereas, the FIR was lodged at 23.10 hours, that is, at 11.10 pm. Yet, in Ex Ka-2 and Ex. Ka 8, not only the case crime number but also section 302 IPC is mentioned when, otherwise, there was no section 302 IPC at the time of registration of the case. This discrepancy the trial court noticed and overlooked by observing that it is a practice of the police to fill papers not on spot but later. No doubt, this does happen and, therefore, it cannot be a clinching circumstance to totally discredit the lodging of the FIR at the time when it is purported to have been lodged but, what it does is that it taints the police investigation and therefore, much mileage cannot be derived by the prosecution from the so-called prompt FIR inasmuch as the police records appear to have been prepared at one go. Under the circumstances, we would have to be circumspect and independently assess the worth of the ocular account rendered by PW-1 so as to find out whether it is wholly reliable and trustworthy, more so, because he is the sole eye witness. At this stage, we may also observe that this is a case where the deceased was shot at on the road from a distance of over six feet thus, being a case of single gun shot, what would have to be examined is whether the incident was a hit and run kind of an incident or it occurred in the manner alleged by PW-1.

25. According to PW-1, he and the deceased were sitting on the cot when the accused arrived. Initially, in the FIR as well in the statement in chief, he stated that while PW-1 and the deceased were sitting on the cot, the accused arrived and, on exhortation of Kanhaiya, Satya Prakash fired the shot which hit the deceased on face and he fell on the spot. As per this initial statement, there was no altercation and no movement of the deceased from the cot therefore, the site where the deceased fell, after being hit, came to be inside the house in its verandah. But, as the spot from where the deceased was lifted fell on the road, outside the house, during cross-examination, PW-1 made improvement and introduced the story that when the accused party came, the deceased rose from the cot went out on the road, entered into an altercation for 1-2 minutes and then the shot was fired, as a result whereof, the deceased fell on the road. This improvement was made for the first time during cross-examination after few years of the examination in chief; and this improved story was not there even in the statement recorded under section 161 CrPC with which PW-1 was confronted. Further, when

he was asked about this improvement, PW-1 stated that what he had stated earlier, on 04.06.2001, is what the Court Sahab had advised him to state. This renders his testimony not wholly reliable and shakes our confidence in his deposition and when we look at it from another angle, that is, he has not been found truthful with regard to the deceased being alive and rushed to the hospital for treatment, various questions arise in our mind, that is, whether he really witnessed the incident or he also arrived at the spot, like others, when the gun shot was heard; and whether the FIR and the prosecution story is contrived, based on guess-work, or suspicion, or ill-motive. Be that as it may, the upshot of the discussion is that the testimony of PW-1 having not been found truthful on a material particular and inconsistent as well, in the sense that it improves upon the earlier statement, in respect of the manner in which the incident occurred, it is not wholly reliable and this by itself is sufficient to extend the benefit of doubt to the accused-appellant. More so, when the prosecution case is based on testimony of a solitary eye witness, who has himself not suffered any injury, and the testimony does not find corroboration from other independent evidence. At this stage, we may notice that though the prosecution had also examined PW-4 as a witness who saw the accused running away from the spot, but this deposition of his is at variance with his statement under section 161 CrPC where he did not state having seen the accused running away. We, therefore, do not propose to rely on the testimony of PW-4 to lend credence to what PW-1 deposed.

26. For all the reasons stated above, we are of the considered view that the prosecution has failed to prove its case beyond the pale of doubt and, therefore, the appellant is entitled to the benefit of doubt. Consequently, the appeal is allowed. The judgment and order of conviction and sentence recorded by the trial court is set aside. The appellant is acquitted of the charge for which he has been tried and convicted. The appellant shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

27. Let a copy of this order be certified to the court below along with the record for information and compliance.

(2022)02ILR A701
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.02.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 62 of 2022

M/S Neel Jewels Gorakhpur & Anr.
...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Baljeet Singh, Suneel Kumar

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law-The Negotiable Instruments Act, 1881- Section 138- Application for Discharge- No provision in law- Maintainability- As by means of the aforesaid order, this Court had merely granted a liberty to the revisionists to move an application and the application was directed to be decided in accordance with the law, which includes the law regarding its maintainability. Therefore, the learned Court below has not

committed any illegality in examining the maintainability of the application. As has already been noted above, the application does not mention the provision of law under which it has been moved presumably because there is no such provision.

As there is no provision for filing an application for discharge under the Negotiable Instruments Act, hence the same was rightly rejected by the court below as being not maintainable.

(B) The Negotiable Instruments Act, 1881- Section 258- Recall of process - Once the Court issues process to the accused/opposite party on a complaint under Section 138 of the Act, there is no provision for recall of the process. The only provision for stopping the proceedings in a certain cases is given in Section 258 Cr.P.C- The conclusion of the learned Court below that it has no jurisdiction to recall or review the order passed by itself summoning the accused does not suffer from any legal infirmity and needs no interference by this Court in exercise of its revisional power under Section 397/401 Cr.P.C.

Settled law that the magistrate cannot review or recall his own order even with the aid of Section 258 of the CrPc as the same is not applicable in proceedings under the Negotiable Instruments Act.

(C) The Negotiable Instruments Act, 1881- Section 141- The revisionist no. 1 is a proprietorship firm and the revisionist no. 2 is its proprietor and this fact has not been disputed by the revisionists. It is nobody's case that the revisionist no. 1 is a company incorporated under the provisions of the Companies Act or a registered firm- A proprietorship concern is not a juristic person. It is merely a trade name used by a person for doing his business. A person may carry on a business in the name of the proprietorship concern but he being the proprietor of the business, would be solely responsible for all the actions and liabilities of the proprietorship concerned. It is correct that the provisions of Section 141 of the Act have no bearing to the present case where the revisionist no. 1 is not a company. The revisionist No. 2 being the proprietor of the revisionist No. 1 is solely responsible for all its action and liability including the liability to face prosecution under Section 138 of the Act for dishonour of a cheque, which was drawn by the revisionist No. 2 himself.

A proprietorship firm is not a juristic person and recourse to Section 141 of the Act is therefore impermissible. Hence, the proprietor of the firm shall be solely responsible for all activities and liabilities of his firm including prosecution under the Negotiable Instruments Act.

(D) Code of Criminal Procedure, 1973- The Negotiable Instruments Act, 1881- Section 202 (2) Applicability of- Section 202(2) of the Code in respect of examination of witnesses on oath is not applicable to the complaints filed under Section 138 of the Act. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. As the Magistrate has taken into consideration the complainant's affidavit and the documentary evidence on record, he has complied with the mandate of Section 202 Cr.P.c.

There is no requirement of law to record the statement of the witnesses u/s 202(2) of the CrPc in proceedings under the Negotiable Instruments Act and its sufficient for the Magistrate to take into consideration only the affidavit and documentary evidence filed by the complainant.

Criminal Revision rejected. (E-3)

Judgements/ Case law relied upon:-

1. Raghu Lakshminarayan Vs Fine Tubes; (2007) 5 SCC 103

2. Adalat Prasad Vs Rooplal Jindal & ors; (2004) 7 SCC 338

3. In Re: Expeditious Trial of Cases U/S 138 of N.I. Act 1881; 2021 SCC OnLine SC 325

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

1. Heard Mr. Baljeet Singh Advocate, learned counsel for the revisionists as well as learned AGA for the State and perused the record.

2. By means of the instant Criminal Revision under Section 397/401 of the Code of Criminal Procedure, 1973, the revisionists have challenged the validity of the order dated 18.10.2021 passed by the Presiding Officer, Additional Court No. 2, Lucknow in Complaint Case No. 6823 of 2019 (M/s Seven Seas Net Mart Sales Pvt. Ltd. vs. M/s Neel Jewellers and another) under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act') rejecting the application filed by the revisionists for being exonerated of the liabilities/obligations mentioned in the complaint.

3. The facts of the case, briefly stated, are that on 19.08.2019 the opposite party no. 2-complainant filed a complaint under Section 138 of the Act *inter alia* stating that the revisionist no. 1 is a proprietorship firm in the proprietorship of the revisionist no. 2, who is a regular customer of the complainant company. During the course of business, the revisionist no. 1 took supply of some items from the complainant and to pay the price of the goods it issued some cheques. A cheque bearing no. 044778 dated 06.06.2019 drawn on Allahabad Bank, City Office Branch, Gorakhpur for Rs. 3,00,000/- only, which was signed by the revisionist no. 2 was dishonored with the endorsement "payment stopped by the drawer". It is stated in the complaint that the action of the revisionists is punishable under Section 138 read with Section 141 of the Act and the revisionist no. 2, the proprietor of the revisionist no. 1 was responsible for conducting the business of the proprietorship firm at the relevant time when the aforesaid offence was committed.

4. The learned Additional Chief Judicial Magistrate, VIIIth, Lucknow recorded the statement of the complainant under Section 200 Cr.P.C. in the form of an affidavit dated 19.08.2019. The complainant gave his statement under Section 200 Cr.P.C. through his affidavit dated 19.08.2019 and he adduced the original cheque in question, the memo issued by the Bank, a copy of the registered notice and the postal receipt as evidence under Section 202 Cr.P.C.. After taking into consideration the aforesaid material, the learned Court below has come to the conclusion that from the material/evidence available on the record, an offence under Section 138 of the Act is made out against the accused persons/revisionists and has passed an order summoning the revisionists for being tried for the aforesaid offence.

5. After passing of the aforesaid order, the revisionist approached this Court by filing an Application under Section 482 Cr.P.C. No. 1901 of 2021 and after arguing the matter at some length, the learned counsel for the applicants (revisionists) submitted that he did not want to press the aforesaid application under Section 482 Cr.P.C. on merits and he confined his prayer only to the extent that the applicants be permitted to move a discharge application through counsel and suitable directions may be issued for expeditious disposal of the same.

6. The aforesaid application No. 1901 of 2021 was accordingly disposed of vide

order dated 22.06.2021 providing that the applicants may move their discharge application through counsel and the same shall be heard and decided, expeditiously, after hearing the parties, in accordance with law, by means of a reasoned and speaking order.

7. Thereafter, the revisionists filed an application before the learned Court below for being exonerated of the liabilities under the complaint, without mentioning the provision of law under which the application was filed.

8. The learned counsel for the revisionists has submitted that in the aforesaid application it was mentioned that "in para 11 of the complaint a prayer has been made to punish the revisionists under Section 141 of the Negotiable Instruments Act, 1881' and that the revisionist no. 1 is neither a company registered under the Companies Act nor is it a firm and, therefore, Section 141 of the Act does not apply to the revisionist no. 1. He submitted that for this reason the complaint is not maintainable and the revisionists ought to be exonerated of the liabilities under the complaint.

9. The opposite party no. 2 filed objections against the aforesaid application inter alia stating that the complaint under Section 138 of the Act has to be decided by the Court through a summary trial. There is no provision in law for filing of a discharge application during a summary trial. Besides this, Section 258 Cr.P.C. also does not apply to cases arising out of a complaint. On this ground, the application filed by the revisionists is not maintainable and is liable to be dismissed. It was further stated in the objections that the Trial Court does not have the jurisdiction to recall or review the order passed by itself and it has no power to recall or review an order passed by it summoning the accused-persons.

10. After hearing the aforesaid application of the revisionists and the objections against it filed by the opposite party no. 2, the learned Court below proceeded to pass the impugned order dated 18.10.2021 whereby the revisionists' application was rejected.

11. Dealing with the objection of the revisionists regarding mentioning of Section 141 of the Act, the learned Court below has stated that in the entire complaint, the revisionist no. 1 has been referred to as a proprietorship firm and the revisionist no. 2 as its proprietor. Mere mention of Section 141 of the Act in the complaint, for whatever reason, may not lead to a conclusion at this stage that the complaint is not maintainable.

12. Dealing with the second submission made on behalf of the revisionists during oral submissions, that no evidence has been led by the complainant under Section 202 Cr.P.C., the learned Court below has held that the documents adduced by the complainant can be taken into consideration under Section 202 Cr.P.C. The learned Court below has referred to the decision of the Hon'ble Supreme Court in the case of ***In Re: Expeditious Trial of Cases Under Section 138 of N.I. Act 1881; 2021 SCC OnLine SC 325*** in which it has been held that there is no inherent power of Trial Courts to review or recall the issue of summons.

13. Mr. Baljeet Singh, learned counsel for the revisionists has assailed the validity of the aforesaid order dated 18.10.2021 mainly on the ground that the application

for discharge had been filed by the revisionist on the direction of this Court vide order dated 22.06.2021, which has wrongly been rejected by the learned Court below as not maintainable.

14. The second submissions advanced by the learned counsel for the revisionists is that under Section 141 of the Act, action can only be taken against a company whereas the revisionist no. 1 is a proprietorship firm and not a company and, therefore, it cannot be proceeded with under Section 141 of the Act.

15. It has also been submitted that the learned Court below has summoned the revisionists without recording the statement of the opposite party no. 2 under Section 202 Cr.P.C. and the said fact has not been considered by the learned Trial Court while rejecting the discharge application.

16. The learned AGA has opposed the revision and submitted that there is no illegality or infirmity in the impugned order.

17. I have considered the submissions made by the parties' counsel and gone through the record.

18. The submission of the learned counsel for the revisionists, that the application for discharge was filed on the direction issued by this Court in the order dated 22.02.2021 passed in Application under Section 482 Cr.P.C. No. 1901 of 2021, is apparently wrong, as by means of the aforesaid order, this Court had merely granted a liberty to the revisionists to move an application and the application was directed to be decided in accordance with the law, which includes the law regarding its maintainability. Therefore, the learned Court below has not committed any illegality in examining the maintainability of the application.

19. As has already been noted above, the application does not mention the provision of law under which it has been moved presumably because there is no such provision.

20 . In ***Adalat Prasad vs. Rooplal Jindal & others; (2004) 7 SCC 338,*** the Hon'ble Supreme Court was pleased to declare the law in the following words: -

"But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under sections 200 and 202, and the only stage of dismissal of the

complaint arises under section 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage."

21. The aforesaid law laid down in ***Adalat Pasad*** (supra) has been followed and reiterated by the Hon'ble Supreme Court in its subsequent decisions in ***Bholu Ram vs. State of Punjab; (2008) 9 SCC 140, Subramanium Sethuraman vs. State of Maharashtra (2004) 13 SCC 324, N.K. Sharma vs. Abhimanyu (2005) 13 SCC 213, Everest Advertising (P) Ltd. Vs. State (Govt. of NCT of Delhi) (2007) 5 SCC 54 and Irish Computers Ltd. vs. Askari Infotech (P) Ltd.; (2015) 14 SCC 399.***

22. Once the Court issues process to the accused/opposite party on a complaint under Section 138 of the Act, there is no provision for recall of the process. The only provision for stopping the proceedings in a certain cases is given in Section 258 Cr.P.C., which provides as follows:-

"258. Power to stop proceedings in certain cases. *In any summons- case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."*

23. In In ***Re: Expeditious Trial of Cases Under Section 138 of N.I. Act 1881*** *(supra),* the Hon'ble Supreme Court has held that Section 258 cannot come into play in respect of the complaint filed under Section 138 of the Act. Affirming the earlier decisions in the Adalat Prasad (supra), the Hon'ble Supreme Court held that the Trial Court cannot be conferred with inherent power either to review or recall the order of issuance of process. Therefore, keeping in view the law laid down by the Hon'ble Supreme Court, the conclusion of the learned Court below that it has no jurisdiction to recall or review the order passed by itself summoning the accused does not suffer from any legal infirmity and needs no interference by this Court in exercise of its revisional power under Section 397/401 Cr.P.C.

24. Now I come to the second submission of the learned counsel for the revisionists seeking discharge on the ground that the complaint makes a mention of Section 141 of the Act, which does not apply because revisionist No. 1 is a proprietorship concern. Section 141 of the Act provides as follows:

"141 Offences by companies. *-- (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished*

accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-- For the purposes of this section,--

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

25. It is specifically pleaded in the complaint that the revisionist no. 1 is a proprietorship firm and the revisionist no. 2 is its proprietor and this fact has not been disputed by the revisionists. It is nobody's case that the revisionist no. 1 is a company incorporated under the provisions of the Companies Act or a registered firm.

26. A proprietorship concern is not a juristic person. It is merely a trade name used by a person for doing his business. A person may carry on a business in the name of the proprietorship concern but he being the proprietor of the business, would be solely responsible for all the actions and liabilities of the proprietorship concerned. It is correct that the provisions of Section 141 of the Act have no bearing to the present case where the revisionist no. 1 is not a company.

27. The stand taken by the revisionists in the application for discharge is that in para 11 of the complaint, a prayer has been made to punish the revisionists under Section 141 of the Act. No punishment is prescribed under Section 141 of the Act which has been reproduced above and the revisionists have not been summoned for being punished under Section 138 of the Act only and not under Section 141.

28. So far as the legal position of the revisionist no. 1 as proprietorship firm is concerned, the following pronouncements of the Hon'ble Supreme Court in ***Raghu Lakshminarayan vs. Fine Tubes; (2007) 5 SCC 103*** throws light on the subject. The relevant observation of the Court is reproduced below: -

"The description of the accused in the complaint petition is absolutely vague. A juristic person can be a Company within the meaning of the provisions of the Companies Act, 1956 or a partnership

within the meaning of the provisions of the Indian Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. Company in terms of the explanation appended to Section 141 of the Negotiable Instruments Act, means any body- corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a Company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Indian Partnership Act."

29. In view of the aforesaid discussions, as the revisionist no. 1-M/S Neel Jewelers Gorakhpur-a proprietorship firm, is not a legal entity. No legal proceedings can be initiated by or against it and this principle of law would apply even for filing of the instant revision by the revisionist no. 1. However, the revisionist no. 2, proprietor of the revisionist no. 1, has also been arrayed as a party in the compliant and he has been summoned for being tried for committing an offence under Section 138 of the Act by the learned Court below. The revisionist No. 2 being the proprietor of the revisionist No. 1, is solely responsible for all its action and liability including the liability to face prosecution under Section 138 of the Act for dishonour of a cheque, which was drawn by the revisionist No. 2 himself.

30. So far as the last submission of the learned counsel for the revisionists that the learned Trial Court had committed a legal error in proceeding to summon the accused-persons without recording the statement of the complaint under Section 202 Cr.P.C. is concerned, the same also does not appear to have any force. Before issuing the summoning order dated 25.11.2019, the learned Court below has taken into consideration the affidavit of the complainant filed in support of the complaint under Section 200 Cr.P.C. and the documentary evidence filed by the complaint i.e., the original cheque in question, the memo issued by the Bank, a copy of the registered notice and the postal receipt, as evidence under Section 202 Cr.P.C. Sub Section (2) of Section 202 Cr.P.C. is not applicable to the proceedings of a complaint under Section 138 of the Act.

31. Section 145 of the Negotiable Instruments Act, 1881 provides as follows: -

***"145. Evidence on affidavit**.-- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.*

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

32. In ***In Re: Expeditious Trial of Cases Under Section 138 of N.I. Act 1881*** (supra), the Hon'ble Supreme Court has been pleased to hold that Section 202 (2) of the Code in respect of examination of witnesses on oath is not applicable to the complaints filed under Section 138 of the Act. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine the witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202 Cr.P.C. As the Magistrate has taken into consideration the complainant's affidavit and the documentary evidence on record, he has complied with the mandate of Section 202 Cr.P.c. Therefore, the submission of the learned counsel for the revisionists regarding non-compliance of Section 202 Cr.P.C. is also without any force and is hereby rejected.

33. In view of the aforesaid reasons, this Court does not find any illegality in the impugned order dated 18.10.2021 passed by the learned Court below in Complaint Case No. 6823 of 2019.

34. Accordingly, the instant Criminal Revision lacks merits and is hereby ***dismissed*** at the admission stage. The learned Court below may proceed with the trial of Complaint Case No. 6823 of 2019 under Section 138 of the Negotiable Instrument Act against the revisionist No. 2 as being the Proprietor of M/s Neel Jewelers, the entire liability for its action lies on the revisionist No. 2.

(2022)02ILR A709
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.01.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 2646 of 2014

Mohammad Sadik ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Viveka Nand Rai, Sri Sanjiv Kumar

Counsel for the Opposite Parties:
A.G.A., Sri Surendra Kumar Tripathi

(A) Criminal Law- Code of Criminal Procedure, 1973- Section 397/ 401- Indian Penal Code, 1860- Section 406- Dowry Prohibition Act- Section 2 & 6 - Criminal revision against acquittal -The finding of the trial court that articles were given for the joint use and there is no entrustment in favour of the accused, hence no offence under section 406 IPC is made out, are illegal and against the law. From the provisions of section 6 of Dowry Prohibition Act it is clear that complainant was entitled to receive possession of the articles which were given at the time of marriage and were in possession of the accused. Refusal in this regard will attract section 406 IPC and if there is sufficient and realiable evidence on record then accused may be convicted.

Articles given at the time of marriage will constitute an entrustment and cannot be said to be for joint use- Refusal to return the said articles will constitute the offence under section 406 of the IPC.

(B) Indian Penal Code, 1860- Section 406- Indian Evidence Act, 1872- Section 65- As documentary evidence a list of articles alleged to be given at the time of marriage and photocopy of receipt of motorcycle have also been filed- The list has not been duly proved as per provisions of Evidence Act. There is no cogent and sufficient evidence on the record to prove the charge under section 406 IPC and hence

finding of acquittal recorded by the court below cannot be interfered. Although the findings recorded by the court below that articles were given for their joint use and there is no entrustment and hence offence under section 406 IPC is not made out, are not according to law, but as there is no cogent and sufficient evidence on the record, the charge under section 406 IPC is not stands proved and finding of acquittal recorded by the trial court cannot be interfered with.

As the list of articles has not been proved in accordance with the provisions of the Evidence Act, therefore offence under section 406 is not made out although the finding that the articles given at the time of marriage would not constitute an entrustment is illegal.

Criminal Revision rejected. (E-3) (Para 10, 11, 12, 13)

Judgements/ Case law relied upon:-

1. Pratibha Rani, 1985 Cri LR 817

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. for the State-respondent.

2. This criminal revision is directed against the judgment and order dated 07.08.2014 passed by Additional Sessions Judge, Court No.1, District Agra, in Criminal Appeal No.340 of 2013, arising out of judgment and order passed by Additional Chief Judicial Magistrate, Agra, Court No.4, in Complaint Case No.46 of 2010 (Mohammad Sadik Vs. Hasmuddin and others) dated 18.10.2013, under section 406 IPC, Police Station Shahganj, District Agra, acquitting opposite party nos. 2 and 3 from the charges under section 406 IPC. The appellate court has dismissed the appeal filed against the aforesaid judgment and order of acquittal.

3. In brief, the facts are that the complainant/revisionist Mohammad Saddik (wrongly mentioned as Mohammad Sadik in revision) filed a complaint before the concerned Magistrate, alleging therein that he performed marriage of his daughter Shabana with opposite party no.1 Hasmuddin on 08.11.2005. He has given ornaments, wearing apparels etc. at the time of marriage and spent Rs.3 lacs on it. Opposite parties also demanded a motorcycle. On 09.10.2005 complainant purchased one C.T.-100 motorcycle for Rs.32,300/- in the name of opposite party no.1 on his saying that he will return it whenever asked by the complainant. Articles as mentioned in the list attached with the complaint, were given with condition that it will come in the use of the daughter of complainant and if opposite parties ill treat her, then they have to return all the things. It is further alleged that sometime after the marriage the opposite party no.1 and his family members, started making demand of Rs.1 lacs and on refusal they burnt to death the daughter of complainant by pouring kerosene on her. Complainant asked the opposite parties to return the motorcycle and other articles, but they refused. Complainant also sent two notices through registered post. Complainant also gave an application to the police, but neither any action was taken nor articles were returned. The learned Magistrate summoned the opposite parties under section 204 Cr.P.C. to face trial for charge under section 406 IPC. After framing charge and taking evidence the learned Magistrate vide its judgment and order dated 18.10.2013 held that opposite parties/accused Hasmuddin and Shamshuddin are not guilty for the charge

under section 406 IPC and acquitted them. Aggrieved by the aforesaid judgment and order of acquittal the complainant/revisionist filed Criminal Appeal No.340 of 2013 (Mohammad Saddik Vs. State of U.P. and others), which was dismissed by the Additional Sessions Judge, Court No.1, District Agra on 07.08.2014.

4. Learned counsel for the revisionist contended that the ornaments and other articles and motorcycle given at the time of marriage by the revisionist to his daughter are the stridhan of his daughter. The husband of his daughter Hasmuddin is living in a joint family with his parents and entire stridhan is still in possession of the opposite parties and they have refused to return it. The courts below have failed to consider that there is specific allegation of entrustment to the opposite parties exclusively, but both the courts below have failed to consider this aspect and have wrongly acquitted the opposite parties. After the death of victim her parents are entitled to receive stridhan and refusal in this respect will be an offence under section 406 IPC. Learned counsel for the revisionist further contended that the order of acquittal of opposite parties is illegal, unjustified and contrary to the facts and evidences on record and also against the settled principles of law.

5. From allegations made in the complaint it is clear that father of the deceased has filed this complaint to get back the ornaments and various other articles given at the time of the marriage of his daughter who had died unnatural death within seven years of her marriage and for which the opposite parties have been charged for dowry death. It is alleged that the articles are in possession of the opposite parties and they have refused to return it.

6. Section-2 of the Dowry Prohibition Act defines dowry and provides as follows:-

*"**2. Definition of "dowry"**.-- In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly-*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

*at or before * [or any time after the marriage] ** [in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.*

Explanation 1.--[***]

Explanation II.--The expression "valuable security" has the same meaning as in Section 30 of the Indian Penal Code (45 of 1860)."

7. Section-6 of the Dowry Prohibition Act, provides as follows:-

*"**6. Dowry to be for the benefit of the wife or her heirs.--(1)** Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman--*

(a) if the dowry was received before marriage, within [three months] after the date of marriage; or

(b) if the dowry was received at the time of or after the marriage, within [three months] after the date of its receipt; or

(c) if the dowry was received when the woman was a minor, within one year after she has attained the age of eighteen years, and pending such transfer, shall hold it in trust for the benefit of the woman.

[(2) If any person fails to transfer any property as required by sub-section (1) within the time limit specified therefor, [or as required by sub-section (3),] he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years or with fine [which shall not be less than five thousand rupees, but which may extend to ten thousand rupees] or with both.]

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being.

[Provided that where such woman dies within seven years of her marriage, otherwise than due to natural causes, such property shall.--

(a) if she has no children, be transferred to her parents; or

(b) if she has children, be transferred to such children and pending such transfer, be held in trust for such children.]

[(3-A) Where a person convicted under sub-section (2) for failure to transfer any property as required by sub-section (1) [or sub-section (3)] has not, before his conviction under that sub-section, transferred such property to the woman entitled thereto or, as the case may be, [her heirs, parents or children] the Court shall, in addition to awarding punishment under that sub-section, direct, by order in writing, that such person shall transfer the property to such woman or, as the case may be, [her heirs, parents or children] within such period as may be specified in the order, and if such person fails to comply with the direction within the period so specified, an amount equal to the value of the property may be recovered from him as if it were a fine imposed by such Court and paid to such woman or, as the case may be, [her heirs, parents or children].

(4) Nothing contained in this section shall affect the provisions of section 3 or section 4."

8. Both the courts below have lost sight of the aforesaid relevant provisions and have not considered it. The trial court had acquitted the accused on the ground that articles were given to the bride and bride groom at the time of their marriage fro their joint use and so it does not come within the purview of section 406 IPC.

9. The Hon'ble Apex Court in the case of **"Pratibha Rani, 1985 Cri LR 817**, has made the following observations in Paras 20, 27 & 57:-

"we are clearly of the opinion that the mere factum of the husband and wife living together does not entitle either of then to commit a breach of criminal law and if one does then he/she will be liable for all the consequences of such breach. Criminal law and matrimonial home are not strangers. Crimes committed in matrimonial home are as much punishable as anywhere else. In the case of stridhan property also, the title of which always remains with the wife though possession of the same may sometimes be with the husband or other members of his family, if the husband or any other member of his family commits such an offence, they will be liable to punishment for the offence of criminal breach of trust under Sections 405 and 406 IPC. To sum up the position seems to be that a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife.

10. The finding of the trial court that articles were given for the joint use and there is no entrustment in favour of the accused, hence no offence under section 406 IPC is made out, are illegal and against the law. The appellant court has also upheld the

11. From the provisions of section 6 of Dowry Prohibition Act it is clear that complainant was entitled to receive possession of the articles which were given at the time of marriage and were in possession of the accused. Refusal in this regard will attract section 406 IPC and if there is sufficient and realiable evidence on record then accused may be convicted.

12. From the perusal of the lower court record it is clear that complainant (revisionist) to prove his case has examined three witnesses, Mohd. Saddik (P.W.-1, complainant himself), Mohd. Israil (P.W.-2) & Wasim (P.W.-3). As documentary evidence a list of articles alleged to be given at the time of marriage and photocopy of receipt of motorcycle have also been filed. The list contains description of various articles, some in print form and some hand written and it contains signature of Hasmuddin. Complainant Mohd Saddik (P.W.-1) in his statement in chief has said that "whatever articles I have given to my daughter, was given to her, for her use. After preparing a list copy of it was given to the father-in-law of his daughter and signature of bride groom was obtained on it". Wasim (P.W.-3) is the son of complainant has said that a list of articles was prepared and signature of Hasmuddin was obtained on it, while Mohd. Israil (P.W.-2) has said that a list of articles was prepared. None of the witnesses have identified the signature of accused Hasmuddin on the list. Witnesses have also not said that accused Hasmuddin has put his signature on the list before them. The description of ornaments is hand written while the description of other articles is in print form. The list bear only one signature that is of Hasmuddin and there is no signature of any witness on it. It is also not clear that who has prepared this list and who has hand written the ornaments described in the list. So from the analysis of the evidence produced by the complainant it is clear that the list has not been duly proved as per provisions of Evidence Act. So there is no cogent and sufficient evidence on the record to prove the charge under section 406 IPC and hence finding of acquittal recorded by the court below cannot be interfered.

13. From the aforesaid discussion it is clear that although the findings recorded by the court below that articles were given for their joint use and there is no entrustment and hence offence under section 406 IPC is not made out, are not according to law, but as there is no cogent and sufficient evidence on the record, the charge under section 406 IPC is not stands proved and finding of acquittal recorded by the trial court cannot be interfered with. The criminal revision lack merits and is liable to be dismissed.

14. Accordingly, the criminal revision is **dismissed.**

15. Lower court record be transmitted back to the concerned court below.

(2022)02ILR A714
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Second Appeal No. 584 of 2021

Jokhan ...Appellant
Versus
Murtuja & Ors. ...Respondents

Counsel for the Appellant:
Sri Kashi Nath Shukla, Sri Sneh Ranjan Shukla

Counsel for the Respondents:
Sri Santosh Kumar Rai, Sri Surendra Kumar Chaubey

A. Civil Law - - Scope of Second Appeal - Civil Procedure Code, 1908 - Section 100 - The appellant has challenged the order dated 12.10.2018/ 25.10.2018 by which delay condonation application has been rejected. **The Court held that such an order is not a decree but only a formal order. The consequential order of dismissal of first appeal will come in the purview of decree but that is not under challenge.** The Second Appeal is not maintainable against the impugned order. (Para 6)

Second Appeal Rejected. (E-10)

List of Cases cited:

1. Ishwar Saran Vs Vijay kumar Kushwaha & ors. Second Appeal No. 1169 of 2018

2. Mata Pher Mishra Vs St. of U.P. & ors. Special Appeal Defective No. 242 of 2021

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This Second Appeal is directed against an order of the learned Additional District Judge, Court No.4 Mau, Misc. Case No.103 of 2018 (*Jokhan and ors vs.Murtaza and ors.)* rejecting an application to condone the delay in preferring an appeal from the judgment and decree of the Additional Civil Judge (Junior Devision) court no.8 Azamgarh dated 24.01.1998 passed in Original Suit No.540 of 1986.

2. Relevant facts for the decision of the second appeal are that respondents-plaintiffs filed a Suit for cancellation of sale deed and injunction against the appellants-respondents. In that original suit the appellants-respondents filed their counter claim seeking relief of possession and injunction against the plaintiffs-respondents. The learned trial court vide judgment and decree dated 24.01.1998 dismissed the original suit as well as the counter claim. This decree was challenged by the plaintiffs-respondents in civil appeal no.54 of 1998 which was later transferred to the District Mau and numbered as Civil

Appeal No.20 of 2014 and is still pending. The appellants-defendants preferred an appeal belatedly under Section 96 of CPC against dismissal of the counter claim before the District Judge, Mau and to condone the delay also moved an application under Section 5 of the Limitation Act on 04.02.2018. The application was supported by an affidavit. This application was assigned to the learned Additional District Judge, court no.4, Mau and its number is 103 of 2018. This application for condonation of delay has been rejected by the impugned order.

3. Grounds taken in the accompanying affidavit with application to condone the delay are that applicant/ appellant- Jokhan is an illiterate rustic villager and other appellants are also illiterate villagers. They have no knowledge of law. The trial court dismissed the Suit of plaintiffs-respondents on 24.01.1988 and the appellants were in the impression that the Suit has been dismissed so they have not to take any further action and in this belief they bonafidely were contesting the Civil Appeal No.54 of 1998 (Kamruddin and ors vs. Rojia and ors) and that appeal is still pending in the court of additional District Judge, court no.3 Mau. No decree was prepared in respect of dismissal of counter claim. During preparation of arguments of the appeal in December 2019 the new counsel engaged, told the applicant that they have also to file an appeal against the decree then applicants/ appellants moved an application before the appellate court for preparation of the decree on which the learned appellate court passed the order dated 06.12.2017 that in the decree prepared there is description of counter claim. Then the counsel for the appellant submitted before the court that separate decree is required against the counter claim on which the learned court agreed to consider it. Meanwhile the presiding officer was transferred to other court. Then on the basis of the order dated 06.12.2017, the applicants/ appellants moved an application for obtaining copy of the decree on 08.02.2018. Thereafter applicant/ appellant- Jokhan became sick and unable to move. When he recovered from the illness, then on 02.07.2018 he came to the court and got the appeal prepared and filed it without any further delay. It has also been alleged that delay in preferring the appeal is not deliberate but under bonafide impression.

The opposite parties/ respondents filed their objections 9Ga against the aforesaid application and alleged therein that the original suit was decided in the year 1998 in District Azamgarh and Suit of the plaintiffs was well as counter claim of defendants were rejected and decree was prepared. It is specifically mentioned in the decree that Suit of the plaintiffs and counter claim of the defendants are hereby dismissed. The defendants have not preferred any appeal against dismissal of the counter claim. The averments of the appellants that no decree of counter claim was prepared is absolutely wrong. No sufficient reason for delay has been shown. Applicants were aware from the very beginning about the appeal filed by the father of the opposite party. It has also been alleged that as the case has been decided at District Azamgarh the appeal should have been filed in District Azamgarh. On the aforesaid grounds, the opposite parties prayed that application to condone the delay be rejected. The learned Additional District Judge, court no.4, after hearing the both the parties, by the impugned order

dated 12.10.2018 has rejected the application to condone the delay.

4. Learned counsel for the appellants mainly contended that the appellants could not understand the effect of judgment and decree passed by the trial court by which counter claim was dismissed, therefore, could not prefer first appeal within the period of limitation. Further no decree in respect of the counter claim filed by the defendants-appellants was prepared. When the appellant engaged other counsel in Civil Appeal, he advised to file an appeal against the dismissal of the counter claim. The learned counsel also contended that the court of Additional District Judge IV did not take pain to deal with Section 5 of the Limitation Act which gives discretion to the court. The appellate court without proper application of mind and adopting very technical approach has rejected the delay condonation application. The expression sufficient cause cannot be strictly interpreted. Lenient approach should be adopted to do the substantial justice. The learned counsel also contended that first appeal against the dismissal of original suit is still pending and hence no prejudice will be caused to the respondents. Learned counsel placed reliance on the decision of this Court in Second Appeal No.1169 of 2018 dated 07.09.2021 in (Ishwar Saran vs. Vijay Kumar Kushwaha and 3 ors) and another decision of division bench this Court dated 09.06.2021 passed in Special Appeal Defective No. 242 of 2021 (Mata Pher Mishra vs. State of U.P. and two ors).

5. Learned counsel for the respondents defended the impugned order and contended that dismissal of counter claim was in the knowledge of the appellants since the beginning. They were also participating in the appeal filed by the respondents so they were aware of all the proceedings but opted not to file any appeal against the dismissal of the counter claim. Later on with much delay, the appeal along with delay condonation application was filed. There is no sufficient ground to condone the delay and the appellate court has rightly rejected the delay condonation application.

6. In this Second Appeal the appellant has challenged the order dated 12.10.2018/ 25.10.2018 by which the delay condonation application has been rejected in misc. case no.103 of 2018. The impugned order dated 12.10.2018 is not a decree, it is only a formal order which is evident from the perusal of the relevant papers. Although it has been described in the memo of the appeal as judgment and decree dated 12.10.2018/ 25.10.2018 but in true sense it is not a decree, it is only a formal order. The consequential order of dismissal of first appeal will come in the purview of decree but the said order is not under challenge nor has been referred in the memo of appeal. The provision of Section 100 of CPC which provides for Second Appeal is as follows:

"Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law."

It is clear from the aforesaid provision that Second Appeal before the High Court shall lie from a decree passed in appeal. As the impugned order does not come under the purview of decree and it

being only a formal order, no Second Appeal will be maintainable against the impugned order. This second appeal is liable to be dismissed on this ground alone.

7. Accordingly the second appeal is hereby dismissed.

(2022)02ILR A717
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2015

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAKESH SRIVASTAVA, J.

First Appeal No.908 of 2003

Gas Authority of India Ltd. ...Appellant
Versus
Ram Ashrey & Ors. ...Respondents

Counsel for the Appellant:
Sri A.K. Gaur, Sri Madhur Prakash, Sri V.K. Singh

Counsel for the Respondents:
Sri Dinesh Pathak, Sri Rakesh Pathak

A. Land Acquisition - Determination of market value of the acquired land - The market value of land under acquisition has to be deduced by loading the price reflected in the instances taken for plus factors and unloading for minus factors. In other words, a balance sheet of plus and minus factors may be drawn and the relevant factors may be valuated in terms of price variation. (Para 19)

First Appeal Rejected. (E-10)

List of Cases cited:

1. Jawajee Nagnatham Vs Revenue Divisional Officer (1994) 4 SCC 595

2. Land Acquisition Officer Vs Jasti Rohini 1995 (1) SCC 717

3. U.P. Jal Nigam Vs M/s Kalra Properties (P) Ltd. (1996) 3 SCC 124

4. Krishi Utpadan Mandi Samiti Vs Bipin kumar (2004) 2 SCC 283

5. Lal Chand Vs U.O.I. & anr. (2009) 15 SCC 769

6. Ramesh Chand Bansal Vs District Magistrate/ Collector (1999) 5 SCC 62

7. R. Sai Ram Bharathi Vs J. Jayalalitha (2004) 2 SCC 9

8. Chimanlal Hargoviddas Vs Special Land Acquisition Officer (1988) 3 SCC 751

9. V.M. Salgoacar & brother Ltd. Vs U.O.I. (1995) 2 SCC 302

10. Shakuntalabai (Smt.) & ors. Vs St.of Mah. 1996 (2) SCC 152

11. State of U.P. Vs Major Jitendra kumar & ors. AIR 1982 SC 876

12. Administrator General of West Bengal Vs Collector, Varanasi AIR 1998 SC 943

13. Meerut Development Authority through its Secretary Vs Basheshwar Dayal (since deceased) through His L.Rs. & anr. First Appeal No. 454 of 2003

14. Bhule Ram Vs UOI & anr. JT 2014 (5) SC 110

15. Bhupal Singh & ors. Vs St.of Har. (2015) 5 SCC 801

16. Chandrashekar Vs Land Acquisition Officer (2012) 1 SCC 390

17. Subh Ram Vs State of Haryana (2010) 1 SCC 444

18. K. Devakimma & ors. Vs Tirumala Tirupati Devasthanam & anr. 2015 (111) ALR 241

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Rakesh Srivastava, J.)

1. Heard Shri V.K. Singh, learned Senior Advocate assisted by Shri Madhur Prakash, learned counsel for appellant and Shri Dinesh Pathak for respondents.

2. This appeal, at the instance of defendant-appellant i.e. Gas Authority Of India Limited (hereinafter referred to as GAIL), has been preferred under Section 54 of Land Acquisition Act, 1894 (hereinafter referred to as "Act, 1894") being aggrieved by award/judgment dated 31.5.2003 in Land Acquisition Reference (hereinafter referred to as LAR) No.56 of 1995 passed by Shri D.L. Srivatava, Additional District Judge, Court No.4, Etawah (hereinafter referred to as Reference Court) determining market value of acquired land considering the factors under Section 23 of Act, 1894, at the rate of Rs.35,000/- per 1800 square feet. Reference Court has further awarded 30% solatium on the amount of compensation, 12% additional compensation and interest for various periods, as per provisions of Act, 1894.

3. Shri V.K. Singh, learned Senior Counsel appearing for appellant stated that challenge in this appeal is confined to the rate of compensation determined by Reference Court i.e. Rs.35,000/- per 1800 square feet. According to him, Reference Court has determined market value at much excessive and inflated rate, which does not represent true market value at the time of acquisition.

4. On the request of appellant GAIL, acquisition proceedings under Act, 1894 were initiated by publication of notification dated 10.4.1992 under Section 4 (1) of Act, 1894 in the Gazette dated 20.6.1992. Notification dated 26.8.1992 under Section 6 (1) of Act, 1894 was published in Gazette dated 12.9.1992 and possession of land in village Vaisundhara was taken on 30.1.1993. It proposed to acquire 164.35 and 53.92 acres of land in villages Vaisundhara and Sehud, Pargana Auraiya, District Etawah (now part of District Auraiya), respectively, for the purpose of constructing residential colony of staff of Petrochemical Project, to be installed at Auraiya. Claimant-respondent no.1 filed objection on 23.5.1992 and thereafter, Special Land Acquisition Officer (hereinafter referred to as SLAO) made its award dated 24.9.1994 determining market value for the purpose of compensation at Rs.1,80,000/- per acre (Rs.7438/- per 1800 square feet). Land of claimant-respondent no.1 is situated in village Vaisundhara bearing Khasra no.185 Gata No.723, area 1.64 acres.

5. Claimant-respondent 1 being dissatisfied with aforesaid offer of compensation made application for reference under Section 18 to District Judge for determination of market value under Section 23 of Act 1894 pursuant whereto impugned award dated 31.5.2003 has been delivered by Reference Court adjudicating and determining market value at Rs.35,000/- per 1800 square feet.

6. Reference Court in determining aforesaid market value has relied upon sale deed dated 6.7.1990 whereby 1800 square feet land of village Sehud, adjacent to village Vaisundhara, was transferred by sale by Karan Singh etc. in favour of Ram Prakash for a consideration of Rs.35,000/-.

7. Reference Court framed three issues. Issue 1, relevant to the issue raised in this appeal, reads as under: -

"क्या विशेष भूमि अध्याप्ति अधिकारी द्वारा किया गया प्रतिकर अपर्याप्त है? यदि हॉ तो याची कितनी धनराशि प्राप्त करने का हकदार है?"

8. Claimant-respondent 1 relied on sale deeds dated 29.8.1989 (paper no.16-Ga/4-5), 15.2.1988 (paper no.16-Ga/6-7), 31.7.1992 (paper no.16-Ga/8-9) and dated 6.7.1990 (paper no.16-Ga/10-12) vide list 22-Ga, besides other documents i.e. map, chakbandi record etc. He examined in support of his claim, himself as PW-1 and one Sobran Singh as PW-2.

9. On behalf of defendant, one Pradeep Kumar, Amin was examined as DW-1 and sale deed dated 10.9.1991 (paper no.46-Ga/1-3) executed by Radhunandan in favour of Lalaram was cited.

10. The court below with respect to location and other potential advantages of the land in question has recorded its findings that villages Sehud and Vaisundhara, both are adjacent to each other. Before SLAO several exemplar sale deeds of the said two villages were cited, but none were accepted by SLAO only for the reason that they would result in making higher rates of compensation to the land owners. Obviously, that could not have been a valid reason to reject exemplars of villages where acquired land is also situated. Having said so, court below has further observed that Collector, Etawah has determined market value for the purposes of stamp duty at the rate of Rs.35/- per square foot and above, depending upon location of land in aforesaid two villagers and some other nearby area. In view thereof, value of acquired land should not have been below Rs.35/- to Rs.45/- per square foot. Having said so, it rightly did not follow circle rate determined by Collector for the reason that the same is not relevant for the purposes of market value under Section 23 of Act, 1894 as held repeatedly by Court time and again.

11. Counsel for the parties do not dispute that circle rate fixed by Collector cannot be a basis for determining market value. In ***Jawajee Nagnatham v. Revenue Divisional Officer, (1994) 4 SCC 595,*** this question came up for consideration in the matter arisen from State of Andhra Pradesh. The land owners appealed against order of Reference Court before Andhra Pradesh High Court claiming higher compensation on the basis of the basic valuation register maintained by Revenue authorities under Stamp Act, 1899. The claim of land owners failed in High Court, which held that such register had no evidenciary value on statutory basis. In appeal, Apex Court held that basic valuation register was maintained for the purpose of collecting stamp duty under Section 47-A of Stamp Act, 1899 as amended in State of Andhra Pradesh. It did not confer expressly any power to the Government to determine market value of the land prevailing in a particular area, i.e., village, block, district or region. It also did not provide, as a statutory obligation, to Revenue authorities to maintain basic valuation register for levy of stamp duty in regard to instruments presented for registration. Therefore, there existed no statutory provision or rule providing for maintaining such valuation register. In the circumstances, such register prepared and maintained for the purpose of collecting stamp duty had no statutory force or basis and cannot form a valid criteria to determine market value of land acquired under Act, 1894. This decision was followed in ***Land Acquisition Officer Vs. Jasti Rohini, 1995 (1) SCC 717.***

12. Another matter from State of U.P. came up for consideration involving the same issue in U.P. ***Jal Nigam Vs. M/s Kalra Properties (P) Ltd., (1996) 3 SCC***

124. The land owners' demanded for compensation in regard to land acquired under Act, 1894 on the basis of market value assessed as per circle rate determined by Collector. It was accepted by High Court, but in appeal, judgment was reversed by Supreme Court following its earlier decision in Jawajee Nagnatham (supra). The Court held that market value under Section 23 of Act, 1894 cannot be determined on circle rates determined by Collector for the purpose of stamp duty under Stamp Act, 1899. This view was reiterated in ***Krishi Utpadan Mandi Samiti Vs. Bipin Kumar, (2004) 2 SCC 283.***

13. The issue has again been considered recently in Lal Chand Vs. Union of India and another, (2009) 15 SCC 769 wherein two Judgments of Apex Court taking a view that circle rates may be considered, as prima facie basis, for the purpose of ascertaining the market value were examined. These decisions are ***Ramesh Chand Bansal v. District Magistrate/Collector, (1999) 5 SCC 62 and R Sai Ram Bharathi v. J Jayalalitha, (2004) 2 SCC 9.*** The Court resolved controversy in Lal Chand Vs. Union of India holding, if in a particular case, guideline for market values are determined by an Expert Committees constituted under State Stamp Law for following a detailed procedure laid down under the relevant rules and are published in State Gazette, the same may be considered as a relevant material to determine market value. The Court said when guideline of market values, i.e., minimum rates for registration of properties, are so evaluated and determined by Expert Committees, as per statutory procedure, there is no reason why such rates should not be a relevant piece of evidence for determination of market value. Having said so in para 44 the Court further stated as under:-

"44. One of the recognised methods for determination of market value is with reference to the opinion of experts. The estimation of market value by such statutorily constituted Expert Committees, as expert evidence can, therefore, form the basis for determining the market value in land acquisition cases, as a relevant piece of evidence. It will be however open to either party to place evidence to dislodge the presumption that may flow from such guideline market value. We, however, hasten to add that the guideline market value can be a relevant piece of evidence only if they are assessed by statutorily appointed Expert Committees, in accordance with the prescribed assessment procedure (either streetwise, or roadwise, or areawise, or villagewise) and finalized after inviting objections and published in the gazette. Be that as it may."

14. F ollowing aforesaid decisions and applying the same to the facts of present case, we find that it is no body's case that circle rates fixed by Collector, Ghaziabad do satisfy the requirement as observed in ***Lal Chand Vs. Union of India*** so as to form a relevant material to be considered for determining market value under Section 23 of Act, 1894. It is, in these circumstances, we have no hesitation in holding that in respect of determination of market value of land, acquired in these appeals, circle rates fixed by Collector would not be relevant material to be looked into for determining market value.

15. Reference Court thereafter referred to sale deed dated 6.7.1990 (Paper

no16-Ga/10-12) whereby Karan Singh transferred land by sale deed to Shri Ram Prakash at the rate of Rs.35,000/- per 1800 square feet. It was two years old exemplar and at the time of acquisition certain industries had already come up to acquire land causing increase in price of land.

16. We find that SLAO determined market value at Rs.1,80,000/- per acre, which comes to Rs.7,438/- for every 1800 square feet and this has been enhanced by Reference Court to Rs.35,000/- relying upon sale deed of 1990, and that too, without applying any appreciation. Can it be said that about a little less than five times increase by Reference Court, in fact, is highly excessive and inflated?

17. We find that in last several decades large number of authorities have come up laying down factors and principles, which have to be observed and followed by the acquiring authorities or the Court determining market value in reference under Section 18 of Act, 1894 following the factors enumerated under Section 23 of Act, 1894 and these principles almost cover the entire field. It would be appropriate to recapture those principles of referring authorities.

18. So far as material placed before SLAO and his award is concerned, we find that the same was not material to be looked into by Reference Court since proceedings before Reference Court are independent and separate. An award by SLAO is like an offer and not to be treated as a judgment of Trial Court. It is well settled, when the land holders are not agreeable to accept the offer made by Land Acquisition Officer, they have a right to approach Collector under section 18 of the Act, 1894, by a written application, for referring the matter to court, for determination of the amount of compensation or if there is any dispute regarding measurement of land for that also. In the present case the references in question were made at the instance of claimants for determining the amount of compensation.

19. In ***Chimanlal Hargovinddas vs. Special Land Acquisition Officer, (1988) 3 SCC 751,*** the court has said that a Reference is like a suit which is to be treated as an original proceeding. The claimants are in the position of a plaintiff, who has to show that the price offered for his land in the award is inadequate. However, for the said purpose the court would not consider the material, relied upon by Land Acquisition Officer in award, unless the same material is produced and proved before the court. The Reference Court does not sit in appeal over the award of Land Acquisition Officer. The material used by Land Acquisition Officer is not open to be used by the Court suo motu unless such material is produced by the parties and proved independently before the Reference Court. Determination of market value has to be made as per market rate prevailing on the date of publication of notification under section 4 of Act, 1894. The basic principle which has to be followed by Reference Court for determining market value of land, as if, the valuer i.e. the court is a hypothetical purchaser, willing to purchase land from the open market and is prepared to pay a reasonable price, as on the crucial day, i.e., date of publication of notification under section 4 of the Act, 1894. The willingness of vendor to sell land on reasonable price shall be presumed. The court, therefore, would co-relate market

value reflated in the most comparable instance which provides the index of market value. Only genuine instances would be taken into account. Sometimes even post-notification instances may be taken into account if they are very proximate, genuine and acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects. Proximity from time angle and from situation angle would be relevant considerations to find out most comparable instances out of the genuine instances. From identified instances which would provide index of market value, price reflected therein may be taken as norm and thereafter to arrive at the true market value of land under acquisition, suitable adjustment by plus and minus factors has to be made. In other words a balance sheet of plus and minus factors may be drawn and the relevant factors may be valuated in terms of price variation, as a prudent purchaser would do. The market value of land under acquisition has to be deduced by loading the price reflected in the instances taken for plus factors and unloading for minus factors.

20. The size of the land, therefore, would constitute an important factor to determine market value. It cannot be doubted that small size plot may attract a large number of persons being within their reach which will not be possible in respect of large block of land wherein incumbent will have to incur extra liability in preparing a lay out and carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers etc. The Court said that in such matters, the factors can be discounted by making deduction by way of an allowance at an appropriate rate ranging between 20% to 50%, to account for land, required to be set apart for carving out road etc. and for plotting out small plots.

21. The concept of smaller and larger plots should be looked into not only from the angle as to what area has been acquired, but also the number of land holders and size of their plots. When we talk of concept of a prudent seller and prudent buyer, we cannot ignore the fact that in the category of prudent seller the individual land holder will come. It is the area of his holding which will be relevant for him and not that of actual total and collective large area which is sought to be acquired.

22. In ***V.M. Salgoacar & brother Ltd. vs. Union of India (1995) 2 SCC 302***, the land acquired by notification dated 06.07.1970 in village Chicalim near Goa Airport belonged to a single owner. The Court observed, when land is sold out in smaller plots, there may be a rising trend in the market, of fetching higher price in comparison to the plot which are much higher in size. Having said so the Court further said "though the small plots ipso facto may not form the basis per se to determine the compensation, they would provide foundation for determining the market value. On its basis, giving proper deduction, the market value ought to be determined".

23. Again, in ***Shakuntalabai (Smt.) and others vs. State of Maharashtra, 1996 (2) SCC 152, 20*** acres of land in Akola town was sought to be acquired by notification published on 11.08.1965 under section 4 (1) of Act, 1894 which was also owned by a single person. It is in this context the Court said "the reference court committed manifest error in determining compensation on the basis of sq. ft. when

land of an extent of 20 acres is offered for sale in an open market, no willing and prudent purchaser would come forward to purchase that vast extent of land on sq. ft. basis. Therefore, the Reference Court has to consider valuation sitting on the armchair of a willing prudent hypothetical vendee and to put a question to itself whether in given circumstances, he would agree to purchase the land on sq. ft. basis. No feat of imagination is necessary to reach the conclusion. The answer is obviously no".

24. We may also notice at this stage that deduction for development is different than the deduction permissible in respect of largeness of area vis-a-vis exemplar of small piece of land. Many times, land owners relied on the rates on which development authorities used to offer allotment of developed plots cropped out by them in residential or industrial area. Such rates apparently cannot form the basis for compensation for acquisition of undeveloped lands for reasons more than one. The market value in respect of large tract of undeveloped agricultural land in a rural area has to be determined in the context of a land similarly situated whereas allotment rates of development authorities are with reference to small plots and in a developed lay out falling within urban or semi-urban area. The statutory authorities including development authorities used to offer rates with reference to economic capacity by the buyer like economic weaker sections, low income group, middle income group, higher income group etc. Therefore, rates determined by such authorities are not uniform. The market value of acquired land cannot depend upon economic status of land loser and conversely on the economic status of the body at whose instance the land is acquired. Further, normally, land acquired is a freehold land whereas allotment rates determined by development authorities etc. constitute initial premium payable on allotment of plots on leasehold basis.

25. However, where an exemplar of small piece of land is relied, in absence of any other relevant material, Court may determine market value in the light of evidence relating to sale price of small developed plots. In such cases, deduction varying from 20% to 75% is liable to apply depending upon nature of development of lay out in which exemplar plot is situated.

26. In ***Lal Chand Vs. Union of India*** (supra), Court noticed that this deduction for development constitutes two components - one is with reference to area required to be utilized for development work and second is the cost of development work. It further held that deduction for development in respect of residential plot may be higher while not so where it is an industrial plot. Similarly, if acquired land is in a semi-developed urban area or in any undeveloped rural area, then deduction for development may be much less and vary from 25 to 40 percent since some basic infrastructure will already be available. The percentage is only indicative and vary depending upon relevant factors. With reference to exemplars of transfer of land between private parties, Court would also look into the intrinsic evidence, i.e., the exemplar sale deed where the sale deed recites financial difficulties of vendor and urgent need to find money as a reason for sale or other similar factors, like litigation or existence of some other dispute. These are all the factors constituting intrinsic evidence of a distress sale.

27. In ***Lal Chand Vs. Union of India*** (supra), the Court also observed, if

acquisition is in regard to a large area of agricultural land in a village and exemplar sale deed is also in respect of an agricultural land in the same village, it may be possible to rely upon the sale deed as prima facie evidence of prevailing market value even if such land is at the other end of village, at a distance of one or two kilometers. But, the same may not be the position where acquisition relates to plots in a town or city where every locality or road has a different value. A distance of about a kilometer may not make a difference for the purpose of market value in a rural area but even a distance of 50 meters may make a huge difference in market value in urban properties. Thus, distance between two properties, the nature and situation of property, proximity to the village or a road and several other factors may all be relevant in determining market value.

28. Normally, the courts have held that exemplars should be such which are before the date of notification under Section 4 (1) but an exemplar sale deed of a subsequent period of date of acquisition notification is not completely ruled out to be relevant document provided the circumstances to justify the same are available.

29. In ***State of U.P. Vs. Major Jitendra Kumar and others, AIR 1982 SC 876,*** notification under Section 4 was published on 6.1.1948. The Court determined rate of compensation relying on sale deed dated 11.7.1959, i.e., a document executed after almost three and half years after the date of acquisition notification. Supreme Court upheld reliance of such document observing that if there is no material to show that there was any fluctuation in market rate between the date of acquisition and the date of concerned sale deed, such document may be considered as a relevant material in absence of any other apt evidence. This view was followed in a subsequent decision, i.e., ***Administrator General of West Bengal Vs. Collector, Varanasi, AIR 1998 SC 943***, where the Court said as under:-

"Such subsequent transactions which are not proximate in point of time to the acquisition can be taken into account for purposes of determining whether as on the date of acquisition there was an upward trend in the prices of land in the area. Further under certain circumstances where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such subsequent transaction, the transaction could also be relied upon to ascertain the market value."

30. Further, we need not go into a catena of other decisions rendered in the last several decades since we are benefitted of a recent Division Bench decision of this Court in First Appeal No.454 of 2003 and other connected matters, ***Meerut Development Authority through Its Secretary vs. Basheshwar Dayal (since deceased) Through His L.Rs and another*** decided on 01.08.2013 wherein the legal principles settled by Apex Court in various judgments, relevant for determination of market value have been crystallized as under:-

(i) Function of the Court in awarding compensation under the Act is to ascertain the market value of the land on the date of the notification under Section 4(1),

(ii) The method for determination of market value may be : -

(a) Opinion of experts,

(b) the price paid within a reasonable time in bona fide transactions of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages,

(c) a number of years purchase of the actual or immediately prospective profits of the land acquired.

[Ref. (1994) 4 SCC 595, Jawajee Nagnatham Vs. Revenue Divisional Officer & others (para 5)]

(iii) While fixing the market value of the acquired land, comparable sales method of valuation is preferred than other methods of valuation of land such as capitalisation of net income method or expert opinion method. Comparable sales method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it had been sold in the open market at the time of issue of notification under Section 4 of the Act. However, comparable sales method of valuation of land for fixing the market value of the acquired land is not always conclusive but subject to the following factors:-

(a) Sale must be a genuine transaction,

(b) the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act,

(c) the land covered by the sale must be in the vicinity of the acquired land,

(d) the land covered by the sales must be similar to the acquired land

(e) the size of plot of the land covered by the sales be comparable to the land acquired.

(f) if there is dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to the court to proportionately reduce the compensation for acquired land.

(iv) The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquisition which are as under : -

Positive factors	**Negative factors**
(i) Smallness of size	(i) Largeness of area
(ii) Proximity to a road.	(ii) Situation in the interior at a distance from the road.
(iii) Frontage on a road.	(iii) Narrow strip of land with very small frontage compared to depth.
(iv) Nearness to developed area.	(iv) Lower level requiring the depressed portion to be filled up.
(v) Regular shape.	(v) Lower level requiring the depressed portion to be filled up.
(vi) Level vis-	(vi) Some special

a-vis land under acquisition.	disadvantageous factor which would deter a purchaser.
(vii) Special value for an owner of an adjoining property to whom it may have some very special advantage.	

(v) For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality.

(vi) Deduction not to be done when land holders have been deprived of their holding 15 to 20 years back and have not been paid any amount.

(vii) In fixing market value of the acquired land, which is undeveloped or under-developed, the Courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired. (Ref. ***(2011) 8 SCC page 9, Valliyammal and another Vs. Special Tahsildar Land Acquisition and another,*** paras 13, 14, 15, 16, 17, 18 and 19).

(viii) When there are several exemplars with reference to similar lands, it is the general rule that the highest of the exemplars, if it is satisfied, that it is a bona fide transaction has to be considered and accepted. When the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality shown to have fetched in a bona fide transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition.(Ref. ***(2012) 5 SCC 432, Mehrawal Khewaji Trust (Registered), Faridkot and others Vs. State of Punjab and others).***

(ix) In view of Section 51A of the Act certified copy of sale deed is admissible in evidence, even the vendor or vendee thereof is not required to examine themselves for proving the contents thereof. This, however, would not mean that contents of the transaction as evidenced by the registered sale deed would automatically be accepted. The legislature advisedly has used the word 'may'. A discretion, therefore, has been conferred upon a court to be exercised judicially, i.e., upon taking into consideration the relevant factors. Only because a document is admissible in evidence, the same by itself would not mean that the contents thereof stand proved. Having regard to the other materials brought on record, the court may not accept the evidence contained in a deed of sale. (Ref. (2004) 8 SCC 270 para 28 and 38, ***Cement Corpn. Of India Ltd. Vs. Purya and others).***

(x) While fixing the market value of the acquired land, the Land Acquisition Collector is required to keep in mind the following factors : -

(a) Existing geographical situation of the land.

(b) Existing use of the land.

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

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

(xi) Section 23(1) of the Act lays down what the court has to take into consideration while Section 24 lays down what the court shall not take into consideration and have to be neglected. The main object of the enquiry before the court is to determine the market value of the land acquired. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. The determination of market value is the prediction of an economic event viz. a price outcome of hypothetical sale expressed in terms of probabilities. For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality.

(xii) The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether near about town is developing.

(xiii) In fixing market value of the acquired land, which is undeveloped or under-developed, the Courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired. Deduction of "development cost" is the concept used to derive the "wholesale price" of a large undeveloped land with reference to the "retail price" of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost". (Ref. ***Sabhia Mohammed Yusuf Abdul Hamid Mulla (dead) and others, (2012) 7 SCC 595*** paras 16, 17, 18, 21 and 22, .

31. In ***Valliyammal and another v. Special Tahsildar (Land Acquisition) and another, (2011) 8 SCC 91*** the Court has looked into various earlier judgments laying down guiding principles for determination of market value of acquired land. The Court has observed that comparable sales method of valuation is preferred since it furnishes the evidence for determination of market value of acquired land at which a willing purchaser would pay for acquired land if it had been sold in open market at the time of acquisition. However, this method is not always conclusive and there are certain factors, which are required to be fulfilled and on fulfillment of those factors, compensation can be determined. Such factors are (a) sale must be a genuine transaction; (b) sale deed must have been executed at the time proximate to the date of issue of notification under Section 4; (c) land covered by the sale must be in the vicinity of acquired land; (d) land covered by the sales must be similar to acquired land; and

(e) size of plot of the land covered by the sales be comparable to the land acquired. If there is dissimilarity in regard to locality, shape and size or nature of land, court can proportionately reduce compensation depending upon disadvantages attached with the acquired land. Further, for determining market value, potentiality of acquired land should also be taken into consideration. The potentiality means, capacity or possibility for changing or developing into state of actuality. It is well settled that market value of property has to be determined having due regard to its existing condition, with all its existing advantages and its potential possibility when led out in its most advantageous manner. The Court stated that when undeveloped or underdeveloped land is acquired the exemplar is in respect to developed land, detection towards deduction can be made. Normally, such deduction is 1/3, but it is not a hard and fast rule.

32. In ***Bhule Ram v. Union of India and another, JT 2014 (5) SC 110*** the Court in para 7 has observed that valuation of immovable property is not an exact science, nor it can be determined like algebraic problem, as it bounds in uncertainties and no strait-jacket formula can be laid down for arriving at exact market value of the land. There is always a room for conjecture, and thus the court must act reluctantly to venture too far in this direction. The factors such as the nature and position of the land to be acquired, adaptability and advantages, the purpose for which the land can be used in the most lucrative way, injurious affect resulting in damages to other properties, its potential value, the locality, situation and size and shape of the land, the rise of depression in the value of the land in the locality consequent to the acquisition etc., are relevant factors to be considered. It further said that value, which has to be assessed, is the value to the owner, who parts with his property, and not the value to the new owner, who takes it over. Fair and reasonable compensation means the price of a willing buyer, which is to be paid to the willing seller. Though the Act does not provide for "just terms" or "just compensation", but the market value is to be assessed taking into consideration the use to which it is being put on acquisition and whether the land has unusual or unique features or potentialities.. The Court then also considered as to what is the concept of guess work and observed that it is not unknown to various fields of law as it applies in the cases relating to insurance, taxation, compensation under the Motor Vehicle Act as well as under the Labour Laws. Having said so, the Court further said: -

"The court has a discretion applying the guess work to the facts of the given case but is is not unfettered and has to be reasonable having connection to the facts on record adduced by the parties by way of evidence. The court further held as under: -

"'Guess' as understood in its common parlance is an estimate without any specific information while "calculations" are always made with reference to specific data. "Guesstimate" is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time "guess" cannot be treated synonymous to "conjecture". "Guess" by itself may be a statement or result based on unknown factors while "conjecture" is made with a very slight amount of knowledge, which is

just sufficient to incline the scale of probability. "Guesstimate" is with higher certainty than more "guess" or a "conjecture" per se." (para 8)

33.x In ***Bhupal Singh and others v. State of Haryana, (2015) 5 SCC 801*** while the above principles laid down in various cases were reiterated, the Court in para 18 of the judgment said: -

"Law on the question as to how the court is required to determined the fair market value of the acquired land is fairly well settled by several decisions of this Court and remains no more res integra. This Court has, inter alia, held that when the acquired land is a large chunk of undeveloped land having potential and was acquired for residential purpose then while determining the fair market value of the lands on the date of acquisition, the appropriate deductions are also required to be made."

34 . It is also reaffirmed that where an exemplar relates to small piece of developed land and is sought to be relied to determine market value on large tract of undeveloped acquired land, deduction can be applied ranging between 20% to 75%. The Court in para 20 of the judgment relied upon its decision in ***Chandrashekar v. Land Acquisition Officer, (2012) 1 SCC 390*** stating that the deduction has two components, one is development and another with respect to the size of the area. The earlier percentage of deduction was restricted in ***Subh Ram v. State of Haryana, (2010) 1 SCC 444*** stating that deduction of both components should be around 1/3 each in its entirety, which would roughly come to 67% of component of sale consideration of exemplar sale transaction. Thus, with respect to escalation of price where exemplar is much earlier in point of time, the Court in ***K. Devakimma and others v. Tirumala Tirupati Devasthanam and another, 2015 (111) ALR 241*** said that recourse can be taken in appropriate cases to the mode of determining market value by providing appropriate escalation over the proved market value of nearby land in previous years where there is no evidence of any contemporaneous sale transaction or acquisition of comparable lands in neighbourhood. The percentage of escalation may vary from case to case so also the extent of years to determine the rates.

35. When we consider the entire matter in the light of above principles, we find that in respect of extreme potentiality of acquired land, Reference Court has observed: -

"विवादित भूमिआबादी हेतु यानि आवासीय कालोनी बनाने हेतु भावनिक क्षमता से परिपूर्ण थी और उस समय उसकी कीमत अत्यधिक हो चुकी थी और प्रतिकर आवासीय कालोनी सीापित होने के आधार पर प्रति वर्ग फुट या वर्ग मीटर में ही अध्यासन होने चाहिए था।"

36. Court below has then relied upon sale deed dated 6.7.1990, which was almost two years old whereby land was transferred by sale at the rate of Rs.19.44 per square feet (1800 square feet land was sold for a consideration of Rs.35,000/-). Normally, if no evidence of further development is available showing much higher increase, 5 to 7% per anum increase could have been applied to aforesaid rate, but in present case, there is specific finding that there has been rapid industrialization and development in the area concerned, meaning thereby rates of land must have increased with sufficient pace. Simultaneously, when a similar piece of

land is sold, Courts have allowed deduction considering principles of largeness of area, which vary from 20 to 75%. If we apply 15% appreciation per anum to the rate of land in sale deed dated 6.7.1990, it would come to around Rs.46,000/- for 1800 square feet in two years and if we apply 30% of deduction in respect of largeness of area, it will reduce to about Rs.29,000/- and odd for 1800 square feet. There is not much difference in two rates and probably, for this reason, Reference Court has followed the rates shown in sale deed 6.7.1990, which was executed two years back without making any enhancement or deduction of any amount.

37. In the entirety of facts and circumstances of the case, we do not find that rates determined by court below can be said to be excessive and inflated to such an extent that the same should be reversed or interfered with by this Court in this appeal.

38. Question, therefore, formulated above, is answered by holding that market value for the purposes of compensation determination of court below is neither unjust, unreasonable or excessive and hence, it warrants no interference.

39. The appeal, therefore, lacks merit. Dismissed with costs.

(2022)02ILR A730
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2022

BEFORE

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

First Appeal From Order No. 534 of 2000

Oriental Insurance Comp. ...Appellant

Versus

Pramod Kumar Srivastava & Ors. ...Respondents

Counsel for the Appellant:
Sri Ajay Singh

Counsel for the Respondents:
Sri Sanjay Kumar Srivastava

(A) Civil Law - Motor Vehicles Act, 1988 - Section 3 - Necessity for driving liscence , Section 149 (2) (a) (ii) - a condition excluding driving by a named person or persons or by any person who is not duly licenced , or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification - negligence - principle of "*res ipsa loquitur*" - "the things speak for itself" -principle of contributory negligence - A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.(Para - 10,11)

Claimant was the driver of tempo - no driving licence - driver of the truck has not stepped into the witness box. -- truck and the tempo are of unequal magnitude - driving the truck in rash and negligent manner - Tribunal awarded a sum of Rs.1,00,000/- - with interest at the rate of 12% as compensation to the respondent claimant - aggrieved by the order of trinbunal - appeal filed by the Insurance company .

HELD:-An additional sum of Rs. 25,000/- @ 6% granted to respondent-claimant. The reason for granting additional amount is that while granting the amount of Rs.1,00,000/-, the Tribunal has not added any amount under the head of future loss of income . Rate of interest of 12% granted by Tribunal not disturbed looking to the passage of time and the injuries which the claimant has sustained.(Para - 20,21)

Appeal partly allowed. (E-7)

List of Cases cited:-

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

2. Nirmala Kothari Vs United India Insurance Co. Ltd. (2020) 4 SCC 49.

3. M/S New India Assurance Company Ltd. Vs Smt. Usha Taneja & ors., First Appeal From Order No.1972 of 2021

4. Anita Sharma Vs New India Assurance Co. Ltd., (2021) 1 SCC 171

5. Oriental Insurance Company Limited Vs Poonam Kesarwani & ors., 2008 LawSuit (All) 1557

6. National Insurance Co. Ltd. Vs Brij Pal Singh, LAWS (ALL) 2002 (12) 19

7. Ram Chandra Singh Vs Rajaram & ors., AIR 2018 SC 3789.

8. United India Insurance Co. Ltd. Vs Sujata Arora & ors., 2013 (3) T.A.C. 29 (SC)

9. National Insurance Co. Ltd. Vs Smt. Vidyawati Devi & 2 ors., F.A.F.O. No.2389 of 2016

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

1. Heard learned counsel for the appellant and learned counsel for the respondent-claimant. Despite notice, none has appeared for the owner.

2. This appeal challenges the judgment and order dated 2.2.2000 passed by Special Judge/Motor Accident Claims Tribunal, Kanpur Dehat in M.A.C.P. No. 100 of 1992 filed by one Pramod Kumar Srivastava, (respondent-claimant herein) whereby the Tribunal awarded a sum of Rs.1,00,000/- with interest at the rate of 12% as compensation to the claimant.

3. The factual scenario urged by the claimant was the driver of tempo being No. CIW 6668. Break of the said tempo failed and, therefore, the claimant along with one other person was rolling the tempo slowly. At that point of time, one truck being No. HYM 7245 which was being driven rashly and negligently by its driver dashed the claimant which caused multiple injuries to the injured claimant. He had to be hospitalized. He had suffered multiple fractures. He was admitted in Madhuraj Nursing Home. He had claimed a sum of Rs. 1,50,000/- for the tortuous act of the respondent. None appeared for the owner. As far as Insurance Company and the driver are concerned, they filed their reply of negativity and contended that it was the claimant who himself

4. At the outset, it is an admitted position of fact that except filing reply, the driver or the owner did not step into the witness box. The Insurance Company has contended that the accident took place due to negligent driving of the injured and not that of the driver of the truck.

5. Learned counsel for the appellant has further submitted that oral testimony of P.W.1 and P.W.2 has been misread by the Tribunal. The second issue on which the appeal has been preferred is that there is breach of provisions of Section 3 of the Act, 1988 and, therefore, the Insurance Company is not liable to indemnify a third party as per the provisions of Section 149 (2) (a) (ii) of the Act, 1988. The Tribunal according to the learned counsel for the appellant has committed an error in not accepting the oral testimony of the investigator appointed by the Insurance Company and has taken a technical stand that if the Transport Authority has not been

examined, then no adverse inference can be drawn.

6. It is further submitted that the evidence adduced by the appellant is a public document and, therefore, when it is proved that the Licensing Authority, Solan has not issued the license, this fact should not have been ignored by the Tribunal.

7. Lastly it is submitted that the compensation awarded by the Tribunal is on the higher side.

8. By way of this appeal, the Insurance Company has felt aggrieved as the Tribunal has negatived its contention that the driver of the truck was not negligent. The Insurance Company has also felt aggrieved as though it was proved by them that the driver of the truck was not having driving license to drive the truck, a negative finding has been returned by the Tribunal. This according to the Insurance Company is flaw in the judgment and they could not have been made liable.

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

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

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

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

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

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

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

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

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

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary

civil suits ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

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

13. While going through the facts of this case, it is an admitted position of fact as elaborately discussed by the Tribunal in issue Nos. 1 and 2. The first fact is that the driver of the truck has not stepped into the witness box. Second, the truck and the tempo are of unequal magnitude. The evidence of P.W.1 and P.W.2 go to show that the driver of the truck was driving the truck in rash and negligent manner and when the charge-sheet was led against the driver of the truck, it cannot be said that the claimant was negligent and was a co-author of the accident. This Court cannot differ with the finding of issue Nos.1 and 2 of the Tribunal.

14. It is a matter of concern that the Insurance Company has taken the plea under Section 149 of Motor Vehicles Act, 1988 (hereinafter referred to as 'Act, 1988') and has examined an advocate to bring home their contention that the driver was not having proper driving license. The law on the point has been propounded recently in **Nirmala Kothari vs. United India Insurance Co. Ltd. (2020) 4 SCC 49.**

15. This Court in First Appeal From Order No.1972 of 2021 **(M/S New India Assurance Company Ltd. v. Smt. Usha Taneja and Others)** while deciding the issue of license on 3.1.2022 has discussed the duty of the owner and Insurance Company at length. In our case, learned counsel for the appellant has contended that the driver was not having valid driving license which has been proved by leading evidence.

16. The judgment of the Apex Court in **Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 171** would also apply to the facts of this case.

17. In our case, though the Insurance Company has examined an advocate who was appointed as investigator, the decision cited by learned counsel for the appellant will not apply to the facts of this case as the judgment in **Oriental Insurance Company Limited Vs. Poonam Kesarwani and others, 2008 LawSuit (All) 1557** will apply to the fact of this case. The judgment in **National Insurance Co. Ltd. v. Brij Pal Singh, LAWS (ALL) 2002 (12) 19** relates to the fact that the insured entrusted the truck to a person who did not have valid and effective driving license. In our case, it has not been proved by the Insurance Company that the owner was in nohow of the fact that the driver did not have a valid driving license and, therefore, the claimant cannot be done injustice.

18. This Court directed deposit of only 50% of the amount which has caused harm to the third party. There was no collusion between owner and claimant and therefore also even if the said judgment is made applicable, the later judgment in **Ram Chandra Singh v. Rajaram and others, AIR 2018 SC 3789.**

19. The judgment of this Court in **United India Insurance Co. Ltd. vs. Sujata Arora and others, 2013 (3) T.A.C.**

29 (SC) cannot be made applicable. Even if we go by the fact that the driver and the owner did not appear before Tribunal, subject to a rider to prove that the owner proves that he had taken all cautions, recovery right is granted to the Insurance Company.

20. As far as quantum is concerned, in view of the decision of the this Court in **F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016** and as per the oral submission of learned counsel for the respondent-claimant, an additional sum of Rs. 25,000/- is granted. The reason for granting additional amount is that while granting the amount of Rs.1,00,000/-, the Tribunal has not added any amount under the head of future loss of income. His income was considered to be Rs.5000/- and a lump sum of Rs.1,00,000/- was granted by the Tribunal without any further bifurcation which is bad in eye of law but, however as the accident took place in the year 1992 and 30 years have practically elapsed a lump sum of Rs.25,000/- would be admissible to the injured-claimant over and above the amount granted by the Tribunal.

21. The rate of interest of 12% granted by the Tribunal is not disturbed looking to the passage of time and the injuries which the claimant has sustained. However, this additional sum of Rs.25,000/- will carry 6% flat rate of interest.

22. In view of the above, this appeal is partly allowed. The remaining amount be deposited with the accrued interest and the claimant be given the same without keeping the same in fixed deposit as more than 30 years have elapsed and the claimant must be in his prime now.

23. Record and proceedings be sent back to the Tribunal forthwith

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(2022)02ILR A735
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2022

BEFORE

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

First Appeal From Order No. 876 of 1992

State Of U.P. & Ors. ...Appellants
Versus
Km. Anubhooti @ Eena ...Respondent

Counsel for the Appellants:
S.C.

Counsel for the Respondent:
Sri A.Kumar, Sri kamal Kumar Singh

(A) Civil Law - Motor Vehicles Act, 1988 - Section 173 - Appeal - Injuries caused to minor - filed claim petition through legal guardian - tribunal raised issues and granted a sum of Rs.2,27,560/- with a rate of interest 12% - State felt aggrieved by award of compensation to the respondent - hence appeal.(Para - 2,4)

HELD:-Negligence proved and involvement also proved. Driver never stepped into the witness box, child is a third party and, therefore, also this Court cannot take a different view then that taken by the tribunal. Compensation as awarded to the minor cannot be said to be exorbitant. Amount of Rs.2, 27,560/- for the injuries caused to the minor even in those days cannot be said to be such which requires any interference. The interim relief shall stand vacated forthwith. The amount be deposited with interest at the rate of 9% . (Para -8,9)

Appeal partly allowed.(E-7)

List of Cases cited:-

1. Sita Ram Moti Lal Vs Santasu Prasad Jai Shanker Bhutt, 1966 ACC 89 (SC)

2. HP Road Transport Corp. Shimla Vs Naem & anr., 1987 ACJ 642

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

1. Heard learned counsel for the appellants, learned counsel for the respondent; and perused the record.

2. By way of this appeal, the State has felt aggrieved by the award of compensation to the respondent on 11.1.1991 at 5.00 p.m. lost the compensation sought was Rs.2,27,560/- for injuries caused to the minor who filed the claim petition through legal guardian.

3. The facts as they culled out from the record are as follows:-

"That on 11.1.1991 at 5.00 p.m. Km. Anubhuti was playing on her tiny tricycle at the gate of resident No.5-B Upadhaya Colony, Civil Lines, Rampur. The respondent Ram Sagar Divedi driving jeep no.US V 3071 belonging to soil conservation department of Rampur District of the Govt. of U.P. rashly and negligently hit the claimant, who sustained grievous heed injury and violent nervous shock. She was shifted to the District Hospital, Rampur where doctors attending on her advised her shifting to AIIMS, New Delhi or any other nursing home with specialist doctors for treatment but there she could not get admission. She was taken to Sahgals Neurological Research Institute, New Delhi for treatment. The grievous head injury allegedly rendered her mentally affirm and permanently disabled. Therefore, she could not be married and would have to depend on her family. A sum of Rs.10,27,560/- has been sought as compensation on different heads as detailed in the petition."

4. Respondent No.3, namely, driver of the vehicle did not contest the litigation the jeep it was alleged the jeep was not involved in the incident in question and the jeep could not have been used by the driver as there was entry in the log book. The tribunal raised issues and granted a sum of Rs.2,27,560/- with a rate of interest 12%, it is this that as aggrieved the State authorities.

5. The factual scenario goes to show that the log book entry and the Soil Conservation Officer tried to help the appellant. However the tribunal has considered the judgment of the Apex Court titled **Sita Ram Moti Lal v. Santasu Prasad Jai Shanker Bhutt, 1966 ACC 89 (SC)** the fact that the vehicle belonged to the Soil Corporation and was being driven by authorized person and is involved in the accident which is proved by documentary evidence.

6. The negligence is proved and involvement is also proved. The driver never stepped into the witness box, child is a third party and, therefore, also this Court cannot take a different view then that taken by the tribunal which was relied on the judgment of the Apex Court in **HP Road Transport Corporation Shimla v. Naem and another, 1987 ACJ 642.**

7. In view of the matter, the compensation as awarded to the minor

cannot be said to be exorbitant for the following reasons:-

(i) the child has suffered grave injuries;

(ii) the tribunal has considered her condition and has held that though the multiplier is of the higher side that she would not be able to earn in future.

8. The amount of Rs.2,27,560/-for the injuries caused to the minor even in those days cannot be said to be such which requires any interference.

9. The interim relief shall stand vacated forthwith. The amount be deposited however with interest at the rate of 9% to that extent.

10. The amount kept in fixed deposit shall be released in favour of minor who by now must have attained majority.

11. This appeal under Section 173 of the Motor Vehicles Act, 1988 shall stands **partly allowed.**

(2022)02ILR A737
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1447 of 2005

Smt Seema Yadav & Ors. ...Appellants
Versus
Vinod Kumar Bajpai & Ors. ...Respondents

Counsel for the Appellants:
Sri Ram Singh

Counsel for the Respondents:

(A) Civil Law - Motor Vehicles Act, 1988 - quantum of compensation - Income Tax Act, 1961 - Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source'- Order of investment not passed because applicants /claimants are neither illiterate nor rustic villagers. (Para - 8,18)

Tribunal awarded a sum of Rs.4,85,000/- - with interest @ 6% as compensation - not granted any amount towards future loss of income of the deceased - multiplier applied 6. (Para - 1,6)

HELD:-Total compensation awarded : 14,72,800. Multiplier applied 11. Deceased in the age bracket of (51-60) years as salaried person, 20% of the income added as future prospects . Rate of interest fixed at 7.5%. Judgment and decree passed by the Tribunal stand modified. Respondent-Insurance Company shall deposit the amount along with additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. (Para - 6,7,13)

Appeal partly allowed. (E-7)

List of Cases cited:-

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

2. New India Assurance Co. Ltd. v. Urmila Shukla & ors., 2021 ACJ 2081,

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

4. A.V. Padma V/s. Venugopal, 2012 (1) GLH (SC), 442

5. Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Co. Ltd., 2007(2) GLH 291

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

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

1. Heard Shri Ram Singh, learned counsel for the appellants, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment dated 14.2.2005 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.7, Fatehpur (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.60 of 2003 awarding a sum of Rs.4,85,000/- with interest at the rate of 6% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent concerned has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** It is further submitted that amount under non-pecuniary heads granted and the interest awarded by the Tribunal are on the lower side and require enhancement and learned counsel submitted that deceased was General Manager in U.P. Sahkari Katai Mills and was getting Rs.15,783/- per month. It is also submitted that as the deceased was survived by his widow, two major children and one minor son and hence the deduction towards personal expenses of the deceased should be 1/4th and not 1/3rd. The multiplier has to be as per age of deceased should have been granted 11 and not 6.

5. Learned counsel for the respondents, has vehemently objected the contentions raised by the learned counsel for the appellants and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement.

6. Having heard learned counsel for the parties and considered the factual data, this Court found that the accident occurred on 31.10.2002 causing death of Ram Naresh Yadav who was 52 years of age and left behind him, widow, two major children and one minor son. The Tribunal has assessed the income of the deceased to be Rs.13000/- per month which is 1,56,000/- per annum is not in dispute. The multiplier of 11 could not have been granted even in the year 2002, it is reduced to 6. The tribunal has erred itself in not considering the multiplier as per the age of deceased and has deducted amount which he could not deduct holding that they were personal benefits to the deceased. We cannot concur with the tribunal as far as holding that the deceased was entitled to that the multiplier of 6. The multiplier has to be considered to

be 11 which would be admissible to the family. We are considering to be Rs.1,56,000/- per annum which we feel is just and proper. The deductions made by the tribunal could not have been made. To which as the deceased was age in the age bracket of (51-60) years as salaried person, 20% of the income will have to be added as future prospects in view of the decision of the Apex Court in **New India Assurance Co. Ltd. v. Urmila Shukla and others, 2021 ACJ 2081, National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** Hence we would add 20% of the income as he was a salaried person and his income considered to be Rs.13,000/- per month. As far as deduction towards personal expenses of the deceased is concerned, it should be 1/3rd as the deceased had four persons to feed and as two of them have minor and not 1/4th. The multiplier of 11 would be granted as deceased was in the age bracket of 51-60 years.

7. In this backdrop let us see evaluate the income in view of the judgment of **New India Assurance Co. Ltd. v. Urmila Shukla and others, 2021 ACJ 2081, National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 and Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and and, the

ii. Percentage towards future prospects : 20% namely Rs.2600/-

iii. Total income : Rs. 13000 + 2600 = Rs.15600/-

iv. Income after deduction of 1/3 : Rs.10,400/-

v. Annual income : Rs.10,400 x 12 = Rs.1,24,800/-

vi. Multiplier applicable : 11 (as the deceased was in the age bracket of 51-55 years)

vii. Loss of dependency: Rs.1,24,800 x 11 = Rs.13,72,800/-

viii. Amount under non pecuniary heads : Rs.70,000/- + Rs.30,000/-

ix. Total compensation : Rs.**14,72,800/-.**

8. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

9. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw

the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

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

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

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

13. In view of the above, the appeal is **partly allowed**. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount along with additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

14. Record be sent back to court below forthwith.

15. The amount be disbursed in the proportion which is ordered by the

16. We are thankful to learned counsels for the parties for ably assisted the Court.

(2022)02ILR A740
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

First Appeal From Order No. 1716 of 2010

Rishi Ram Sahu & Anr. ...Appellants
Versus
Mahendra Kumar Tripathi & Ors. ...Respondents

Counsel for the Appellants:
Sri S.D. Ojha

Counsel for the Respondents:
Sri Shreesh Srivastava

(A) Civil Law - Motor Vehicles Act, 1988 - Compensation Enhancement - Daughter of appellants (claimants) - aged about 6 years - died in accident - filed claim petition before motor accident claim tribunal - an award of Rs.

1,07,000/- with 6% per annum interest awarded - aggrieved by award - filed appeal for enhancement of the compensation amount . (Para - 1,2,5)

HELD:-Award enhanced to Rs. 2,25,000/- with interest @ 7% per annum . Respondent to re-calculate the amount of compensation accordingly and deposit the difference within 12 weeks from today before the tribunal. Judgment and decree shall stand modified. (Para - 9,10,11)

Appeal allowed. (E-7)

List of Cases cited:-

1. Kheldas Vs Virendra Singh & ors., 2008 (3) TAC 875

2. New India Insurance Co. Vs Satendra & ors., 2007 (1) TAC page 11 SC

3. Manju Devi & anr. Vs Musafir Paswan, 2005 (1) TAC 609 (SC)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This first appeal from order has been filed by the appellants (claimants) being aggrieved by the judgment and order dated 8.4.2010 passed by the Motor Accident Claim Tribunal, Chitrakoot in Motor Accident Claim Petition No. 105/70/2008 Rishi Ram Sahu and another Vs. Mahendra Kumar Tripathi and others. By the impugned judgment and order an award of Rs. 1,07,000/- with 6% per annum interest has been awarded.

2. Claimants have preferred this appeal for enhancement of the compensation amount.

3. Learned counsel for the claimant submitted that the Hon'ble Apex Court in Rajendra Singh and others Vs. National Insurance Company 2020 ACJ 2211 has awarded a compensation of Rs. 2,95,000/- for death of a child. Taking into consideration the view of the Hon'ble Supreme Court compensation awarded by the tribunal is insufficient and need to be enhanced according to proposition led by the Hon'ble Supreme Court.

4. Learned counsel for the respondent no. 3 insurance company submitted that in the facts of the present case, case of Manju Devi 2005 (1) TAC 609 SC will apply and the award may be enhanced accordingly.

5. The accident is of 22.11.2008 in which daughter of the appellants (claimants) aged 6 years has died. The impugned award is dated 8.4.2010. The tribunal has computed the amount of compensation relying on the case law Kheldas Vs. Virendra Singh and others 2008 (3) TAC 875 of Rajasthan High Court and has observed that in the aforesaid case law the Rajasthan High Court has held that for the death of a child upto 5 years of age, compensation of Rs. 1 lakh should be awarded. The learned tribunal has also referred judgment of Hon'ble Supreme Court in New Inida Insurance Company Vs. Satendra and others 2007 (1) TAC page 11 SC and has observed that deceased belongs to a ordinary family, the earning of his father is Rs. 50/- per day and has awarded Rs. 1 lakh amount plus Rs. 5000/- for loss of love and affection and Rs. 2000/- for funeral expenses and this way has awarded Rs. 1,07,000/- compensation with 6% per annum interest.

6. In para 5 of the memo of appeal it is mentioned that Hon'ble Apex Court in the case of Manju Devi and another Vs. Musafir Paswan, reported in 2005 (1) TAC 609 (SC) has enhanced the compensation from Rs. 90,000/- to Rs. 2,25,000/-, in the

case of death of a boy of aged about 13 years and the case of the appellant is identical and fully covered with the judgment of Hon'ble Apex Court and the appellants are also entitled for compensation of Rs. 2,25,000/-.

7. In Manju Devi Vs. Musafir Paswan (Supra) the Hon'ble Supreme Court has held that :

"As set out in the Second Schedule to the Motor Vehicles Act, 1988, for a boy of 13 years of age, a multiplier of 15 would have to be applied. As per the Second Schedule, he being a non-earning person, a sum of Rs. 15,000.00 must be taken as the income. Thus, the compensation comes to Rs. 2,25,000.00."

8. The case law Rajendra Singh Vs. National Insurance Company Ltd. and others (Supra) cited by the learned counsel for the appellants will not apply in the present case as in that case the date of the accident was 25.12.2012 and award was passed thereafter. The amount of compensation was assessed on the basis of notional income of 36,000/- per annum and applying a 50% deduction towards personal expenses with multiplier of 15 the compensation was calculated as Rs. 2,70,000/- and out of which 50% was deducted towards contributory negligence. A sum of Rs. 25,000/- was added towards funeral expenses leaving to a total award of Rs. 1,60,000/-. The Hon'ble Supreme Court has held that there was no contributory negligence of the deceased and deduction on account of contributory negligence was held to be unsustainable.

9. In the facts of the present case the judgment of Manju Devi (Supra) under all the heads is applicable. Award is required to be enhanced accordingly.

10. The award is enhanced to Rs. 2,25,000/- with interest @ 7% per annum.

11. The appeal is **allowed** accordingly. Respondent no. 3 will re-calculate the amount of compensation accordingly and deposit the difference within 12 weeks from today before the tribunal. The judgment and decree shall stand modified to the aforesaid extent. The record, if in this Court, be sent forthwith to the tribunal with the copy of the judgment to enable the respondent no. 3-Insurance Company to deposit the difference.

(2022)02ILR A742
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2022

BEFORE

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

First Appeal From Order No. 1972 of 2021

M/s New India Assurance Comp. Ltd. ...Appellant
Versus
Smt. Usha Taneja & Ors. ...Respondents

Counsel for the Appellant:
Sri Arun Kumar Shukla, Sri Pankaj Bhatia

Counsel for the Respondents:

(A) Civil Law - Motor Vehicles Act, 1988 - Section 140 - Liability to pay compensation in certain cases on the principle of no fault , Section 147 - Requirements of policies and limits of liability - negligence - principle of "res ipsa loquitur" - "the things speak for itself" - if the the order is not questioned as to whether the driver was having a driving licence or not and if it is proved that the driving licence was there in that

case of the matter thus it cannot be said that driver was disqualified to drive the vehicle. (Para -13)

Accident taken place - respondents are drivers and owner of the truck - insured with appellant - death of the sole bread-earner of the respondents-claimants - filed claim petition - claimed a sum of Rs.25,64,000/- - judgment and award granting a sum of Rs.3,24,000/- by tribunal - challenged by Insurance Company - defective appeal since 1998 - pending till date - main dispute regarding driving licence of the driver - finding of fact . (Para - 2,3,4)

HELD:- Not proved by the Insurance Company that the owner was aware of the fact that driving licence had expired . Tribunal has not granted any amount under the head of future loss of income rather the multiplier of 17 though is slightly on higher-side the dependency. Thus, this court does not that any amount under the head of in absence of the appellant appear before this Court, no amount requires to be enhanced. Court do not feel that the tribunal has committed any error in allowing the claim petition.(Para - 14,16,17)

Appeal dismissed. (E-7)

List of Cases cited:-

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

2. Ram Chandra Singh Vs Rajaram & ors., AIR 2018 SC 3789

3. Nirmala Kothari Vs United India Insurance Co. Ltd.,2020 4 SCC 49 (12)

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

1. Heard learned counsel for the parties and perused the judgment and order impugned..

2. Despite notice, none has appeared and it was a defective appeal since 1998 and has been recently numbered and taken up for final disposal. The record is not necessary as the matter can be disposed of as there is Annexure appended to the appeal itself.

3. By way of this appeal, the Insurance Company has brought in challenge the judgment and award granting a sum of Rs.3,24,000/- for the death of the sole bread-earner of the respondents-claimants, who had filed claim petition claimed a sum of Rs.25,64,000/- for the death of Sudhir Mohan Taneja who died in the vehicular accident and left behind him his widow and three minor children. The matter has remained pending from 1998 till date.

4. Before this Court adverts to the brief facts, the accident having taken place is not in dispute. The respondents are the drivers and the owner of the truck which is insured with appellant which is also not in dispute. The main dispute is regarding the driving licence of the driver and, therefore, the insurance company could not have been fastened with liability to pay the claimants. Hence insurance company could not have been made liable and that the multiplier was wrongly applied.

5 . The brief facts of this case are that on 22.4.1992, the deceased while he tried to board the bus, was no successful in boarding the bus in the meantime, the truck came from Delhi Road side, which was being driven rashly and negligently and dashed with the deceased. The driver of the truck tried to overtake the stationary bus from the wrong side without blowing horn, which was driven by one of the opponents and while the deceased was taken to hospital he succumbed to the injuries. The involvement of the truck and it being

insured with the appellant is not in dispute, it is not disputed that the truck tried to overtake the stationary bus and, therefore, the issue of negligence has not been raised.

6. The deceased was 32 years of age. He was a medical representative and without waiting an FIR was lodged and the witnesses were examined.

7. It is an admitted position of fact that the driver of the truck did not appear and, therefore, when a truck driver tries to overtake a bus which was stationary from the left side, the driver of the truck has to be held to be negligent which this court holds negligence judgments. This Court concur with the tribunal that the driver of the truck was rightly held to be and, therefore, this Court concur with the tribunal as far as issue of negligence is concerned and the same and the submission made by learned counsel for appellant is negatived.

8. The issue of negligence has to be decided from the perspective of the law laid down by the Courts.

9. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance. Negligence can be both intentional or accidental which can also be accidental. More particularly, term negligence connotes reckless driving and the injured of claimants must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

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

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

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to

conclusion that vehicle was being driven by him rashly as well as negligently.

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

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

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

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

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

11. The aspect of the driver Sarvan Singh not having a valid driving licence,

the triunal had considered the clause of the policy. It has been held by the tribunal as follows:

"Person or persons entitled to drive"

The insured,

Any other person who is driving on the Insurance order or with his permission.

Provided, the person driving holds a valid licence to drive the vehicle or has held a permanent driving licence (other than a learner's licence) and is not disqualified from holding or obtaining such a licence."

12. Thus, this Court also concurs with the findings of fact. It cannot be held that the driver was not knowing driving nor it can be said that he was disqualified for holding of a valid licence, not knowing how the drive a vehicle in a separate issue. The Provision of Section 147 of Motor Vehicles Act, 1988 read with Section 140 reads as follows:

"147 Requirements of policies and limits of liability. --

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which--

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)--

(i) against any liability which may be incurred by him in respect of the death of or bodily27 [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required--

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee--

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. --For the removal of doubts, it is hereby declared that the death

of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:--

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

Section 140 in The Motor Vehicles Act, 1988

140. Liability to pay compensation in certain cases on the principle of no fault.--

(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of 1[fifty thousand rupees] and the amount of compensation payable under that sub-section in respect of

the permanent disablement of any person shall be a fixed sum of 2[twenty-five thousand rupees].

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement. 3[(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force: Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A."

13. It has been discussed by the learned tribunal that the persons who are entitled to drive reads or as holds a bringing driving licence and it cannot disqualifies holding and obtaining such licence. One more aspect borne in mind, recently the Apex Court has held that if the the order is not questioned as to whether the driver was having a driving licence or not and if it is proved that the driving licence was there in that case of the matter thus it cannot be said that driver was disqualified to drive the vehicle.

14. In our case, it is not proved by the Insurance Company that the owner was aware of the fact that driving licence had expired. The judgment in ***Ram Chandra Singh v. Rajaram and others, AIR 2018 SC 3789*** wherein on liability of insurance company, no attempt was made by High Court and trial court to examine whether owner of vehicle was aware of fact that driving licence possessed by driver was valid or not. The matter was remanded back to High Court for fresh consideration of question of liability of owner or of insurer to pay consideration. (Section 147 of Motor Vehicles Act, 1988).

15. In our case, learned counsel Shri Arun Kumar Shukla has contended that driver was not having a valid driving licence which has been proved by leading evidence. In our case the judgment of the Apex Court titled **Nirmala Kothari v. United India Insurance Company Ltd**., reported in **2020 4 SCC 49 (12)** will apply in full force.

16. As far as the compensation is concerned, the tribunal cannot be said to have exceeded the principles as enunciated in those days. The tribunal has no granted any amount under the head of future loss of income rather the multiplier of 17 though is slightly on higher-side the dependency, the income of the deceased was Rs.3,000/- per month which is incentive which has also not been considered by the tribunal. The bonus has been deducted, the tribunal has deducted 1/4 for his personal expenses. The income of the deceased has been

considered to be Rs.18,000/- per year, no amount under the head of future loss of income is given and only a sum of Rs.18,000/- as additional amount is granted for non pecuniary damages. Thus, this court does not that any amount under the head of in absence of the appellant appear before this Court, no amount requires to be enhanced.

17. Hence this Court do not feel that the tribunal has committed any error in allowing the claim petition.

18. In view of the above, this appeal fails and is **dismissed.**

(2022)02ILR A749
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 2124 of 2021

Roop Lal & Anr. ...Appellants
Versus
Suresh Kumar Yadav & Ors. ...Respondents

Counsel for the Appellants:
Sri Mohd. Naushad Siddiqui

Counsel for the Respondents:
Sri Vipul Kumar, Sri Shreesh Srivastava

(A) Civil Law - Motor Vehicles Act, 1988 - Compensation Enhancement - Section 163-A - Scheme for payment of compensation in case of hit and run motor accidents .

Son (07 years of age at the time of death) of appellant died in accident - Appellants - claimants (deceased father and mother) filed claim petition before tribunal - awarded a sum of Rs.1,80,000/- as compensation to the claimants with interest at the rate of 7.5% per annum - aggrieved by award - filed appeal claiming enhancement of award.(Para - 1 to 7)

HELD:- It is a fit case to increase the notional income by taking into account the inflation, devaluation of the rupees and cost of living . Notional income of the deceased assumed to be Rs.25,000/- per annum as he was non-earning member . Notional income multiplied with applicable multiplier ''15' as prescribed in Scheduled-II of the Motor Vehicles Act, 1988 towards loss of dependency. Appellants entitled to the total compensation of Rs.4,70,000/- and entitled to the rate of interest as 7.5% per annum from the date of filing the claim petition. Judgment and award passed by the Tribunal stand modified . (Para - 12,13,14,15)

Appeal partly allowed.(E-7)

List of Cases cited:-

1. Kishan Gopal & anr. Vs Lala & ors., 2013 (101) ALR 281 (SC) = 2013 (131) AIC 219 = 2014 (1) AICC 208 (SC)

2. Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC)

3. United India Insurance Co. Ltd. Vs Mumtaz Ahmad & anr., 2017 (2) AICC 1229

4. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr., 2021 (4) TAC 673

5. Puttamma & ors. Vs K.L. Narayana Reddy & anr., 2014 (1) TAC 926

6. Kishan Gopal & anr. Vs Lala & ors., 2013 (4) TAC 5

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the claimants-appellants against the judgment and award dated 24.08.2021 passed by learned Presiding Officer, Motor Accident Claims Tribunal, Kanpur Dehat (hereinafter referred to as "Tribunal') in M.A.C.P. No. 116 of 2018 (Roop Lal and Another Vs. Suresh Kumar Yadav and others), whereby the learned Tribunal awarded a sum of Rs.1,80,000/- as compensation to the claimants with interest at the rate of 7.5% per annum.

2. The claimants-appellants have preferred this appeal for enhancement of quantum.

3. The brief facts of the case are that a claim petition was filed before the learned Tribunal by the claimants-appellants with the averments that on 18.03.2018 claimant-appellant no.1, Roop Lal was walking with his son on Kakvan Road within the jurisdiction of police station Bilhaur Districct Kanpur Nagar. At that time, a truck bearing no. U.P.93 BT 4990 who was being driven very rashly and negligently by its driver, hit the son of the appellant no.1 from behind due to which he fell on the road and front wheel of the truck ran over him. Appellant no.1's son sustained fatal injuries and died on the spot. The deceased was a child of aged about 7 years.

4. The respondents filed their respective written statements. Learned Tribunal after considering the evidence on record, awarded Rs.1,80,000/- to the appellants-claimants who are deceased's father and mother respectively.

5. Aggrieved mainly with the compensation awarded, the appellants preferred this appeal.

6. Heard Mr. Mohd. Naushad Siddiqui, learned counsel for the appellants, Mr. Vipul Kumar, learned counsel for the respondent no.3 and Mr. Shreesh Srivastava, learned counsel for the respondent nos.1 & 2. Perused the record.

7. The accident is not in dispute. The issue of negligence has been decided in favour of the appellants herein. The Insurance Company has not challenged the liability imposed on it by the Tribunal. The only issued to be decided is the quantum of compensation.

8. This is a claimants appeal, claiming enhancement of award for the death of a child who was 07 years of age at the time of his death. Learned counsel for the appellants has submitted that deceased was a brilliant student and he had very bright future. This aspect is not considered by the Tribunal. It is also submitted by learned counsel for the appellants that the notional income of the deceased is taken Rs.15,000/- per annum by the Tribunal. It is next submitted that learned Tribunal has held that the contribution of the deceased towards his family was only assumed as 1/2 of his income and in this way the Tribunal has awarded only 1/2 of his income as compensation, which is not just and proper.

9. Per contra, learned counsel for the Insurance Company has submitted that the compensation awarded by the Tribunal is just and proper and the judgment and award passed by Tribunal also does not suffer from any such infirmity or illegality which may call for any interference by this court.

10. The learned counsel for the appellants has contended that the award is bad and relied on decision of this Court and

Apex Court in ***Kishan Gopal and another v. Lala and others, 2013 (101) ALR 281 (SC) = 2013 (131) AIC 219 = 2014 (1) AICC 208 (SC) and Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC)*** relied by this Court in its recent decision of this Court in ***United India Insurance Company Limited. Vs. Mumtaz Ahmad and Another, 2017 (2) AICC 1229*** wherein this Court held as follows:

"6. Sri Ram Singh has heavily relied on the decision in the case of ***Kishan Gopal and another v. Lala and others, 2013 (101) ALR 281 (SC) = 2013 (131) AIC 219 = 2014 (1) AICC 208 (SC) and Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC). I****t goes without saying the notional figure fixed by the Apex Court since Manju Devi's judgment has been consistently Rs.2,25,000 for children below the age of 15 years. I think that is just and proper and hence, the amount requires to be enhanced from Rs.1,57,000 to Rs.2,25,000 with 6% be recovered from the owner. The appeal is partly allowed. The cross-objection is also partly allowed."*

11. The judgment of ***Kisan Gopal (Supra)*** cannot be made applicable to the facts of this case as in this case the apex court did not deduct any amount towards personal expenses.

12. Recently, the Hon'ble Apex Court has decided the controversy ans settled the law regarding the death of a child in ***Kurvan Ansari @ Kurvan Ali and another Vs. Shyam Kishore Murmu and another, 2021 (4) TAC 673 (Supreme Court)***. In this case, the Hon'ble Apex Court has stated that in spite of repeated directions, Scheduled-II of Motor Vehicles Act, 1988 is not yet amended. Therefore, fixing notional income of Rs.15,000/- per annum for non earning members is not just and reasonable. It is further stated by the Apex Court that in view of the judgments in the cases of ***Puttamma and others Vs. K.L. Narayana Reddy and another, 2014 (1) TAC 926 and Kishan Gopal and another v. Lala and others, 2013 (4) TAC 5.*** It is a fit case to increase the notional income by taking into account the inflation, devaluation of the rupees and cost of living.

13. With the aforesaid observations, the Hon'ble Apex Court took the notional income of the deceased at Rs.25,000/- per annum, hence we are of the considered view that notional income of the deceased must be assumed Rs.25,000/- per annum as he was non-earning member. Accordingly, when the notional income is multiplied with applicable multiplier "15' as prescribed in Scheduled-II for the claims under Section 163-A of the Motor Vehicles Act, 1988, it comes to Rs.3,75,000/- towards loss of dependency. The appellant nos.1 & 2 are also entitled to a sum of Rs.40,000/- each towards filial consortium and Rs.15,000/- funeral expense. Hence, the appellant nos.1 and 2 are entitled to the following amount towards compensation;

(i) Loss of Dependency : 25,000/- X 15 = Rs.3,75,000/-

(ii) Filial consortium : 40,000/- X 2 = Rs.80,000/-

(iii) Funeral expenses : Rs.15,000/-

(iv) Total compensation : Rs.4,70,000/-

14. We hold that in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat***

Johal and Others, 2019 (2) T.A.C. 705 (S.C.), the appellant nos.1 and 2 shall be entitled to the rate of interest as 7.5% per annum from the date of filing the claim petition.

15. In view of the above, the appeal is ***partly allowed***. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 08 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

(2022)02ILR A752
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2022

BEFORE

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

Writ A No. 19263 of 2021
connected with
Writ A Nos. 19265 of 2021 and 19267 of 2021

Chandan Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Jeevanjee Srivastava

(A) Civil Law - Recovery of rent - Uttar Pradesh Municipalities Act, 1916, S. 292 - Rent due to municipality from a tenant of its demised shop can be recovered by issuance of recovery certificate & be recovered as arrears of land revenue

(B) Uttar Pradesh Municipalities Act, 1916, S. 292 - U/s 292 rent in respect of properties such as demised shop can be recovered by the Nagar Palika either by directly levying distress, attaching and selling movable property of the defaulter under Chapter VI or issuing a recovery certificate u/s 292 read with Section 173-A to the Collector – all the provisions of chapter VI apply to recovery of rent due to the Nagar Palika relating to the immovable property in view of Section 166 (1) (c) of the Act, that say *any other sum, declared by the Act* of 1916 or by Rules or Bye Laws to be recoverable in the manner provided under Chapter VI, can also be recovered (Para 19, 20, 21)

Father of the tenant-petitioner, allotted Shop, owned by the Nagar Palika Parishad, on the basis of an auction for a period of 99 years - Nagar Palika Parishad issued recovery certificate, on account of outstanding unpaid rent – Petitioner pleaded that Nagar Palika Parishad have no legal right to issue a recovery certificate vis-a-vis defaulted rent due for demised shop & to recover it as arrears of land revenue – Petitioner contended u/s 173-A only taxes due can be recovered as arrears of land revenue but not rent, that is contractual in nature - Held - Nagar Palika well within their rights in issuing a recovery certificate to the Collector for the realization of arrears of rent due in respect of the shop that the petitioner holds on lease against payment of rent (Para 21)

Writ Petition dismissed. (E-5)

List of cases cited :-

1. Ram Bilas Tibriwal Vs Chairman, Municial Board, Titri Bazar, Siddarthnagar & ors., 1998 (89) RD 514

2. Mohd. Umar Vs Collector/D.M, Moradabad & ors., 2006 (9) ADJ 66 (All) (DB)

3. Iliyas Vs St. of U.P. & ors., 2007 (2) ADJ 143 (DB).

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

This judgment and order shall dispose of the present writ petition and connected Writ-A Nos. 19265 of 2021 and 19267 of 2021, all of which involve identical questions of fact and law. Writ-A No. 19263 of 2021 is being treated as the leading case.

2. Heard Mr. Ashok Kumar Singh, learned counsel for the petitioner, Mr. Jeevanjee Srivastava, learned counsel appearing on behalf of respondent no. 3 and Mr. V.K. Nagaich, learned Standing Counsel appearing on behalf of the State.

3. The brief facts of the leading case are that the Late Kamla Prasad, father of the tenant-petitioner, Chandan Lal was allotted Shop No. 6 on the basis of an auction dated 29.08.1990, for a period of 99 years. The shop is owned by the Nagar Palika Parishad, Gopi Ganj, District Bhadohi and the Nagar Palika, represented by the Executive Officer, is the landlord of the said shop. The rent of Rs. 250/- per month was settled, besides a premium of Rs. 30,000/-. The case of the petitioner is that he has been regularly paying rent to the Nagar Palika Parishad, but without determining his tenancy, the Nagar Palika Parishad have issued a recovery certificate dated 05.11.2019 for a sum of Rs. 93,508/- claimed to be outstanding against the petitioner on account of unpaid rent.

4. The petitioner challenged the order dated 05.11.2019 before this Court vide Writ-C No. 37670 of 2019 on the ground that the petitioner's lease has not been determined, yet a recovery citation has been issued. Substantially, the recovery citation was objected to on the ground that the petitioner is not in default of payment of monthly rent and further, that he has already deposited all outstanding rent under Section 30 of the U.P. Act No. 13 of 1972. It was contented, therefore, on behalf of the petitioner, in the writ petition last mentioned, that the petitioner cannot be said to have committed default in payment of rent. The writ petition was contested by the respondent-Nagar Palika Parishad on the ground that the provisions of U.P. Act No. 13 of 1972 do not apply to the Nagar Palika Parishad owned buildings, in view of the provisions of Section 2(1)(a) of the said Act. Therefore, deposit of rent in Court under Section 30 of the Act under reference would not enure to the petitioner's benefit. A further objection raised on behalf of the Nagar Palika Parishad was that the petitioner was not at all a tenant and the lease, pleaded by the petitioner, was denied.

5. The writ petition under reference came up for determination before a Division Bench of this Court and their Lordships were of opinion, considering the stand of the Nagar Palika Parishad, denying the petitioner's tenancy, that disputed questions of fact were involved, which cannot be decided in a writ petition. So far as the fact that the Nagar Palika Parishad being exempt from the operation of U.P. Act No. 13 of 1972 under Section 2(1)(a) thereof, no deposit under Section 30 could be made is concerned, this Court held that the Act would not apply to a Nagar Palika Parishad. It was also remarked by the Division Bench that the question, whether a sum of money due to the Nagar Palika as rent can be recovered as arrears of land revenue, is also a disputed question of fact, that cannot be gone into.

6. In view of the findings, the Division Bench directed the District Magistrate, Bhadohi to decide the matter in accordance with law, after hearing the

petitioner as well as the Nagar Palika, subject to the condition that the petitioner deposits half of the sum of money due under the impugned recovery certificate, within fifteen days of the date of that order with the respondent-Nagar Palika Parishad. It was further directed that the petitioner would deposit the rent/damages at the rate of Rs. 1000/- per month, in future. It was provided that subject to compliance with these directions, *status quo* with regard to possession, nature and character of the property in question would be maintained. The District Magistrate, Bhadohi was directed to decide the dispute preferably within a period of three months of the date of the order, under reference. The petitioner was granted liberty to adduce evidence in support of his case. The order further provided that in case the petitioner commits default, either in depositing half of what was shown recoverable under the impugned recovery certificate or in the matter of deposit of current rent/damages at the rate indicated and within time, the benefit of the order dated 22.11.2019, passed by this Court, would not be available to the petitioner.

7. Now, the District Magistrate has proceeded to pass the order impugned dated 07.10.2021, purportedly under Section 24(2) of U.P. Act No. 13 of 1972, whereby he has rejected the petitioner's application submitted in compliance with the orders of this Court dated 22.11.2019, passed in Writ-A No. 37670 of 2019. An objection to the said application was filed before the District Magistrate by the Nagar Palika, being an objection dated 24.02.2020.

8. A perusal of the application submitted to the District Magistrate on behalf of the petitioner shows that he has asserted the fact clearly that he was granted lease of the demised shop for a period of 99 years, consequent to an auction by the Nagar Palika on the monthly rent of Rs. 250/- In order to establish the factum of his lease, the petitioner has brought on record the order of the Additional Commissioner (Stamp), Sant Ravidas Nagar, Bhadohi dated 28.03.2007, passed in Case No. 303 of 2006-07, under Section 33 of the Indian Stamps Act, 1899, adjudicating a deficiency of stamp duty paid on the instrument to the tune of Rs. 7,250/-, besides imposing a penalty in the sum of Rs. 100/-. A copy of that order was filed before the District Magistrate and also before this Court. In addition, it was pleaded that the petitioner has been a regular pay master and not a defaulter. As such, no case for recovery of arrears of rent is made out. It was urged that there being no default in the payment of rent, no recovery certificate could have been issued by the respondent-Nagar Palika Parishad. It was also pleaded that the Nagar Palika Parishad have no legal right to issue a recovery certificate vis-a-vis the rent they claim to be due from the petitioner for the demised shop.

9. It appears from a perusal of the impugned order passed by the Collector that so far as the issue about the petitioner being a tenant in the demised shop is concerned, the stand of the Nagar Palika Parishad is utterly confounded and contradictory, which the Collector has made worst confounded. The Nagar Palika has almost disowned the fact that any lease deed was ever executed, relating to the demised shop, in favour of the petitioner, but acknowledged the fact that the petitioner's predecessor, Kamla Prasad, along with a number of other shop-keepers were allotted shops, including the demised

shop on rent, through a document called a "Shartnama" (a memorandum of terms). Since the petitioner as well as the other allottee shop-keepers committed default in payment of rent, an order was passed, asking them to vacate shop and pay the outstanding rent. The stand of the Nagar Palika further is that no lease deed for a period of 99 years was executed. The Collector has recorded the fact that the demised shop was allotted to the petitioner's father, Kamla Prasad, who was asked to get the allotment renewed through a notice dated 15.06.2015. The original allottee, Kamla Prasad's successor, that is to say the petitioner, Chandan Lal, instead of contacting the Office of the Nagar Palika, approached this Court, which is a violation of Clause 12 and 13 of the *Shartnama*. The Collector has also taken note of the Nagar Palika's case that the impugned notice has been issued to recover arrears of rent from the petitioner, as the heir and successor-in-interest of the original allottee, Kamla Prasad and to ensure vacation of the demised shop, the same being required for expansion of office premises of the Nagar Palika. The Collector has also recorded that notices dated 17.05.2011, 11.07.2018 and 16.10.2018 have been issued by the Nagar Palika, asking the petitioner to vacate the demised shop.

10. After setting out the case of the petitioner and the other similarly situate allottees of shops, the Collector has recorded his findings in a short paragraph, that says that the petitioner, being an allottee of the shop along with other similarly situate tenants, bears the moral responsibility of paying rent, which he has not. There is also a remark that the shopkeepers do not have the right to make any kind of alteration in the shops allotted, but the petitioner and the other shop-keepers have not complied with the terms of allotment and the Shartnama. The petitioner has been found in default. Therefore, the Nagar Palika has a right to recover the rent that is in default and take steps to dispossess the petitioners.

11. Now, before this Court, the learned counsel for the petitioner has primarily questioned the right of the Nagar Palika Parishad to recover the defaulted rent as arrears of land revenue. It is submitted that the Nagar Palika Parishad has no jurisdiction to recover the rent due as arrears of land revenue and, therefore, the impugned recovery certificate, that has been approved by the order impugned, are both without jurisdiction. He has relied on the provisions of Section 173-A of the Uttar Pradesh Municipalities Act, 1916 (for short, "the Act of 1916') to submit that only taxes due to the Nagar Palika from a person can be recovered as arrears of land revenue but not rent, that is contractual in nature. In support of his contention aforesaid, Mr. Ashok Kumar Singh has placed reliance upon Division Bench decisions of this Court in **Ram Bilas Tibriwal vs. Chairman, Municial Board, Titri Bazar, Siddarthnagar and others, 1998 (89) RD 514; Mohd. Umar vs. Collector/D.M, Moradabad and others, 2006 (9) ADJ 66 (All) (DB); and, Iliyas vs. State of U.P. and others, 2007 (2) ADJ 143 (DB).**

12. Refuting the contention of the learned counsel for the petitioner, Mr. Jeevanjee Srivastava, learned counsel for the Nagar Palika Parishad and Mr. V.K. Nagaich, learned Standing Counsel appearing on behalf of the State submit that the law relating to realization of Tehbazari is different from realization of rent due to the Nagar Palika Parishad. Mr. Jeevanjee

Srivastava, in particular, has drawn the attention of this Court to Section 292 of the Act of 1916 to submit that the arrears of rent due from a person to the municipality, relating to immovable property, can be recovered as arrears of land revenue.

13. This Court has considered the rival submissions canvassed on behalf of the parties.

14. In **Ram Bilas Tibriwal** *(supra)*, the question before this Court was, whether a sum of money due from the petitioner under a contract for realization of Tehbazari, settled in his favour by the municipality, could be recovered as arrears of land revenue. The further question that was involved appears to be - Whether the said sum of money could be recovered under Section 21 of the Town Areas Act, 1914 (for short, "the Act of 1914"). Their Lordships of the Division Bench, after referring to the provisions of Section 173-A of the Act of 1916 and Section 21 of the Act of 1914 held:

> 5. ...A bare perusal of the two provisions, extracted above, reveals that the contention of the learned counsel of the petitioner is well founded. The aforesaid two provisions make recoverable as arrears of land revenue only such sum which is due on account of a tax. Admittedly, the amount alleged to be due from the petitioner is not due on account of a tax. Indeed, it is due on account of the contract of realisation of Tah-bazari settled in favour of the petitioner. Therefore, for recovery of this due, the provisions of Section 173-A of Municipalities Act and Section 21 of Town Area Act cannot be resorted to. Under the provisions of U.P. Zamindari Abolition and Land Reforms Act 1950 only such sum can be recovered which is due as arrears of land revenue. It cannot be gainsaid that the amount in question is not due on account of a land revenue. Under the provisions of U.P. Zamindari Abolition and Land Reforms Act, an amount other than land revenue can be realised as arrears of land revenue only if it is made recoverable as arrears of land revenue under any statutory provision or any agreement in that regard. If the money due is not a land revenue or is not made recoverable as arrears of land revenue in the manner aforesaid, it can be recovered only by filing a Civil Suit. The respondent No. 1 may, if so advised, institute a Civil Suit against the petitioner for recovery of the alleged dues but the amount cannot be realised through the impugned recovery proceedings. The impugned proceeding is totally without jurisdiction and deserves to be quashed.

15. Likewise, in **Mohd. Umar** *(supra)* the question that fell for consideration before the Division Bench was - Whether contractual dues on account of settlement of *Tehbazari* rights in one set of cases could be recovered as arrears by the *Zila Panchayat* under the U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 and in another set, similar *Tehbazar*i dues under a contract for realization could be recovered by the Nagar Palika Parishad and the Nagar Panchayat under the Act of 1916. The group of cases considered pertaining to the Act of 1916 in **Mohd. Umar** are more relevant to the issue here. Their Lordships held that contractual dues outstanding against a person granted rights to collect T*ehbazari* cannot be recovered as arrears of Land Revenue under the Act of 1916 or under the Act of 1914, as both the statutes do not invest the municipality with that authority. It was held by the Division

Bench in **Mohd. Umar** in the following terms:

71. Section 173-A of the U.P. Municipalities Act empowers the recovery of any sum due on account of tax, other than any tax payable upon immediate demand as arrears of land revenue. Section 21 of the Town Area Act provides for recovery of an arrear of tax imposed under the Act. The amount due against the petitioners is not a tax but a premium for right to collect Tehbazari dues. The amount due to the petitioners being a consideration for contract given to them by the respondents it cannot be characterised as arrears of tax. Likewise, the amount due to the petitioners cannot be recovered as arrears of land revenue under Section 21 of the U.P. Town Area Act. The amendment of Section 173-A of the U.P. Municipalities Act has not made any difference, as the mount due against the petitioners is not a tax. Under the provisions of the U.P. Zamindari Abolition and Land Reforms Act an amount other than land revenue can be recovered as arrears of land revenue only if it is made recoverable as such under any statutory provisional in case, the amount due is not land revenue or is not made recoverable as arrears of land revenue under the statutory provisions, the said amount cannot be recovered as arrears of land revenue. The amount due from the petitioners not being an amount of arrears of tax, the recovery of the said amount cannot be made as arrears of land revenue by invoking the provisions of Section 173-A of the U.P. Municipalities Act and Section 21 of the U.P. Town Area Act. Section 293 of the Municipalities Act provides that the municipality may charge fee to be fixed by bye-law or public auction or by agreement for the use or occupation otherwise that under a lease of any immovable property vested in or entrusted to the management of the Municipality including any public street or place of which it allows the use and occupation whether by allowing a projection thereon or otherwise. The petitioners were required to pay a fixed sum under the contracts. The contracted amount is not Tehbazari. Tehbazari dues were payable by the shopkeepers for the use of land, therefore, the Tehbazari dues cannot be equated with rent, sayer or other dues in respect of the property vested in a local authority recoverable as arrears of land revenue under the provisions of Section 225 of the U.P. Zamindari Abolition and Land Reforms Act. Under Section 293 of the U.P. Municipalities Act the municipality may charge fees for use otherwise than under a lease of municipal property. The amount due is not fees but contract money, therefore, cannot be recovered under the provisions of Section 293 of the Act. Moreover the recovery of fee for use as contemplated under Section 293 of the Act cannot be made as arrears of land revenue. The recovery of the arrears of fee under the said provision is to be made under Chapter VI of Act by distress or sale of movable property.

72. The question whether the amount due towards the contract for realisation of Tehbazari dues can be recovered as arrears of land revenue came up for consideration before this Court in the case of Mumtaz Ali v. Divisional Magistrate and others, 1970 AWC 6 ; Chiranji Lal v. Collector and others, 1973 AWR 124 ; Raj Bahadur Singh v. Collector Etawah-cum-District Magistrate Etawah and others, 1985 UPLBEC 680, Ram Bilas Tibriwal v. Chairman, Municipal Board Titri Bazar and others, 1998 (2) AWC 1468 ; Titu Singh v. District Magistrate/ Collector, Mathura and others, 2003 (5)

AWC 3479 and it was held that there is no provision under the U.P. Municipalities Act or U.P. Town Area Act authorizing the respondents to realise Theka money as arrears of land revenue, as such the said amount cannot be recovered in the said manner. In view of these facts, the respondents have no authority to recover the amount of Theka money due against the petitioners as arrears of land revenue.

16. In **Iliyas** *(supra)* the question that fell for consideration again was - Whether a sum of money due to the Nagar Palika Parishad from a person under a contract for realization of Tehbazari can be realized as arrears of land revenue, under Section 173-A of the Act of 1916? Answering the question in the negative in **Iliyas**, it was held by their Lordships, thus:

4. In view of the aforesaid provisions the learned counsel for the petitioner submits that it is clear that only taxes, which are due to the municipalities can be recovered as arrears of land revenue and no other sum can be recovered as arrears of land revenue.

5. The petitioner has placed reliance upon a Division Bench judgement of this Court reported in 2006 (9) ADJ 66 (All) Mohammad Umar v. Collector/District Magistrate, Moradabad and others and reliance has been placed upon paras 10, 12 to 14 and paras 15 and 17 of the said judgement and has submitted that the Division Bench of this Court has held that amount due towards the contract for realization of Tehbazari cannot be recovered as arrears of land revenue and there is no provision under the Municipalities Act or U.P. Town Area Act authorizing the respondents to realize theka money as arrears of land revenue, as such, the said amount cannot be recovered in the said manner and has held that in view of the aforesaid fact, the respondents have no authority to recover the amount due to the petitioner as arrears of land revenue.

6. We have considered the submission made on behalf of the petitioner and the respondents. We are in full agreement with the judgement relied upon by the counsel for the petitioner. As there is no factual dispute in the present writ petition, the only question was to be decided whether the amount due against the petitioner can be recovered as arrears of land revenue or not. As in view of the Division Bench judgement of this Court, which is fully applicable to the present case, the Tehbazari amount due against the petitioner cannot be recovered as arrears of land revenue, as such, without inviting the counter affidavit, with the consent of the parties, the writ petition is being disposed of.

17. Section 291 and 292 of the Act of 1916 find place under Chapter VIII of the Act of 1916, entitled, "Other Powers and Penalties". Section 291 to 294 are placed under the heading "Rent and Charges". These read :

291. Recovery of rent on land.- (1) Where any sum is due on account of rent from a person to a Municipality in respect of land vested in, or entrusted to the management of the Municipality, the Municipality may apply to the Collector to recover any arrear of such rent as if it were an arrear of land revenue.

(2) The Collector on being satisfied that the sum is due shall proceed to recover it as an arrear of land revenue.

292. Recovery of rent of other immovable property.- Any arrears due on account of rent from a person to the Municipality in respect of immovable property other than land vested in or entrusted to the management of the Municipality, shall be recovered in the manner prescribed by Chapter VI.

18. Chapter VI of the Act of 1916 is entitled "Recovery of Certain Municipal Claims". A perusal of Sections 166 to 177 generally shows that the chapter contains machinery provisions for the enforcement of certain claims of the Nagar Palika, due from third parties. These claims mentioned in Section 166 relate to "taxes or charges' in respect of water supply or license fee etc. that are mentioned therein. The Nagar Palika is invested with the authority to issue distress warrant, attach movable property of the defaulter and sell it off by a public auction to realize its dues. Section 173-A is a later addition to Chapter VI, brought in by amendment, empowering the Nagar Palika to issue a recovery certificate to the Collector to recover any sum of money due from a person to the Nagar Palika on account of tax, other than a tax payable upon immediate demand, as arrears of land revenue. Thus, Chapter VI carries provisions setting up two different mechanisms for recovery of the specified dues of the Nagar Palika; one by distress laid by the Nagar Palika itself through its agencies, limited to attachment and sale of movables of the defaulters, and the other, under Section 173-A by issue of a recovery certificate to the Collector to recover the specified dues as arrears of land revenue.

19. Generally speaking, Section 173-A or Chapter VI, do not authorize the recovery of dues of the municipality on account of rent, either by distress or by the issue of a recovery certificate to the Collector. However, the provisions of Section 166(1)(c) show that any other sum, declared by the Act or by Rules or Bye Laws to be recoverable in the manner provided under Chapter VI, can also be recovered. Section 166 is extracted below:

166. Presentation of bill.- (1) As soon as a person becomes liable for the payment of,-

(a) any sum on account of tax, other than any tax payable upon immediate demand; or

(b) any sum payable under clause (c) of Section 196 or Section 229 or Section 230 in respect of the supply of water, or payable in respect of any other municipal service or undertaking; or

(c) any other sum declared by this Act or by rule or bye-law to be recoverable in the manner provided by this chapter, the Municipality shall, with all convenient speed cause a bill to be prescribed to the persons so liable.

(2) Unless otherwise provided by rule, a person shall be deemed to become liable for the payment of every tax and licence fee upon the commencement of the period in respect of which such tax or fee is payable.

20. A perusal of Section 291 and 292, on the other hand, shows that recovery of a sum of money due to the Nagar Palika from a person, on account of rent relating to land vested in the Nagar Palika, or entrusted to its management, can be recovered by the Nagar Palika asking the Collector to recover it as arrears of land revenue.

Section 291 thus applies in case of rent due to the Nagar Palika from a person, relating to land vested in it or entrusted to its management. The Nagar Palika has been empowered, under the provision itself, to issue a recovery certificate to the Collector for the recovery of rent due in respect of land, by virtue of Section 291 and without the aid of Chapter VI. However, in case of property other than land, like the one involved here, which is a shop let out to the petitioner, it is provided that rent due to the municipality from a tenant, in respect of a property of this kind (that is other than land vested in or entrusted to the management of the Nagar Palika) shall be recovered in the manner prescribed by Chapter VI. Thus, for the recovery of rent due to the Nagar Palika from a tenant in respect of property other than land, the entire provisions of Chapter VI apply. Rent in respect of properties such as the demised shop can, therefore, be recovered by the Nagar Palika either by directly levying distress, attaching and selling movable property of the defaulter under Chapter VI or issuing a recovery certificate under Section 292 read with Section 173-A to the Collector. The legal position that Chapter VI would apply validly to recovery of rent due to the Nagar Palika relating to the immovable property, other than land vested in or entrusted to the said local body, is placed beyond any cavil by the terms of Section 166 (1) (c) of the Act, that say, "**that any other sum declared by this Act**", would be the subject matter of presentation of a bill under Section 166 and its recovery under Chapter VI.

21. What Section 292, therefore, does is to apply all the provisions of Chapter VI to the recovery of dues on account of rent owed to the Nagar Palika by a tenant in respect of immovable property, other than land vested or entrusted to the management of the Nagar Palika. The property, in respect of which rent is sought to be recovered from the petitioner, is a shop claimed by the tenant to be rented out to him, and not forthrightly denied by the Nagar Palika too. Thus, what the Nagar Palika seeks to recover by issuing the impugned recovery certificate to the Collector is rent in respect of the Nagar Palika property, other than land vested in them or entrusted to their management. The Nagar Palika are well within their rights in issuing a recovery certificate to the Collector for the realization of arrears of rent due in respect of the shop that the petitioner holds on lease against pa**yment of rent. The decisions of this Court in Ram Bilas Tibriwal, Mohd. Umar and** Iliyas are not at all applicable on principle, inasmuch as what is laid down there is that contractual dues of the Nagar Palika, due under a *Tehbazari* contract, cannot be recovered as land revenue. Thus, those authorities do not, at all, relate to rent due to the Nagar Palika for a property other than land.

22. In this view of the matter, none of the authorities relied upon by the learned counsel for the petitioner, would come to his rescue. The impugned recovery, therefore, cannot be faulted or questioned on the ground of lack of jurisdiction, Whether, in fact, there are any dues or not outstanding against the petitioner is beyond the province of this Court to adjudicate in exercise of our powers under Article 226 of the Constitution.

23. It must, however, be remarked that so far as the order of the Collector says that since the petitioners are defaulters in the payment of rent it can be recovered and they can be evicted, that remark may not be

without its own fallacies. Recovery of possession from a tenant in default, or for whatever reason can be made by a landlord, even if it is the Nagar Palika or the State, in accordance with the procedure established by law and not by employing the administrative authority or the force of State available at their command. Also, the remarks of the Collector that there is nothing to show that the petitioner holds a 99 years' lease, may not be a well considered finding at all, because it is ultimately acknowledged that the petitioner's predecessor, and thereafter, the petitioner in the leading case, and the petitioners in the other cases as well are tenants who owe rent to the Nagar Palika. It is for the said reason that the respondent-Nagar Palika seeks to recover rent from the petitioners. Thus, this Court thinks that so far as recovery of possession from the petitioner is concerned, the Nagar Palika would be free to take steps in accordance with law, by approaching a forum of competent jurisdiction, and so far as the petitioner is concerned, he would have liberty to establish his case of tenancy on whatever terms he pleads, also in a suit instituted before a Court of competent jurisdiction. It is not for this Court to go into those questions, as these involve disputed questions of fact about the terms of the lease/ tenancy, the right to recovery of possession etc. Thus, these questions are left open to be examined in a suit that may be instituted by one party or the other, for the purpose of relief, to which the concerned party thinks himself/itself entitled.

24. So far as the recovery certificate that has led to this writ petition is concerned, and the impugned order made by the Collector, insofar as it relates to recovery, though for reasons very different than those that have weighed with the Collector, must be upheld. As such, subject to the liberty given above to both parties, these petitions **fail** and are ***dismissed.***

25. No costs.

(2022)02ILR A761
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 34 of 2020
with other cases

M/s Panchsheel Buildtech Pvt. Ltd.
...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Mishra, Sri Nikhil Agarwal

Counsel for the Respondents:
C.S.C., Sri Mahesh Chandra Chaturvedi (Senior Adv.), Sri Mahesh Narain Singh, Sri Ravi Prakash Pandey

A. Civil Law - UP Urban Planning and Development Act, 1973 – Ch. VI – Sections 15 and 18 – Imposition of infrastructure surcharge and corner charge by Development Authority – Validity challenged – Provision for 10% additional infrastructure charge as envisaged in the First Government Order does not find place in the Second Government Order – Benefit claimed – First Government Order stood amended and degraded/devolved to the extent provided by the Second Government Order – Held, intention of the Second Government Order is clear that it seeks to modify and degrade the First Government Order in terms explicit in the Second Government Order – Waiver of

infrastructure surcharge for reason of responsibility of internal development of the plot in question by the petitioner, cannot be claimed as a right by the petitioner just because the GDA has recommended reconsideration of its imposition – Authority on the State Government and the GDA to impose infrastructure surcharge and corner charge is conferred by Chapter VI of the Act of 1973. (Para 22, 24, 28 and 32)

B. Interpretation of Statute – Rule of *contemporanea exposition* – First Government Order vis-à-vis Second Government Order – Effect – Held, Second Government Order, which has not been challenged by the petitioner, has to be viewed as a conscious decision by the government to modify and degrade/ devolve the First Government Order by removing the clause for imposition of infrastructure surcharge post issuance of the Second Government Order – Neither the express words of the Second Government Order nor the intention thereof are to rescind or abrogate the First Government Order. (Para 28)

C. Transfer of Property Act, 1882 – Section 105 – Document transferring the property in favour of society is a lease–deed, not sale-deed – However, demand of infrastructure surcharge was made by the Development Authority – Validity challenged – First Government Order governing the demand of infrastructure surcharge, its applicability – Held, Lease-deed leave no room for doubt that the transfer of the property in question is not one of transfer of ownership but is a transfer of a right to enjoy such property made for a period of 90 years on payment of premium and rent – Held further, Government Order applies only to such plots of land sold by the Development Authorities – The claim of the GDA of infrastructure surcharge on the property in question pursuant to the First Government Order is *dehors* the entitlement of the GDA under the First Government Order. The demand for infrastructure surcharge from the petitioner Society does not have the mandate of law and as such is illegal. (Para 69, 70 and 71).

D. Interpretation of statute – Estoppel rule – Application – Principle of law discussed – No estoppel would operate against a statute – Private interest would have to give way to public interest. (Para 88)

E. Interpretation of statute – Word 'Vendee' used in the sale-deed – Definition – Original allottee/vendee of development authority executed sale-deed in favour of the petitioner/subsequent purchaser – Claimed that the GDA is stopped from raising any demand for additional charge and it would be deemed that they have waived their right to recover any charge other than what has been paid – Held, the vendees mentioned in the sale deed includes their heirs and successors, executors, administrators and permitted assignees – Petitioners, therefore, would be bound under the terms and conditions of the sale deed dated 01.05.2015. (Para 92 and 96)

Eight writ petitions dismissed; one writ petition allowed. (E-1)

List of Cases cited:

1. Virendra Kumar Tyagi Vs Ghaziabad Development Authority; 2006 (1) AWC 834

2. Rohitash Kumar Vs Om Prakash Sharma; (2013) 11 SCC 451

3. Vasantkumar Radhakisan Vora Vs Board of Trustees of the Port of Bombay; (1991) 1 SCC 761

(Delivered by Hon'ble Jayant Banerji, J.)

The aforesaid bunch of writ petitions have been filed before this Court on issue of imposition of infrastructure surcharge, and, in some cases, imposition of corner charge by way of demand notices issued by the Ghaziabad Development Authority,

Ghaziabad1. Since detailed submissions on facts and law were advanced in the aforesaid Writ-C No.34 of 2020, that case is made the leading petition and is being adjudicated first.

WRIT - C No. - 34 of 2020

(M/S Panchsheel Buildtech Pvt. Ltd. Vs. State Of U P And 3 Others)

1. Heard Shri Nikhil Agarwal, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the remaining respondent nos.2, 3 and 4 representing GDA.

2. This writ petition has been filed seeking the following reliefs:-

"I issue a suitable writ or direction in the nature of certiorari quashing the impugned demand notice dated 10.10.2019 (contained as Annexure no.11 to the writ petition);

II issue a suitable writ or direction in the nature of certiorari quashing the Condition no.4 of the Government Order dated 26.07.2019 (contained as Annexure no.14 to the writ petition) so far it makes the Government Order applicable with immediate effect;

III issue a suitable writ or direction in the nature of mandamus commanding the Ghaziabad Development Authority, Ghaziabad to forthwith execute sale deed of the land in favour of the petitioner; so that the petitioner would be able to execute sale deeds in favour of their flat buyers;

IV issue a suitable writ or direction in the nature of mandamus commanding the Ghaziabad Development Authority, Ghaziabad to grant permission to mortgage to avail loan facility from the Bank concerned."

3. Pursuant to an order of this Court on 11.2.2020, another relief was added, which is as follows:-

"(ia) issue a suitable writ, order or direction in the nature of certiorari quashing the office order dated 11.7.2019 issued by the Finance Controller and 15.7.2019 issued by Secretary, Ghaziabad Development Authority, Ghaziabad (contained as Annexure no. 12 & 13 to the writ petition)."

SUBMISSIONS

4. It is stated that the GDA invited tenders for allotment/sale of plots having an area 2000 sq. mts. or more for the development of Group Housing, etc. The terms and conditions were mentioned in the brochure issued by the GDA giving the complete details of the scheme. A Government Order dated 15.01.19982 provided, inter alia, for charging 10% surcharge by the Development Authorities on properties sold by them towards infrastructure development of the urban area. The condition providing for realisation of infrastructure surcharge led to increase in cost of big plots which were to be sold for purpose of Group Housing resulting in creation of imbalance and lack of interest on part of interested persons to purchase plots due to heavy cost involved. Accordingly, a proposal was submitted before the Board of the GDA that the First Government Order requires reconsideration and no infrastructure surcharge or corner charge be levied on the sale of properties by GDA having area in excess of 2000 square meters.

5. It is contended that the Board of the GDA approved the proposal on 17.10.2014. Meanwhile by a letter dated 09.10.2014, the Vice-Chairman forwarded the recommendation to the State Government for taking a decision regarding imposition of infrastructure surcharge and corner charge.

6. The GDA published a brochure for auction of plots of land in the developed schemes for purpose of group housing and other commercial purposes. It was clearly mentioned in that brochure that the matter with regard to the infrastructure surcharge was referred to the State Government and in case the State Government decided to realize the same, then it would be payable by the allotees. There was no clause for realising corner charge from the allottees. The petitioner bid successfully for Group Housing No. GH-01(18A), Vaishali Scheme, Sector-3, Ghaziabad for an area of 7768 sq. mts. and a letter of acceptance was issued to the petitioner on 27.12.2014. An agreement to sell was executed between the petitioner and the GDA which was registered on 10.02.2015. The petitioner constructed flats as per the norms and sanctioned map and a completion certificate was issued by the GDA on 22.08.2019. The petitioner paid the entire installments and there is nothing due to the GDA from the petitioner. It is stated that the petitioner, after completion of construction, has sold more than 80% of the flats to the allottees but, since no sale-deed has yet been executed by the GDA in favour of the petitioner, the petitioner is not in a position to execute sale-deeds in favour of the flat buyers, who all have made full and final payment to the petitioner. By means of a demand notice dated 10.10.2019, the petitioner has been asked to deposit a sum of Rs.14,06,81,588/- towards corner charge, infrastructure surcharge, lease rent and freehold charge. The petitioner, thereafter, learnt that an audit objection was raised regarding the infrastructure surcharge and as such the demand notice was raised by the GDA.

7. It is further stated that in 2014, after the GDA requested the State Government for amending the provisions of the First Government Order, the State Government issued another Government Order dated 26.07.20183 by which the clauses for imposition of infrastructure surcharge and corner charge were removed by the Government. It is contended that once the First Government Order was rescinded by means of the Second Government Order, there was no occasion for the GDA to realise infrastructure surcharge and corner charge from the petitioner. It is stated that the petitioner has already paid the lease rent and freehold charges and, hence, demanding additional lease rent and freehold charges is illegal. Learned counsel for the petitioner has referred to the judgment of this Court in the matter of **Virendra Kumar Tyagi vs. Ghaziabad Development Authority4** to contend that in a similar matter with regard to payment of mutation charges imposed under the provisions of sub-section (2A) of Section 15 of the Uttar Pradesh Urban Planning and Development Act, 19735, this Court held that the demand for mutation charges pursuant to a Government Order is illegal and without authority of law and the demand was quashed. It is further stated that the judgment in Virendra Kumar Tyagi (supra) was relied upon by the coordinate Bench of this Court in Writ-C No.46967 of 2015 Mahesh Chandra Agarwal vs. State of U.P. & Ors.) and a similar demand issued by a Development Authority with regard to mutation charges was set aside. Challenge

to these judgments before the Supreme Court was negated by dismissal.

8. It is stated that it was on the basis of assurance of the GDA as appearing in the brochure, did the petitioner agree to bid for and purchase the plot in question and the agreement to sell (Annexure-7 to the writ petition) was executed. It is stated that the impugned demand notice dated 10.10.2019 is for a sum of Rs.14,06,81,588/- which includes 10% corner charge, 10% infrastructure surcharge and 12% lease rent and freehold charge. This demand clubs all the alleged dues together and no breakup of the charges has been given. Learned counsel urged that the Court apply the rule of contemporanea expositio in the interpretation of the Second Government Order and interpret it as rescinding the First Government Order in light of the resolution and recommendation of the GDA and thus no infrastructure surcharge and corner charge be levied after the issuance of the Second Government Order. In this regard, the learned counsel for the petitioner relied upon a judgment of the Supreme Court in the case of **Rohitash Kumar v. Om Prakash Sharma6** (paragraphs 12, 14 and 19).

9. No counter affidavit has been filed by the respondent no.1-State Government.

10. A counter affidavit has been filed on behalf of the respondent nos.2 to 4 (GDA and its authorities). It is admitted that the petitioner being the highest bidder has paid the total amount towards the plots in question which was Rs.59,79,82,000/-. Apart from the aforesaid, 12% lease rent and freehold charges amounting to Rs.7,17,57,870/- was also deposited by the petitioner. It has been stated that the allotment letter also indicated the fact that if the State Government directs charging of the infrastructure surcharge then the allottees would be liable to pay the same. It is stated that when a local audit was conducted by the GDA in the year 2013-14, objections were raised in two matters regarding non-charging of infrastructure surcharge in view of the First Government Order. Though objections raised by the Audit Department were duly replied, but the Audit Department was not satisfied with the reply. Thereafter, a review meeting was conducted under the chairmanship of the Principal Secretary, Housing, Government of U.P., wherein directions were issued to the effect that in respect of those properties/plots, which have been allotted during the period from 15.01.1998 to 26.07.2018, notice should be issued to the allottees concerned for recovery of infrastructure surcharge. It is stated that the notice dated 10.10.2019 is in consonance with the First Government Order. As per the terms of the brochure itself, since the Government has taken a decision, the infrastructure surcharge is liable to be paid by the petitioner. Since the allotment of the plots were made on 'AS IS WHERE IS" basis and as such the corner charge is levied only on those plots which were situated on a corner. The plot of the petitioner is situated on a corner, hence, the petitioner is required to pay the corner charges also. It is stated that under the direction of the Government, on the amount of the infrastructure surcharge and the corner charge, additional 12% towards lease rent and freehold charge are also payable and as such the demand was incorporated in the letter dated 10.10.2019.

11. In the rejoinder affidavit, the allegations contrary to the interest of the petitioner in the counter affidavit have been denied. It has been specifically stated that

there was no provision of corner charge in the brochure, allotment letter and registered agreement to sell issued/ executed by the GDA and, therefore, the demand for payment of corner charge is arbitrary, unreasonable and illegal.

DISCUSSIONS AND ANALYSIS

12. Chapter VI of the Act of 1973 provides for acquisition and disposal of land. Section 17 provides for compulsory acquisition of land where land is required for the purpose of development or for any other purpose, under the Act. The land so acquired by the State Government may be transferred to the authority or any local authority for the purpose for which the land was acquired after its possession has been taken, on payment by authority or the local authority of the compensation awarded under that Act and of the charges incurred by the Government in connection with the acquisition. Section 18 of the Act of 1973 reads as follows:-

"18. Disposal of land by the Authority or the local authority concerned.-

(1) Subject to any directions given by the State Government in this behalf, the Authority or, as the case may be, the local authority concerned may dispose of-

(a) any land acquired by the State Government and transferred to it, without undertaking or carrying out any development thereon; or

(b) any such land after undertaking or carrying out such development as it thinks fit.

to such persons, in such manner and subject to such terms and conditions as it considers expedient for securing the development of the development area according to plan.

(2) Nothing in this Act shall be construed as enabling the Authority or the local authority concerned to dispose of land by way of gift, but subject thereto, references in this Act, to the disposal of land shall be construed as references to the disposal thereof in any manner, whether by way of sale, exchange or lease or by the creation of any easement, right or privilege or otherwise.

.....

....."

13. Section 18, therefore, provides for disposal of the land by the authority, subject to any directions given by the State Government in this behalf in such manner and subject to such terms and conditions as it considers expedient for securing the development of the development area according to plan.

14. There is no dispute that the GDA has dealt with the land in question in accordance with the Section 18 of the Act of 1973. The terms and conditions and the manner of disposal of the land in question by the GDA appears in its brochure, which is enclosed as Annexure-1 to the writ petition. The First Government Order that is issued under the authority of the Governor of the State contains directions given to the development authorities for infrastructural development of cities and specifies specific portions of the various sources of income of the development authorities to be deposited in a separate

bank account. The First Government Order is being quoted in its entirety :-

"उत्तर प्रदेश सरकार
आवास अनुभाग–1
संख्याः152 / 9–आ–1–1998
लखनऊः दिनांक 15 जनवरी, 1998

कार्यालय ज्ञाप

विकास प्राधिकरणों द्वारा नगर के इन्फ्रास्ट्रक्चर विकास के प्रति योगदान सुनिश्चित करने के उद्देश्य से विकास प्राधिकरणों की कुछ श्रोतों से आप के निर्धारित अंश को इस प्रयोजन हेतु निर्दिष्ट करने का निर्णय लिया गया है। तदनुसार श्री राज्यपाल ने सहर्ष निदेशित किया है किः–

1. नीचे प्रस्तर–5 में उल्लिखित आय को विकास प्राधिकरण के सामान्य पूल में न डालकर एक अलग बैंक खाते में, जो आवासीय इन्फ्रास्ट्रक्चर हेतु निहित होगा, में जमा की जाये।

2. यह खाता विकास प्राधिकरण के स्तर पर होगा, परन्तु इस खाते की धनराशि से व्यय, मण्डलायुक्त की अध्यक्षता में गठित एक समिति के अनुमोदन से किया जायेगा जिसके सदस्य जिलाधिकारी, उपाध्यक्ष, विकास प्राधिकरण, मुख्य नगर अधिकारी, नगर निगम / अधिशासी अधिकारी, नगरपालिका परिषद व जल निगम के प्रतिनिधि होगें।

3. उक्त खाते से किये जाने वाले व्यय शासन द्वारा समय≤ पर जारी शासनादेश में निहित रीति से किये जायेंगे।

4. इस खाते से प्रत्येक वर्ष 80 प्रतिशत पूंजीगत व्यय किया जायेगा तथा अधिकतम 20 प्रतिशत राजस्व व्यय किया जा सकेगा।

5. इस खाते में निम्नलिखित प्राप्तियाँ जमा की जायेगीः–

(क) निम्न स्तरीय भू–उपयोग में परिवर्तन करते समय पवितर्न शुल्क का 90 प्रतिशत तथा शेष 10 प्रतिशत विकास प्राधिकरण अंश।

(ख) विकास प्राधिकरण की योजना के बाहर के शहरी क्षेत्र के मानचित्र स्वीकृति करने हेतु विकास शुल्क तथा सुदृ

(घ) अनाधिकृत निर्माण के सम्बन्ध में प्राप्त होने वाले शमन शुल्क का 50 प्रतिशत अंश तथा शेष 50 प्रतिशत विकास प्राधिकरण अंश।

(च) विकास प्राधिकरण द्वारा अपनी सम्पत्तियों को फ्री–होल्ड किये जाने से प्राप्त होने वाली आय का 90 प्रतिशत अंश तथा शेष 10 प्रतिशत विकास प्राधिकरण अंश।

(छ) विकास प्राधिकरण द्वारा बेचे जा रहे भूखण्डों के मूल्य पर 10 प्रतिशत अधिभार लगाते हुए प्राप्त होने वाली अतिरिक्त आय की शत–प्रतिशत अंश।

(ज) विक्रय विलेख के निबन्धन से प्राप्त आय का 90 प्रतिशत अंश तथा शेष 10 प्रतिशत विकास प्राधिकरण अंश।

आज्ञा से,

अतुल कुमार गुप्ता
सचिवष

15. In its meeting held on 4.10.2014, a committee of officials constituted by the GDA noted that for bulk sale for Group Housing and other large plots of land for 30-35% of additional area of land, the value of the same is received by the GDA and moreover for the internal development of such large plot of land, the GDA does not have to make internal development. For sale of large plots of land, 1.5 - 2 time of the value is fixed and, thus, imposition of 10% infrastructure charge and 10% corner charge ought to be reconsidered. It was noted that several other Development Authorities are not exacting infrastructure surcharge. Due to the extra imposition of the infrastructure surcharge, the price of the plots of land increase resulting in lack of interest in purchasing them. The Committee noted that plots of land having an area in excess of 2000 sq. mts. are identified in advance and the purchasers, after seeing the site and location, place their bids for the plots of land; and the plots

of land having better location receive higher bids than plots at ordinary location and as such there is no rationale for imposition of corner charge. Thus, it was proposed that with regard to the First Government Order, the Government be requested not to impose infrastructure surcharge over such plots of land and in the brochure it be provided that in case the Government again directs imposition of infrastructure surcharge then the purchasers would have to pay the same. The recommendations of the Committee were approved at the meeting of the Board on 17.10.2014. The Vice-Chairman of the GDA had, in the meantime, written a letter dated 09.10.2014 to the Principal Secretary of the respondent no.1 making his recommendation in accordance with the views/proposals expressed by the aforesaid Committee in its meeting dated 04.10.2014. The brochure of the GDA includes the terms and conditions for allotment of Group Housing and non-residential plots of 2000 sq. mts. or above, through a two bid system in various schemes of the GDA. Certain clauses of the said brochure are quoted below:-

"7.8 Regarding imposition of 10% infrastructure surcharge as per Government Order No.-152/9-Aa-1-1998 Avas anubhag-1 Lucknow dated 15.01.1998, matter is referred to Government with recommendation of not to impose it extra. The decision of Government in this regard will be applicable and binding.

7.9 The plots are to be allotted on a free hold basis. Lease rent and free hold charge @ 12% of total bid amount will be payable extra at the time of agreement/sale deed registered, as the case may be.

.....

7.16 Applicants are advised to inspect the site and get the information about any process regarding tender before submitting the tender in the tender box. After submitting the tender no objection will be entertained.

.....

8.5 If allottee adopts the pay plan-A, possession will be given after depositing full payment, 12% lease rent and freehold charge on total bid amount and registered sale deed executed in his favor. If the allottee adopts in the pay plan-B, then possession of plot will be given to the allottee of payment of 25% of the bid amount with 12% lease rent and freehold charge on total bid amount and registered sale agreement of full stamp value executed between GDA and the allottee. Accordingly, after possession, the allottee can plan a scheme for construction on the entire land within the prescribed bye-laws of GDA/as per FAR/ground coverage and land use published in newspapers/mentioned in Table-1 and can get the approval by GDA, the allottee will be entitled to have plan sanctioned by the GDA and start construction. The allottee shall be free to advertise the scheme at this own cost and risk, but in case of plan-B, allottee will not transfer any property (shop/flat as the case may be) to any body before sale deed is executed in their favor from GDA.

.....

9.7 Any money due to the GDA from the seller in respect of the plots shall be recoverable as arrears of the land revenue

from the buyer besides other modes and rights of recovery.

.....

9.9 The water supply, sewerage, drainage and electricity lines as per specification and standard shall be provided up to the the boundary of the property by GDA. The internal work shall be completed by the allottee.

9.10 Plots will be allotted on "AS is-Where is" basis and possession of plot will be given to allottee on "As is-where is" basis also. No objection will be entertained later.

.....

10.00 Stamp Duties and Other Charges:

The cost and expenses regarding stamp duty, registration charges of agreement to sale/sale deed or any other such documents required in this behalf including all incidental expenses shall be borne by the allottee. The allottee shall be bound to pay the duty of transfer of immovable property by State Government, Municipal Corporation or any other duty or charge that may be levied by any other authorities."

15. The plot in question found place in an agreement to sell executed between the GDA and the petitioner, which was registered on 10.02.2015.

16. In this agreement to sell, receipt of 25% of the total premium and 12% lease rent and freehold charge was acknowledged by the GDA and balance of 75% of the total premium, payable in four half yearly installments alongwith interest, was payable. One of the clauses in the agreement to sell is as follows:-

"8. The Second Party shall be liable to pay rates, taxes, charges and assessment of every description in respect of apportioned plot/building whether assessed, charged or imposed on that plot or on the building construction."

17. Having entered into a contract, in this case an agreement to sell, executed subsequent to the issuance of the brochure by the GDA, the petitioner stood bound by the terms of the conveyance. Thenceforth, the terms of the brochure were subject to the terms of the conveyance and the petitioner became liable thereunder. The petitioner committed itself to pay the rates, charges, taxes and assessments as envisaged in Clause 8 of the agreement to sell dated 10.02.2015.

18. On 22.08.2019 the GDA issued a completion certificate in favour of the petitioner under the provisions of Section 15A(2) of the Act of 1973. By another letter dated 22.08.2019, the petitioner was informed that the payment of the entire installments pertaining to the plot in question had been made. It was specified that if in the future any amount of the GDA is found due, that would have to be deposited.

19. By means of the letter dated 10.10.2019 the petitioner was informed that against the plot in question, 10% corner charge and 10% infrastructure surcharge and 12% of the lease rent and free hold charge amounting to Rs. 14,06,81,588.00/- is to be deposited within a month. Annexure No. 12 to the petition is a letter dated 11.07.2019 addressed by the Finance Controller to the Vice-Chairman of the GDA referring to a meeting dated 27.05.2019 chaired by the Principal

Secretary in which it was directed that between the period of First Government Order and the Second Government Order, the infrastructure surcharge be recovered and notice be issued in this regard. There is yet another inter-departmental letter issued by the Additional Secretary of the GDA on 15.07.2019 (Annexure No. 13 to the writ petition) directing that all those properties that were auctioned or sold in bulk with the permission of the Board between 15.01.1998 and 26.07.2018 on which infrastructure surcharge has not been imposed then, as sequel to the objections raised by the CAG, steps for recovering of infrastructure surcharge are required to be taken.

20. At this stage it is pertinent to refer to the Second Government order dated 26.07.2018 which has been enclosed as Annexure No. 14 to the writ petition. The Second Government Order is as follows:

''उत्तर प्रदेश शासन''
आवास एवं शहरी नियोजन अनुभाग–1
संख्याः 948(1)/आठ–1–18–44विविध/18
लखनऊः दिनांक 26 जुलाई, 2018

~~कार्यालय ज्ञाप~~

विकास प्राधिकरणों द्वारा नगर के इन्फ्रास्ट्रक्चर विकास के प्रति योगदान सुनिश्चित करने के उद्देश्य से आवास एवं शहरी नियोजन अनुभाग–1, उत्तर प्रदेश शासन के कार्यालय ज्ञाप संख्या–152/9–आ–1–1998, दिनांक 15.01.1998 के अधीन विकास प्राधिकारणों की कुछ स्रोतों से आय के निर्धारित अंश को एक अलग बैंक खाते जो आवसीय इन्फ्रास्ट्रक्चर हेतु निहित है, में जमा किए जाने की व्यवस्था है। परन्तु उस खाते में जिस क्षेत्र/कालोनी से शुल्क (विशेष कर विकास शुल्क) जमा किया जा रहा है उसका उसी क्षेत्र/ कालोनी विशेष में उपयोग सुनिश्चित किये जाने हेतु व्यवस्था नहीं है। इसके अतिरिक्त कार्यालय ज्ञाप संख्या–152/9–आ–1–1998 दिनांक 15.01.1998 के जारी होने के पश्चात शासन द्वारा क्रय–योग्य एफ.ए.आर. शुल्क का निर्धारण किया गया है तथा विकास शुल्क, नगरीय विकास प्रभार एवं भू–उपयोग परिवर्तन प्रभार नियमावलियॉ प्रख्यापित की गई हैं, जिनके प्राविधानों के दृष्टिगत उपर्युक्त कार्यालय ज्ञाप दिनांक 15.01.1998 में संशोधन किया जाना आवश्यक है।

2– उपरोक्त के दृष्टिगत कार्यालय–ज्ञाप संख्या–152/9–आ–1–1998, दिनांक 15.01.1998 को अवक्रमित करते हुए श्री राज्यपाल महोदय उत्तर प्रदेश नगर योजना और विकास अधिनियम, 1973 की धारा–41 की उपधारा–(1) द्वारा प्रदत्त अधिकारों के अधीन निम्न निर्देश देते हैः–

2.1– विकास प्राधिकरण की निम्नलिखित स्रोतों से प्राप्त होने वाली आय को प्राधिकरण के सामन्य पूल में न डालकर निम्नानुसार दो अलग–अलग बैंक खातों में जमा किया जाएगाः–

(क) नगर स्तरीय आवस्थापना विकास खाता

(1) उत्तर प्रदेश नगर योजना और विकास (नगरीय विकास प्रभार का निर्धारण, उद्ग्रहण और संग्रहण) नियमावली, 2014 के अधीन नगरीय विकास प्रभार के रूप में प्राप्त होने वाली धनराशि का शत– प्रतिशत अंश।

(2) उत्तर प्रदेश नगर योजना और विकास (भू–उपयोग परिवर्तन शुल्क का निर्धारण, उदग्रहण एवं संग्रहण) नियमावली, 2014 के अधीन भू–उपयोग परिवर्तन शुल्क के रूप में प्राप्त होने वाली धनराशि का शत–प्रतिशत अंश।

(3) उत्तर प्रदेश नगर योजना और विकास अधिनियम, 1973 की धारा–32 के अधीन अनाधिकृत निर्माण के शमन से शमन शुल्क के रूप में प्राप्त होने वाली धनराशि का 50 प्रतिशत अंश तथा शेष 50 प्रतिशत विकास प्राधिकरण का अंश।

(4) विकास प्राधिकारण द्वारा अपनी सम्पत्तियों को फ्री–होल्ड किए जाने से प्राप्त होने वाली आय का 90 प्रतिशत अंश तथा शेष 10 प्रतिशत विकास प्राधिकरण का अंश।

(5) विकास प्राधिकरण द्वारा विकसित/सृजित सम्पत्तियों के विक्रय–विलेख के निबन्धन से प्राप्त होने वाली आय का 90 प्रतिशत अंश तथा शेष 10 प्रतिशत विकास प्राधिकरण का अंश।

(ख) क्षेत्रीय अवस्थापना विकास खाता

(1) उत्तर प्रदेश नगर योजना और विकास (विकास शुल्क का निर्धारण, उद्ग्रहण एवं संग्रहण) नियमावली, 2014 के अधीन विकास शुल्क के रूप में प्राप्त होने वाली धनराधि का शत–प्रतिशत अंश।

(2) अनाधिकृत कालोनियों के नियमितीकरण की कार्यवाही के अन्तर्गत प्राप्त होने वाली धनराधि का 90 प्रतिशत अंश तथा शेष 10 प्रतिशत विकास प्राधिकरण का अंश।

(3) क्रय–योग्य एफ0ए0आर0 शुल्क से प्राप्त होने वाली धनराशि का 90 प्रतिशत अंश तथा शेष 10 प्रतिशत विकास प्राधिकरण का अंश।

2.2 नगर स्तरीय एवं क्षेत्रीय अवस्थापना विकास खाते में से प्रत्येक वर्ष 80 प्रतिशत पूँजीगत तथा अधिकतम 20 प्रतिशत राजस्व व्यय किया जा सकेगा। उक्त खातों में से पूँजीगत व्यय निम्न समितियों के अनुमोदन से किया जाएगाः–

(1) नगर स्तरीय अवस्थापना विकास खाते में से नगर की सामान्य अवस्थापना सुविधाओं के सम्बर्द्धन/विस्तार हेतु सम्बन्धित मण्डलायुक्त की अध्यक्षता में गठित एक समिति जिसमें जिलाधिकारी, उपाध्यक्ष विकास प्राधिकरण, नगर आयुक्त/अधिशासी अधिकारी तथा जल निगम के प्रतिनिधि सदस्य होंगे के अनुमोदन से व्यय किया जाएगा।

(ख) क्षेत्रीय अवस्थापना विकास खाते में सक सम्बन्धित क्षेत्र/ कालोनी के विकास कार्यों हेतु उपाध्यक्ष, विकास प्राधिकरण की अध्यक्षता में गठित एक समिति, जिसमें नगर आयुक्त/ अधिशासी अधिकारी, प्राधिकरण के मुख्य अभियन्ता/ प्रभारी अभियंत्रण तथा जल निगम के प्रतिनिधि सदस्य होंगे, के अनुमोदन से व्यय किया जाएगा। प्राधिकरण द्वारा अनाधिकृत कालोनियों के नियमितीकरण की कार्यवाही के अन्तर्गत प्राप्त होने वाली धनराशि का ब्यौरा अलग से रखा जाएगा और इस मद में प्राप्त होने वाली आय को उसी कालोनी में व्यय किया जाएगा, जिससे वह आय प्राप्त हो रही है।

3– इस सम्बन्ध में पूर्व में जारी सुसंगत शासनादेश तत्सीमा तक संशोधित समझे जाएंगे।

4– उपरोक्त आदेश तत्काल प्रभाव से लागू होंगे।

ह0अ0
नितिन रमेश गोकर्ण
प्रमुख सचिव

संख्या एवं दिनांक तदैव।

प्रतिलिपिः– निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः–

1. समस्त अपर मुख्य सचिव/प्रमुख सचिव/सचिव, उ0प्र0 शासन।
2. राजस्व एवं सचिव, राजस्व परिषद, उत्तर प्रदेश।
3. उपनिरीक्षण, निबन्धन, उत्तर प्रदेश।
4. समस्त मण्डलायुक्त, उत्तर प्रदेश।
5. आवास आयुक्त, उ0प्र0 आवास एवं विकास परिषद, लखनऊ।
6. समस्त जिलाधिकारी, उत्तर प्रदेश।
7. उपाध्यक्ष, समस्त विकास प्राधिकरण।
8. अध्यक्ष, समस्त विशेष क्षेत्र विकास प्राधिकरण।
9. नियत प्राधिकारी, समस्त विनियमित क्षेत्र, उत्तर प्रदेश।
10. निदेशक(प्रशासन) आवास बन्धु, उ0प्र0, लखनऊ।
11. मुख्य नगर एवं ग्राम नियोजक, उत्तर प्रदेश।
12. निदेशक, आवास बन्धु को इस आशय से प्रेषित कि इस कार्यालय ज्ञाप को आवास एवं शहरी नियोजन विभाग की वेबसाइट पर अपलोड कराना सुनिश्चित करें।
13. गार्ड फाइल।

आज्ञा से,

ह0 अस्पष्ट
26/07/18
(राजेश कुमार पाण्डे)
विशेष सचिव

21. The point to be determined is whether the GDA is entitled to recover an amount of 10% as infrastructure surcharge and 10% corner charge from the petitioner with respect to the plot in question.

22. It is not in dispute that imposition of 10% infrastructure surcharge on plots of land being sold by the Development

Authorities was required to be made pursuant to the First Government Order. Section 18 of the Act of 1973 permits the disposal of the land by the GDA subject to any directions given by the State Government and in such manner and subject to such terms and conditions as the GDA considers expedient for securing the development of the developing area according to the plan. It is nobody's case that the property in question is outside the developmental area of the GDA. It appears from the record that the GDA had voiced its concerns to the government for the first time in its letter dated 09.10.2014 regarding the imposition of 10% infrastructure surcharge and 10% corner charge on the large plots of land sold by it exceeding 2000 square metres in area. It can, therefore, be presumed that prior to that, the GDA was imposing and recovering 10% infrastructure surcharge (as provided in the First Government Order) and 10% corner charge (depending on corner location) on all plots of land being disposed of by it under the provisions of Chapter VI of the Act of 1973. In view of the concerns reflected by the Committee constituted by the GDA in its meeting dated 04.10.2014, the matter was sent for consideration of the Government. The Second Government Order was issued for modifying the First Government Order. As such, by means of the Second Government Order the First Government Order was modified and downgraded. The Second Government Order provided for allocation of the charges and fees recovered by the Development Authorities under various heads of account whereafter it was provided that the previous related Government Orders would be considered as amended to the extent provided in the Second Government Order and the Second Government Order would come into effect immediately. The provision for 10% additional infrastructure charge as envisaged in the First Government Order does not find place in the Second Government Order. The Second Government Order was issued on 26.07.2018.

23. The contention of the learned counsel for the petitioner that the word 'vodzfer' appearing in the Second Government Order, which is used in reference to the First Government Order, means 'rescinded', thereby implying that the First Government Order seized to operate ab initio, cannot be accepted. The word 'vodzfer' has been translated to English in Rajpal Advanced Learner's Hindi-English Dictionary authored by Dr. Hardev Bahri (2013 Edition) as follows:-

अवकमित ;आतंउपजद्ध a. degraded, devolved.

24. Therefore, the First Government Order stood amended and degraded/devolved to the extent provided by the Second Government Order. The Second Government Order came into effect on the date of its issue which is 26.07.2018 and would have effect since that day. The inter-departmental letter dated 11.07.2019 written by the Finance Controller to the Vice-Chairman of the GDA reflects the decision taken by the Principal Secretary in the meeting held under his Chairmanship on 27.05.2019 pursuant to the audit objection raised by the CAG. That decision affirms the situation arising out of the issuance of the Second Government Order, that is to say, that infrastructure surcharge would be liable to be paid from the date of the First Government Order to the date of the Second Government Order and notices be issued accordingly. The decision taken by the Principal Secretary in the meeting

dated 27.05.2019 cannot be faulted as it is merely reflects the consequence of the Second Government Order.

25. The concerns voiced by the GDA regarding payment of infrastructure surcharge raised in the letter of Vice-Chairman of the GDA to the State Government on 09.10.2014 have, for all facts and purposes, been addressed by the issuance of the Second Government Order.

26. The GDA in its brochure (Annexure No. 1 to the writ petition) has categorically specified the imposition of 10% infrastructure surcharge as per the First Government Order with the condition that decision of the Government in this regard would be applicable and binding. In the agreement to sell dated 10.02.2015 the petitioner admits its liability to pay rates, taxes, charges and assessment of every description in respect of apportioned plot/building whether assessed, charged or imposed on that plot or on the building construction. Thus the contingency envisaged in clause 8 of the agreement to sell became enforceable by the GDA when the audit objection was raised and acted upon by the GDA pursuant to the directions of the Principal Secretary in the meeting held on 27.05.2019. There is no dispute between the parties that the internal work was required to be completed by the petitioner. The water supplies, sewerage, drainage, and electricity lines as per specification and standard were to be provided by the GDA up to the boundary of the property in question. This clause is mentioned appears at point no. 12 in the agreement to sell. However, this does not take away the fact that the imposition of 10% infrastructure surcharge by the First Government Order formed part of the brochure and the petitioner acquiesced to purchase the plot in question after going through the brochure and executing the agreement to sell with its 'eyes open' with regard to its imposition.

27. The judgment of **Rohitash Kumar** cited by the learned counsel for the petitioner pertains to a decision in a service matter. The submission on behalf of the appellants in that case before the Supreme Court was that officers that are selected in response to a single advertisement, and through the same selection process, if have been given training in two separate batches, for administrative reasons i.e. police verification, medical examination, etc., cannot be accorded different seniority by bifurcating them into two or more separate batches, and, that the provisions of Rule 3 of the Border Security Force (Seniority, Promotion and Superannuation of Officers) Rules, 1978 (hereinafter referred to as "the 1978 Rules"), were wrongly interpreted by the High Court. The Supreme Court observed as follows:-

"11. This Court applied the rule of contemporanea expositio, as the Court found that the same is a well-established rule of the interpretation of a statute, with reference to the exposition that it has received from contemporary authorities. However, while doing so, the Court added words of caution to the effect that such a rule must give way where the language of the statute is plain and unambiguous. This Court applied the said rule of interpretation by holding that contemporanea expositio as expounded by administrative authorities, is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument. The words used in a statutory provision must be understood in the same way in which they are usually understood in ordinary common parlance

with respect to the area in which the said law is in force or by the people who ordinarily deal with them. .....

12. In N. Suresh Nathan v. Union of India [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928] and M.B. Joshi v. Satish Kumar Pandey [1993 Supp (2) SCC 419 : 1993 SCC (L&S) 810 : (1993) 24 ATC 688] this Court observed that such construction, which is in consonance with the long-standing practice prevailing in the department concerned in relation to which the law has been made, should be preferred.

13. In Senior Electric Inspector v. Laxminarayan Chopra [AIR 1962 SC 159] and J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India [1987 Supp SCC 350 : 1988 SCC (Tax) 26 : AIR 1988 SC 191] it was held that while a maxim was applicable with respect to construing an ancient statute, the same could not be used to interpret Acts which are comparatively modern, and in relation to such Acts, interpretation should be given to the words used therein, in the context of new facts and the present situation, if the said words are in fact capable of comprehending them.

14. In Desh Bandhu Gupta and Co. v. Delhi Stock Exchange Assn. Ltd. [(1979) 4 SCC 565 : AIR 1979 SC 1049] this Court observed that the principle of contemporanea expositio i.e. interpreting a document with reference to the exposition that it has received from the competent authority, can be invoked though the same will not always be decisive with respect to questions of construction. Administrative construction i.e. contemporaneous construction that is provided by administrative or executive officers who are responsible for the execution of the Act/Rules, etc. should generally be clearly erroneous, before the same is overturned. Such a construction, commonly referred to as practical construction although not controlling, is nevertheless entitled to be given considerable weightage and is also highly persuasive. It may however be disregarded for certain cogent reasons. In a clear case of error, the Court should, without hesitation, refuse to follow such a construction for the reason that, "wrong practice does not make the law". .....

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17. This principle has also been applied in judicial decisions, as it has been held consistently that long-standing settled practice of the competent authority should not normally be disturbed, unless the same is found to be manifestly wrong, "unfair". .....

18. The rules of administrative interpretation/executive construction may be applied either where a representation is made by the maker of a legislation at the time of the introduction of the Bill itself, or if construction thereupon is provided for by the executive, upon its coming into force, then also, the same carries great weightage. .....

19. In view of the above, one may reach the conclusion that administrative interpretation may often provide the guidelines for interpreting a particular rule or executive instruction, and the same may be accepted unless, of course, it is found to be in violation of the rule itself.

20. The normal function of a proviso is generally to provide for an exception i.e. exception of something that is outside the ambit

of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, a proviso cannot be interpreted as a general rule that has been provided for. Nor it can be interpreted in a manner that would nullify the enactment, or take away in entirety, a right that has been conferred by the statute. In case the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude by implication, what clearly falls within its expressed terms. If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit and scope.

21. The proviso to a particular provision of a statute, only embraces the field which is covered by the main provision, by carving out an exception to the said main provision.

22. In a normal course, a proviso can be extinguished from an exception for the reason that exception is intended to restrain the enacting clause to a particular class of cases while the proviso is used to remove special cases from the general enactment provided for them specially.

23. There may be a statutory provision, which causes great hardship or inconvenience to either the party concerned, or to an individual, but the court has no choice but to enforce it in full rigour. It is a well-settled principle of interpretation that hardship or inconvenience caused cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare perusal of the statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice. [Vide CIT (Ag) v. Keshab Chandra Mandal [AIR 1950 SC 265] and D.D. Joshi v. Union of India [(1983) 2 SCC 235 : 1983 SCC (L&S) 321 : AIR 1983 SC 420] .]

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25. In Mysore SEB v. Bangalore Woollen Cotton & Silk Mills Ltd. [AIR 1963 SC 1128] (AIR p. 1139, para 27) a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. In Martin Burn Ltd. v. Corpn. of Calcutta [AIR 1966 SC 529] this Court, while dealing with the same issue observed as under: (AIR p. 535, para 14)

"14. ... 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. A statute must of course be given effect to whether a court likes the result or not."

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26. Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein is unequivocal.

27. The court has to keep in mind the fact that, while interpreting the provisions of a statute, it can neither add, nor subtract even a single word. The legal maxim "A verbis legis non est

recedendum" means, "from the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The court cannot proceed with the assumption that the legislature, while enacting the statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a statute, or read words into it which are not part of it, especially when a literal reading of the same produces an intelligible result. .....

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33. If we apply the settled legal propositions referred to hereinabove, no other interpretation is permissible. The language of the said Rule is crystal clear. There is no ambiguity with respect to it. The validity of the Rule is not under challenge. In such a fact situation, it is not permissible for the Court to interpret the Rule otherwise. The said proviso will have application only in a case where officers who have been selected in pursuance of the same selection process are split into separate batches. Interpreting the Rule otherwise would amount to adding words to the proviso, which the law does not permit."

28. Now, on to consider the Second Government Order in the light of the rule of contemporanea expositio. The words in Hindi used in the Second Government Order are translated as 'modification' of the First Government Order and 'degrading/devolving' it and issuing the directions mentioned in the Second Government Order. It is in this light that clause 4 of the Second Government Order would have to be read with says that the aforesaid order shall be applied with immediate effect. As such, the intention of the Second Government Order is clear that it seeks to modify and degrade the First Government Order in terms explicit in the Second Government Order. Waiver of infrastructure surcharge for reason of responsibility of internal development of the plot in question by the petitioner, cannot be claimed as a right by the petitioner just because the GDA has recommended reconsideration of its imposition. The Second Government Order, which has not been challenged by the petitioner, has to be viewed as a conscious decision by the government to modify and degrade/ devolve the First Government Order by removing the clause for imposition of infrastructure surcharge post issuance of the Second Government Order. Neither the express words of the Second Government Order nor the intention thereof are to rescind or abrogate the First Government Order. The direction of the Principal Secretary in the meeting dated 27.05.2019 is reflected in the inter-departmental letter of the GDA dated 11.07.2019 directing issuance of notices regarding recovery of infrastructure surcharge for the period between 15.01.1998 and 26.07.2018. This direction stems from a correct reading of the Second Government Order and calls for no interference from this Court. The language of the Second Government Order is clear and unambiguous. No different

interpretation is called for and neither are any words to be added or subtracted in the Second Government Order.

29. With regard to imposition of corner charges, the learned counsel for the petitioner has referred to the brochure/recommendations made by the Committee of the GDA in its meeting of 04.10.2014 and the letter dated 09.10.2014 issued by the Vice-Chairman of the GDA to the State Government in support of his contention regarding non-chargeability of corner charges. However, payment of corner charge is governed not by such recommendations or letters but by the relevant rules regarding registration and allotment of plots / buildings of the GDA which provide for the same. There is no specific denial by the petitioner that the plot in question is a corner plot. Moreover, the petitioner has, in the agreement to sell dated 10.02.2015, agreed to and accepted his liability to pay charges and assessment of every description in respect of apportioned plot/building whether assessed, charged or imposed on that plot or on the building construction. It is not the contention of the petitioner that the imposition of corner charges is contrary to any legal provision or that the GDA is not otherwise entitled to charge the same in terms of the relevant rules relating to allotment of land under the provisions of Chapter VI of the Act of 1973.

30. Therefore, the imposition of 10% infrastructure surcharge and 10% corner charge alongwith the corresponding incidence of 12% lease rent and freehold charges demanded by the GDA in the impugned notice dated 10.10.2019 cannot be faulted.

31. The reliance by the learned counsel for the petitioner on the judgement of this Court in **Virendra Kumar Tyagi** is misplaced. The challenge in that case was the imposition of mutation fee at the rate of 1% of the sale consideration which rate was not prescribed by Rules even though Section 15(2A) of the Act of 1973 provided for levy of mutation fee in such manner and at such rates as may be prescribed. This court held that the word 'prescribed' means prescribed by Rules under the Act of 1973 in view of the provisions of sub-section (33A) of Section 4 of the General Clauses Act, 1904 and the Rules to be framed by the State Government under Section 55 of the Act of 1973 had to be notified in the Gazette which was admittedly not done. Therefore the demand for mutation charges was held to be illegal and without the authority of law.

32. However, in the instant case, as elaborated above, authority on the State Government and the GDA is conferred by Chapter VI of the Act of 1973. The rules pertaining to allotment of land and the First and Second Government orders are apparently framed / issued in exercise of the authority conferred by Chapter VI of the Act of 1973.

33. Thus the challenge to the impugned demand notice dated 10.10.2019 imposing infrastructure surcharge falls and the writ petition is, accordingly, dismissed.

WRIT - C No. - 36232 of 2019

M/S We Two Homes Pvt Ltd v. State Of U.P. & others

34. Heard Shri Kshitij Shailendra, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh,

learned counsel appearing for the remaining respondent nos.2, 3 and 4 representing GDA.

34. The petitioner, which, by its description in the array of parties appears to be a private limited company, successfully bid for the commercial plot No.B.S.-02 on Ambedkar Road, Ghaziabad, which was allotted to it on 21.08.2012 pursuant to an auction of commercial properties by the GDA under the terms and conditions contained in the Prospectus & Application form for Allotment of Commercial Properties in various schemes of the GDA.

36. Challenge in the petition is to the orders dated 01.08.2019, 05.08.2019 and 30.10.2019 passed by the officials of GDA. The order dated 01.08.2019 contains the departmental comments pertaining to charging of infrastructure surcharge over the property in question which has received the assent of various officials of the GDA. The order dated 05.08.2019 is a letter from the GDA communicating the petitioner the demand for Rs.40,18,000/- payable within a month from the date of the letter towards infrastructure surcharge and other charges. The order dated 30.10.2019 is a communication to the petitioner that his representation dated 30.08.2019 for not recovering the infrastructure surcharge has been rejected.

37. The contention of the learned counsel for the petitioner is that with regard to the plot in question, a sale deed dated 06.06.2017 was executed which was a concluded contract and the entire demand including installments that were fixed by the GDA pursuant to the successful bid of the petitioner, had been duly deposited and no further dues remained. As such, the GDA is estopped from raising any demand for additional charge and, in view of the concluded contract, it would be deemed that they have waived their right to recover any cost other than what has been paid. Learned counsel contends that it was not a case where the GDA had erroneously computed the cost which would entitle it to demand infrastructure surcharge from the petitioner.

38. A perusal of the Prospectus and Application form that has been enclosed as Annexure-3 to the writ petition reveals the various conditions for the sale deed, some of which are being quoted below:-

6. Conditions of Sale Deed:

(ii) The aforesaid property shall be held by the bidder as the allottee of the Ghaziabad Development Authority on the same terms and conditions prescribed by the Authority as contained in the sale deed to be executed by the bidder allottee.

.....

(vii) The purchaser shall be liable to pay municipal taxes, all other charges as per every description in respect of the plot whether assessed, charged or imposed on that plot or on the building constructed there on by government or any other local body.

(viii) Any money due to the GDA from the seller in respect of the plot shall be recoverable in respect of the plot shall be recoverable as arrears of the land revenue from the buyer besides other modes and rights of recovery.

.....

(xi) The water supply, sewarage, drainage and electricity lines as per specification and standard shall be provided

up to the boundary of the property by GDA. The internal work shall be completed by the bidder.

(xii) Plots will be allotted on "As is-Where is" basis and possession of plot will be given to allottee on "As is-where is" basis also. No objection will be entertained later.

....."

39. The sale deed has been enclosed as Annexure-6 to the writ petition which bears the signatures of the Director of the petitioner as well as the authorised signatory of the GDA. Clauses 8, 9 and 12 of the sale deed are as follows:-

"8. The vendee shall be liable to pay rates, taxes, charges and assessment of every description in respect of the apportioned plot/building whether assessed, charge or imposed on that plot or on the building construction.

9. Any money due to the GDA from the vendee of the aforesaid property, shall be recoverable as arrears of land revenue from the vendee or his nominee.

.....

12. The water supply, sewarage, Drainage and Electricity lines as per specification and standard shall be provided upto the boundary of the property by GDA. The internal work shall be completed by the vendee."

40. On the issue of promissory estoppel, the Supreme Court, in the case of **Vasantkumar Radhakisan Vora v. Board of Trustees of the Port of Bombay7,** observed as follows:-

"17. ..... The principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. The doctrine of promissory estoppel is now well established one in the field of administrative law. This principle has been evolved by equity to avoid injustice. It is neither in the realm of contract nor in the realm of estoppel. Its object is to interpose equity shorn of its form to mitigate the rigour of strict law.

.....

.....

If it can be shown by the government that having regard to the facts as they have transpired, it would be inequitable to hold the government or public authority to the promise or representation made by it, the court would not raise an equity in favour of the promisee and enforce the promise against the government. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the government should be held bound by the promise made by it. But the government must be able to show that in view of the fact as have been transpired,

public interest would not be prejudiced. Where the government is required to carry out the promise the court would have to balance the public interest in the government's carrying out the promise made to the citizens, which helps citizens to act upon and alter his position and the public interest likely to suffer if the promises were required to be carried out by the government and determine which way the equity lies. It would not be enough just to say that the public interest requires that the government should not be compelled to carry out the promise or that the public interest would suffer if the government were required to honour it. In order to resist its liability the government would disclose to the court the various events insisting its claim to be exempt from liability and it would be for the court to decide whether those events are such as to render it equitable and to enforce the liability against the government. .....

18. It is equally settled law that the promissory estoppel cannot be used to compel the government or a public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the government or the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity, if larger public interest so requires, and if it can be shown by the government or public authority, for having regard to the facts as they have transpired that it would be inequitable to hold the government or public authority to the promise or representation made by it. The court on satisfaction would not, in those circumstances raise the equity in favour of the persons to whom a promise or representation is made and enforce the promise or representation against government or the public authority. .....

19. Though executive necessity is not always a good defence, this doctrine cannot be extended to legislative acts or to acts prohibited by the statute.

20. When it seeks to relieve itself from its application the government or the public authority are bound to place before the court the material, the circumstances or grounds on which it seeks to resile from the promise made or obligation undertaken by insistence of enforcing the promise, how the public interest would be jeopardised as against the private interest. It is well settled legal proposition that the private interest would always yield place to the public interest. .. .."

41. The demand for imposition of infrastructure surcharge by the GDA has already been upheld in the leading writ petition above and as such the reasons are not reiterated here for the sake of brevity. Clause 8 of the sale deed evinces the liability of the petitioner to pay rates, taxes, charges and assessment of every description in respect of the apportioned plot/building whether assessed charge or imposed on that plot or on the building construction. Thus, the sale deed is subject to the provisions of clause 8 thereof and as such the petitioner cannot claim any estoppel against the GDA with regard to the demand for infrastructure surcharge etc. as evinced in the letter of demand dated 05.08.2019. The principle of promissory estoppel would not arise under the facts and circumstances of the case.

42. The issues raised by the petitioner in its representation dated 30.08.2019 were

considered by the GDA and the order dated 30.10.2019 was passed, which, in view of discussion hereinabove, is justified and calls for no interference.

43. Accordingly, the writ petition fails and is dismissed.

WRIT - C No. - 36234 of 2019
M/S Jain Sons Surgicals Pvt Ltd v. State of U.P. & others

44. Heard Shri Kshitij Shailendra, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the remaining respondent nos.2, 3 and 4 representing GDA.

45. The petitioner, which, by its description in the array of parties appears to be a private limited company, successfully bid for the commercial plot No.B.S.-04 on Ambedkar Road, Ghaziabad, which was allotted to it on 22.08.2012 pursuant to an auction of commercial properties by the GDA under the terms and conditions contained in the Prospectus & Application form for Allotment of Commercial Properties in various schemes of the GDA.

46. Challenge in the petition is to the orders dated 02.08.2019, 05.08.2019 and 30.10.2019 passed by the officials of GDA. The order dated 02.08.2019 contains the departmental comments pertaining to charging of infrastructure surcharge over the property in question which has received the assent of various officials of the GDA. The order dated 05.08.2019 is a letter from the GDA communicating the petitioner the demand for Rs.51,74,400/- payable within a month from the date of the letter towards infrastructure surcharge and other charges. The order dated 30.10.2019 is a communication to the petitioner that his representation dated 04.09.2019 for not recovering the infrastructure surcharge has been rejected.

47. The contention of the learned counsel for the petitioner is that with regard to the plot in question, a sale deed dated 17.11.2014 was executed which was a concluded contract and the entire demand including installments that were fixed by the GDA pursuant to the successful bid of the petitioner, had been duly deposited and no further dues remained. As such, the GDA is estopped from raising any demand for additional charge and, in view of concluded contract, it would be deemed that they have waived their right to recover any charge other than what has been paid. Learned counsel contends that it was not a case where the GDA had erroneously computed the cost which would entitle it to demand infrastructure surcharge from the petitioner.

48. A perusal of the Prospectus and Application form that has been enclosed as Annexure-3 to the writ petition reveals the various conditions for the sale deed, some of which are being quoted below:-

6. Conditions of Sale Deed:

(ii) The aforesaid property shall be held by the bidder as the allottee of the Ghaziabad Development Authority on the same terms and conditions prescribed by the Authority as contained in the sale deed to be executed by the bidder allottee.

.....

(viii) Any money due to the GDA from the seller in respect of the plot shall be recoverable in respect of the plot shall be recoverable as arrears of the land revenue from the buyer besides other modes and rights of recovery.

.....

(xi) The water supply, sewarage, drainage and electricity lines as per specification and standard shall be provided up to the boundary of the property by GDA. The internal work shall be completed by the bidder.

(xii) Plots will be allotted on "As is-Where is" basis and possession of plot will be given to allottee on "As is-where is" basis also. No objection will be entertained later.

....."

49. The sale deed has been enclosed as Annexure-7 to the writ petition which bears the signatures of the Director of the petitioner as well as the authorised signatory of the GDA. Clauses 6, 7 and 10 of the sale deed are as follows:-

"6. The vendee shall be liable to pay rates, taxes, charges and assessment of every description in respect of apportioned plot/building whether assessed, charged or imposed on that plot or on the building construction.

7. Any money due to the GDA from the vendee of the aforesaid property, shall be recoverable as arrears of land revenue from the vendee or his nominee.

.....

10. The water supply, sewarage, Drainage and Electricity lines as per specification and standard shall be provided upto the boundary of the property by GDA. The internal work shall be completed by the vendee."

50. The demand for imposition of infrastructure surcharge by the GDA has already been upheld in the leading writ petition above and as such the reasons are not reiterated here for the sake of brevity. Clause 6 of the sale deed evinces the liability of the petitioner to pay rates, taxes, charges and assessment of every description in respect of the apportioned plot/building whether assessed charge or imposed on that plot or on the building construction. Thus, the sale deed is subject to the provisions of clause 6 thereof and the petitioner cannot claim any estoppel against the GDA with regard to the demand for infrastructure surcharge etc. as evinced in the letter of demand dated 05.08.2019. The issues raised by the petitioner in its representation dated 04.09.2019 were considered by the GDA and the order dated 30.10.2019 was passed, which, in view of discussion hereinabove, is justified. This case calls for no interference.

51. Accordingly, the writ petition fails and is dismissed.

WRIT - C No. - 40300 of 2019

Committee Of Management Nanki Seva Sansthan & Another vs. State Of U.P. & Ors.

Amendment Application No.4 of 2020

51. This amendment application was filed on 18.09.2020. However, this application has not been pressed by the learned counsel for the petitioners and, therefore, it is rejected.

Order on Writ Petition

52. Heard Shri Manmohan Singh, learned counsel for the petitioners and and Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the respondent nos.2, 3 and 4 The learned Standing Counsel represents the respondent no.1-State of U.P.

53. This writ petition has been filed, inter alia, with the following prayers:-

"A. Issue a writ, order or direction in the nature of certiorari quashing the impuged order dated 14.11.2019 and 20.11.2019 passed by the respondent No.4 and 3 respectively (Annexure No.7 & 8 to the writ petition)

B. Issue a writ, order or direction in the nature of MANDAMUS commanding and directing the respondent No.2 to forthwith sanction the map of school building submitted by the petitioner before him."

54. It is stated that the petitioner no.1 is a Society registered on 24.12.2001 under the Societies Registration Act. The contention of the learned counsel for the petitioners that pursuant to an advertisement of the GDA in the year 2007 regarding allotment of land in Swarn Jayantipuram Yojana in favour of the Societies for running educational institutions. The Society through its Manager applied for allotment on 04.08.2006 an an area of approximately 3055.50 sq. mts. in D-Block in Swarn Jayantipuram Scheme in the plot of land earmarked for primary school. A payment schedule of the installments was communicated to the petitioners and thereafter a lease-deed of the aforesaid plot of land admeasuring 3050.85 sq. mts. was executed on 30.06.2015 between the GDA as lessor and the petitioner-Society as lessee. It is stated that delivery of possession was given to the petitioner-Society on 30.09.2015. At the time of execution of the lease-deed, there was no outstanding dues against the petitioners. For completing constructions of the school building within the stipulated time as prescribed by the lease-deed, an application was submitted before the GDA for sanction of the map for school building. However, the respondent no.4 (Assistant Engineer, Master Plan Section, GDA) informed the petitioner-Society that an amount of Rs.10,47,052.00 is outstanding against the petitioner and without payment of the same, the map cannot be sanctioned. Further, on 20.11.2019 demand letter was issued by the GDA whereby an amount of Rs.8,72,543.00 was demanded as infrastructure surcharge. It is contended that at this stage, the GDA cannot demand any amount as infrastructure surcharge inasmuch as the entire installments, as fixed by the GDA, have been duly deposited and no dues are outstanding as is evinced in the lease-deed dated 30.06.2015.

55. Counter and rejoinder affidavits have been exchanged.

56. A perusal of the brochure of the GDA that has been appended as Annexure-1 to the writ petition reveals that a scheme was framed for registration of plots of land for educational institutions which included the rules for applications, and other terms. The eligibility criteria were that the educational institution had to be registered before the Registrar of the Society or as a Trust; that it had to be a recognised institution in accordance with the rules of the relevant authorised Educational Board. Moreover, those institutions would be given priority who had an experience of minimum of 3 three years (a minimum of two years for Nursery/Primary school). The financial condition of the applicant-Institution was necessarily to be sound. The scheme provided for payment of rates of allotment as well as lease rent. Clause 7 of the brochure provided for a lease-deed which is as follows:-

"7.0 पट्टा विलेख

7.1 संस्था को भूखंड 90 वर्ष की अवधि हेतु पटटे पर दिया जायेगा। संस्था द्वारा समस्त देय धनराशि जमा कराकर अंतिम किश्त की निर्धारित तिथि से तीन माह में निर्धारित प्रोफोर्मा पर अपने खर्चे पर पट्टा विलेख कराना होगा अन्यथा आवंटन / अनुबंध निरस्त कर दिया जायेगा।

7.2 आवंटित भूखंड के कुल प्रीमियम का 10 प्रतिशत लीज रेंट 90 वर्ष के लीज अवधि हेतु अग्रिम रूप से कब्ज़ा प्राप्त करते समय देय होगा।

7.3 पट्टा विलेख तैयार करने में स्टाम्प, रजिस्ट्री, लीज डीड एवं उसकी प्रति तथा अन्य सभी खर्चे आवंटी को स्वयं करने होँगे।"

57. Clause 9.4 restricted the transfer of the plots in question and is as follows:-

"9.4 भूखंड का हस्तांतरण अनुमन्य नहीं होगा और यदि प्रत्यक्ष या परीक्ष रूप से हस्तांतरण प्राधिकरण के संज्ञान में आता है तो नियम 10.10 और 10.12 के अनुसार हस्तांतरण शुल्क वसूल करने का प्राधिकरण को अधिकार होगा अन्यथा प्राधिकरण आवंटन / अनुबंध /पट्टा निरस्त कर भूखंड में पुनः प्रवेश कर लेगा।"

58. By the letter dated 24.06.2008, the GDA informed the petitioner-Society that the plot of land for Primary School situated at D-Block in Swarn Jayantipuram Scheme has been allotted to the petitioner-Society and specified the amounts that were required to be paid pertaining to the allotment rates.

59. By means of a registered lease-deed dated 30.06.2015, for a period of 90 years, the plot in question was leased to the petitioner-Society by the GDA. The terms of the lease-deed evince that the ownership of the property transferred would vest in the GDA which would have the right of resumption in case the terms of the lease-deed were flouted and on determination of the lease.

60. By means of the letter no.469/म० प्लान० अनु०/जोन-3/2019, dated 14.11.2019 (Annexure 7 to the writ petition) pertaining to the sanction of building plan of the plot in question, the GDA informed that an amount of Rs.10,47,052.00 is outstanding and only after its deposit, the no-objection to the building plan can be given.

61. By means of another letter no.2067/व्यव० अनु० /2019 dated 20.11.2019 (Annexure-8 to the writ petition), the

petitioner-Society was informed by the GDA that in terms of the Government Order No.152@9&vk&1&1998, dated 15.01.1998 (the First Government Order), infrastructure charge of Rs.8,72,543.00 is required to be paid within a period of one month.

62. In the two impugned orders dated 14.11.2019 and 20.11.2019, reference has been made by the GDA of the amounts allegedly due to the GDA by the petitioner Society and the relevant averments find place in paragraphs 17, 18 and 25 of the writ petition which are as follows:-

"17. That after receiving the aforesaid application of petitioner society, respondent No.4 wrote letter dated 14.11.2019 to the petitioner, whereby informed that as per Business Section, against the said plot there is about Rs.10,47,052/00 are outstanding dues and without payment of the same map cannot be sanctioned. Copy of the letter dated 14.11.2019 is annexed herewith and marked as Annexure No.7 to this writ petition.

18. That petitioner also received a demand letter dated 20.11.2019 issued from the respondent No.3, whereby he has arbitrarily and illegality directed the petitioner to deposit Rs.8,72,543./00 as infrastructure fee. Copy of the demand letter dated 20.11.2019 issued from the respondent No.3 is annexed herewith and marked as Annexure No.8 to this writ petition.

.....

25. That it is respectfully submitting before this Hon'ble Court that after receiving the letter dated 14.11.2019 and 20.11.2019, manager of the Society regularly approaching the respondents and requesting to recall the illegal demand notice of infrastructure fee and also forthwith sanction the map of school, whereby he can construct the building of school within time, but till date no action has been taken by the respondents. It is respectfully submitted before this Hon'ble Court that if development authority does not sanctioned the map earliest then petitioner society will suffer irreparable loss and injury."

63. In the counter affidavit filed on behalf of the GDA, reply to these paragraphs of the writ petition are give in paragraph 22 and 26 and the same are as follows:-

"22. That, the contents of paragraph Nos.17 and 18 of the writ petition need no reply. It is relevant to be submitted before this Hon'ble Court that prior to sanction of building-plan, the Master Plan Section of the Ghaziabad Development Authority had sought for No-Objection from the concerned Section whereupon it was informed that 10% of the total value of the plot in question towards infrastructure surcharge has not been deposited by the petitioners' Institution and as such the necessary intimation was sent to the petitioners requiring them to deposit the same.

It is further submitted that the local audit of the year 2013-14 was duly conducted by the Local Fund Audit/Comptroller and Auditor General (C.A.G.) wherein in as many as 24 matters objections were raised regarding non compliance of Clause 5 (Chha) of the Government Order No.152/9-Aa-1/1998 dated 15.1.1998 Residential Section with regard to charging of 10% of the total value

of the plot towards infrastructure surcharge, but since the said 10% amount was not charged hence the Government has suffered with substantial revenue loss. In pursuance of the objection raised by the Audit department, a meeting was held in the office of the Principal Secretary (Housing) State of U.P. wherein directions were issued that in respect to the properties which had been allotted in between the Government Orders dated 15.1.1998 and the Government Order dated 26.7.2018 the notices may be issued for recovery of infrastructure surcharge from the concerned allottees. In pursuance of the aforesaid as well as the direction issued by the State Government for recovery of amount towards infrastructure surcharge, which was not charged by the Ghaziabad Development Authority on account of inadvertence, the same is being charged/demanded by means of letter dated 20.11.2019. The petitioner was required to deposit the amount of infrastructure surcharge in pursuance of the Government Order dated 15.1.1998 but since the same could not be demanded earlier on account of inadvertence hence the demand-letter has been issued to the petitioner which, being perfectly justifiable in the facts and circumstances of the case, requires no interference whatsoever of this Hon'ble Court.

That, it is further relevant to be submitted before this Hon'ble Court that the petitioner has not challenged the relevant clause of the Government Order dated 15.1.1998 which authorizes the Development Authorities to levy the infrastructure surcharge on the properties which had been allotted in between the Government Order dated 15.1.1998 and the Government Order dated 26.7.2018 and as such at this stage the petitioner cannot question the demand-letter issued by the respondent Authority in pursuance of the aforesaid Government Order dated 15.1.1998 and thus the writ petition is liable to be dismissed.

.....

26. That, the contents of paragraphs No.25 of the writ petition are wholly misconceived in the light of the facts mentioned in the preceding paragraphs and are emphatically denied. In reply thereto it may further be submitted before this Hon'ble Court that the surcharge/infrastructure surcharge is being demanded from the petitioner in pursuance of the audit-objection and the Government Order dated 15.1.1998."

64. Therefore, the GDA is not disputing that the amount of Rs.10,47,052.00 stated to be outstanding in the order dated 14.11.2019 and the amount of Rs.8,72,543.00 demanded in the order dated 20.11.2019 both pertain to the imposition of infrastructure surcharge over the property in question in terms of the First Government Order, though, the monetary values of the claim of the GDA in the aforesaid two letters differ.

65. A perusal of the lease-deed reveals that with regard to the allotted land, an amount of Rs.95,18,652.00 as premium and Rs.1,04,70,518.00 towards lease rent has been paid by the petitioner-Society to the GDA which has been duly acknowledged by the GDA.

66 As far as the demand of infrastructure surcharge raised in the impugned orders issued by the GDA to the petitioner-Society is concerned, the First Government Order needs to be referred to.

Clause 5(छ) of the First Government Order is the provision enabling the GDA and other Development Authorities to impose 10% surcharge in respect of plots of land sold by the Development Authorities. Clause 5(छ) is being quoted again as follows:-

" (छ) विकास प्राधिकरण द्वारा बेचे जा रहे भूखण्डों के मूल्य पर 10 प्रतिशत अधिभार लगाते हुए प्राप्त होने वाली अतिरिक्त आय की शत–प्रतिशत अंश।"

67. As mentioned above, the document transferring the property in question in favour of the petitioner Society is a lease-deed and not a deed of sale. Sale of immoveable property is governed by the provisions of Chapter III of the Transfer of Property Act, 1882. Section 54 defines 'sale' as follows:-

"54. "Sale" defined.- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

68. Lease of immoveable property is governed by Chapter V of the Transfer of Property Act. Section 105 speaks as follows:-

"105. Lease defined.--A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.--The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

69. The terms of the lease-deed dated 30.06.2015, which have been mentioned above, leave no room for doubt that the transfer of the property in question is not one of transfer of ownership but is a transfer of a right to enjoy such property made for a period of 90 years on payment of premium and rent.

70. The nature and contents of the lease-deed dated 30.06.2015 being that of lease are not governed by the provisions of the First Government Order inasmuch as that Government Order applies only to such plots of land **sold** by the Development Authorities which is not the case in the present case.

71. Thus, the claim of the GDA of infrastructure surcharge on the property in question pursuant to the First Government Order is dehors the entitlement of the GDA under the First Government Order. The demand for infrastructure surcharge from the petitioner Society does not have the mandate of law and as such is illegal. Accordingly, the impugned letters /orders dated 14.11.2019 and 20.11.2019 claiming infrastructure surcharge are quashed. The GDA shall not require the petitioners to deposit the infrastructure surcharge for sanction of the map. However, other conditions of sanction would apply.

72.The writ petition is, accordingly, allowed.

WRIT - C No. - 3490 of 2020

M/S Airon Buildcon Private Limited vs. State Of U.P. And 3 Others

73. Heard Shri Sumit Daga, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the respondent nos.2, 3 and 4 representing GDA.

74. The petitioner appears to be a private limited company, which successfully applied for allotment of commercial plot under a scheme of the GDA for allotment of residential/ commercial properties by auction.

75. It is contended that the area of plot was initially 481 square meters and the total cost was Rs.2,23,66,500.00. The petitioner was also asked to deposit 12% of the entire bid value as lease rent and a sum of Rs.26,83,980.00 as freehold charges prior to execution of a registered deed. However, the actual area of the plot was reduced by 106.00 sq. mts. and the total area of the plot conveyed was 375.00 sq. mts., the total premium of the plot being Rs.1,74,37,500.00 with 12% lease rent and freehold charge of Rs.20,92,500.00 totaling a sum of Rs.1,95,30,000.00. It is submitted that after deposit of all the dues demanded by the GDA, a sale deed dated 06.01.2018 was executed between the GDA and the petitioner.

76. It is contended that by the impugned order dated 05.08.2019, 10% corner charge and 10% infrastructure charge is sought to be recovered amounting to Rs.41,01,300.00. By the other impugned order dated 17.09.2019, the petitioner has been informed that the amount of corner charge and infrastructure charge is liable to be paid by the petitioner along with interest. In that impugned order, as far as the infrastructure charge is concerned, the GDA has referred to the First Government Order in support of its demand.

77. The petitioner has stated that the conduct of the GDA is hit by the principles of estoppel and waiver and the amount cannot be recovered, particularly in view of the concluded contract of sale deed dated 06.01.2018.

78. No counter affidavit appears on record of this case despite the order dated 06.02.2020 passed by this Court.

79. The brochure that has been appended as Annexure-2 to the writ petition reveals the conditions of the sale deed. Clause 6(ii) of the brochure is as follows:-

"(ii) The aforesaid property shall be held by the bidder as the allottee of the Ghaziabad Development Authority on the same terms and conditions prescribed by the Authority as contained in the sale deed to be executed by the bidder allottee."

80. The sale deed dated 06.01.2018 provides the terms of agreement between the parties. Clause 5 is as follows:-

"5. That the vendee shall be liable to pay rates, taxes, charges and assessment of every description in respect of apportioned plot/building whether assessed, charged or imposed on that plot or on the building construction."

81. The sale deed is in the nature of an agreement signed by the Director of the petitioner company as well as the authorised signatory of the GDA. It has not

been disputed by the petitioner that the allotted plot no. S-1 situate at I-Block, Convenient Shopping, Kavinagar, Ghaziabad is a corner plot. The same is also reflected in the site plan that forms part of the sale deed dated 06.01.2018. In view of the detailed discussion in the leading writ petition, the demand for 10% infrastructure surcharge and 10% corner charge by the GDA cannot be faulted.

82. As such, the impugned orders dated 05.08.2019 and 17.09.2019 are justified and call for no interference.

83. This writ petition is, accordingly, dismissed.

WRIT - C No. - 3608 of 2020

M/S Treveni Aadarika Construction And Projects Company Pvt. Ltd. vs. State Of U.P. And 3 Others

84. Heard Shri Sumit Daga, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the respondent nos.2, 3 and 4 representing GDA.

85. The petitioner appears to be a private limited company, which successfully applied for allotment of commercial plot No.S-2, I-Block, Kavi Nagar, Ghaziabad under a scheme of the GDA for allotment of residential/commercial properties by auction.

86. It is contended that the area of plot allotted was 481 square meters and the total cost was Rs.2,23,66,500.00. The petitioner was also asked to deposit 12% of the entire bid value as lease rent and a sum of Rs.26,83,980.00 as freehold charges prior to execution of a registered deed. However, in the agreement to sell dated 13.02.2013 executed by the GDA and the petitioner, the actual area of the plot was reduced to 375.00 square meters, the total premium of the plot being Rs.1,74,37,500.00. Clause 6 of conditions of sale in the agreement to sell is as under:-

"6. That the Second Party shall be liable to pay rates, taxes, charges and assessment of every description in respect of apportioned plot/building whether assessed, charged or imposed on that plot or on the building construction."

87. Prior to the agreement to sell, the petitioner had paid a total amount of Rs.64,51,875.00. The balance amount of 75% was to be paid in installments. Thereafter, a sale deed pertaining to the land in question was executed between the GDA and the petitioner on 02.04.2014 which acknowledged the payment of the entire premium including lease rent and freehold charges. However, in this case, the terms of the sale deed are as follows:-

"1. That the Free Hold Convenient Shopping Plot No.S-2, I Block, Kavi Nagar, Ghaziabad measuring area 375.00 sq. mtr. is free from all charges, liens and encumbrances and being transferred to the vendee through this deed.

2. That Possession of the Convenient Shopping Plot in question has already been delivered to the vendee after the execution of the agreement to sale.

3. If the compensation of the land in question is increased by the decision of the court of law, the vendee agree to pay the proportionate amount of compensation to the vendor.

4. The vendee has paid Stamp duty on the total premium of land and building including lease rent and free hold charges in the above said sale agreement, now this document is being executed as per the rules.

5. The Plot and building thereon shall be used for Convenient Shopping Plot as per approved plan and building bye-laws.

6. The water supply, sewerage, Drainage and Electricity lines as per specification and standard shall be provided upto the boundary of the property by vendor at his cost. The vendee shall complete the internal work.

7. The Plot and building thereon shall not be used for any purpose other than specified in the agreement/sale deed executed by the vendor.

8. Details of Free Hold Convenient Shopping Plot Nos.S-2, I-Block, Kavi Nagar, Ghaziabad measuring 375.00 sq. mtr. Boundaries of which are given below:-

NORTH : 9.00 Metre Wide Road

SOUTH : 3.85 Wide Service Road (Existing)

EAST : Plot No.S-01

WEST : 40'.00 Wide Road"

88. Though there is no condition in the sale deed that the GDA can recover any other taxes, charges and assessment whether assessed, charged or imposed on that plot but, it is a settled principle of law that no estoppel would operate against a statute. Private interest would have to give way to public interest. As held in the leading writ petition, the imposition of 10% corner charge is referable to the allotment rules of the GDA and, the imposition of 10% infrastructure surcharge is permissible under the First Government Order that has been issued pursuant to the powers conferred upon the GDA and the State Government under Chapter VI of the Act of 1973. As such, the GDA is entitled to impose 10% infrastructure surcharge and 10% corner charge as evinced in the two impugned orders.

89. As such, the challenge to the aforesaid impugned orders fails and the writ petition is, accordingly, dismissed.

WRIT - C No. - 3611 of 2020

Pradeep Kumar Khanna And 4 Others vs.State Of U.P. And 3 Others

90. Heard Shri Kshitij Shailendra, learned counsel for the petitioners and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the remaining respondent nos.2, 3 and 4 representing GDA.

91. Challenge in the petition is to the orders dated 02.08.2019, 05.08.2019 and 30.10.2019 passed by the officials of GDA. The order dated 02.08.2019 contains the

departmental comments pertaining to charging of infrastructure surcharge over the property in question which has received the assent of various officials of the GDA. The order dated 05.08.2019 is a letter from the GDA communicating the petitioners the demand for Rs.50,73,600/- payable within a month from the date of the letter towards infrastructure surcharge and other charges. The order dated 30.10.2019 is a communication to the petitioners that their representation dated 04.09.2019 for not recovering the infrastructure surcharge has been rejected.

92. The contention of the learned counsel for the petitioners is that commercial plot No. B.S. - 6, Ambedkar Road, Opposite Bikaner Sweets, Ghaziabad measuring 200.00 square meters was sold by the GDA to Rakesh Agarwal and Ritu Agarwal by means of a registered sale-deed dated 01.05.2015. Thereafter, a sale deed, which was registered on 20.05.2015, was executed by the aforesaid Rakesh Agarwal and Ritu Agarwal transferring the property in question to the petitioners which was a concluded contract and the entire demand including installments that were fixed by the GDA pursuant to the successful bid had been duly deposited and no further dues remained. As such, the GDA is estopped from raising any demand for additional charge and it would be deemed that they have waived their right to recover any charge other than what has been paid. Learned counsel contends that it was not a case where the GDA had erroneously computed the cost which would entitle it to demand infrastructure surcharge from the petitioner. It is further contended that it was not open for the GDA to demand any infrastructure charge from the petitioners pursuant to the sale deed executed by the original allottees in their favour.

93. It appears from the record that GDA published a Prospectus and Application form for allotment of commercial properties by auction in various schemes of the GDA (brochure). One Rakesh Agarwal, who is not a party in the present writ petition, was allotted the plot in question. The entire amount of premium and 12% lease rent and freehold charges amounting to Rs.5,07,36,000.00 was deposited by the aforesaid Rakesh Agarwal pursuant to which a sale deed dated 01.05.2015 was executed by the GDA through its Joint Secretary/Authorised Signatory in capacity of vendor and Shri Rakesh Agarwal and Smt. Ritu Agarwal as vendees. Clause 6 of the sale deed is as follows:-

"6. The vendee shall be liable to pay rates, taxes, charges and assessment of every description in respect of the apportioned plot/building whether assessed, charge or imposed on that plot or on the building construction."

94. Relevant conditions of sale deed have been mentioned in the brochure and Clause 6(ii) and (vii) are as follows:-

"(ii) The aforesaid property shall be held by the bidder as the allottee of the Ghaziabad Development Authority on the same terms and conditions prescribed by the Authority as contained in the sale deed to be executed by the bidder allottee.

.....

(vii) The purchaser shall be liable to pay municipal taxes, all other charges as per every description in respect of the plot whether assessed, charged or imposed on that plot or on the building constructed

there on by government or any other local body."

95. The terms of Clauses 6(ii) and (vii) of the conditions of sale deed mentioned in the brochure also the terms of the sale deed dated 01.05.2015 were binding on the vendees. The vendees, namely Rakesh Kumar Agarwal and Ritu Agarwal, transferred the plot in question to the petitioners by executing a sale deed registered on 20.05.2015.

96. The sale deed dated 01.05.2015 evinces that the vendees mentioned therein includes their heirs and successors, executors, administrators and permitted assignees. The petitioners, therefore, would be bound under the terms and conditions of the sale deed dated 01.05.2015.

97. In view of the imposition of infrastructure surcharge by the GDA being upheld in the leading writ petition for the reasons given therein, the demand raised by the GDA is justified and calls no interference.

98 The writ petition, thus, fails and is dismissed.

WRIT - C No. - 3614 of 2020

Vipul Garg And Another vs. State Of U.P. And 3 Others

99. Heard Shri Kshitij Shailendra, learned counsel for the petitioners and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the remaining respondent nos.2, 3 and 4 representing GDA.

100. Challenge in the petition is to the orders dated 01.08.2019, 05.08.2019 and 30.10.2019 passed by the officials of GDA. The order dated 01.08.2019 contains the departmental comments pertaining to charging of infrastructure surcharge over the property in question which has received the assent of various officials of the GDA. The order dated 05.08.2019 is a letter from the GDA communicating the petitioners the demand for Rs.46,06,000/- payable within a month from the date of the letter towards infrastructure surcharge and other charges. The order dated 30.10.2019 is a communication to the petitioners that their representation dated 30.08.2019 for not recovering the infrastructure surcharge has been rejected.

101. The contention of the learned counsel for the petitioners is that with regard to the plot No.BS-03 situated at Ambedkar Road, Opposite Bikaner Sweets, Ghaziabad measuring 175 square meters, a sale deed dated 03.07.2013 was executed between the GDA and them which is a concluded contract and the entire demand including installments that were fixed by the GDA pursuant to the successful bid of the petitioners, had been duly deposited and no further dues remain. As such, the GDA is estopped from raising any demand for additional charge and, in view of concluded contract, it would be deemed that they have waived their right to recover any charge other than what has been paid. Learned counsel contends that it was not a case where the GDA had erroneously computed the cost which would entitle it to demand infrastructure surcharge from the petitioners.

102. Despite time being granted to the respondents to file a counter affidavit by

means of the order dated 10.02.2020, no counter affidavit has been filed.

103. A perusal of the Prospectus and Application form that has been enclosed as Annexure-3 to the writ petition reveals the various conditions for the sale deed, some of which are being quoted below:-

6. Conditions of Sale Deed:

(ii) The aforesaid property shall be held by the bidder as the allottee of the Ghaziabad Development Authority on the same terms and conditions prescribed by the Authority as contained in the sale deed to be executed by the bidder allottee.

.....

(vii) The purchaser shall be liable to pay municipal taxes, all other charges as per every description in respect of the plot whether assessed, charged or imposed on that plot or on the building constructed there on by government or any other local body. "

104. The sale deed has been enclosed as Annexure-7 to the writ petition which bears the signatures of the petitioners as well as the authorised signatory of the GDA. Clause 6 of the sale deed is as follows:-

"6. The vendee shall be liable to pay rates, taxes, charges and assessment of every description in respect of the apportioned plot/building whether assessed, charge or imposed on that plot or on the building construction."

105. The demand for imposition of infrastructure surcharge by the GDA has already been upheld in the leading writ petition above and as such the reasons are not reiterated here. Clause 6 of the sale deed evinces the liability of the petitioner to pay rates, taxes, charges and assessment of every description in respect of the apportioned plot/building whether assessed charge or imposed on that plot or on the building construction. Thus, the sale deed is subject to the provisions of clause 6 thereof and as such, the petitioner cannot claim any estoppel against the GDA with regard to the demand for infrastructure surcharge etc. as evinced in the letter of demand dated 05.08.2019. The issues raised by the petitioners in their representation dated 30.08.2019 were considered by the GDA and the order dated 30.10.2019 was passed. In view of discussion hereinabove, the demand raised by the GDA in the orders impugned is justified and calls for no interference.

106. Accordingly, the writ petition fails and is dismissed.

WRIT - C No. - 5300 of 2020

M/S Express Properties Private Limited vs. State Of U.P. & 2 Ors.

107. Heard Shri Pankaj Srivastava, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent no.1-State of U.P. as well as Shri M.C. Chaturvedi, learned Senior Advocate assisted by Shri M.N. Singh, learned counsel appearing for the remaining respondent nos.2 and 3 representing GDA.

108. This writ petition has been filed, inter alia, with the following prayers:-

"(i) issue a writ, order of direction in the nature of CERTIORARI quashing the impugned orders dated 16.12.2019 and 24.12.2019 passed by the respondent no.3

(Annexure No.11 & 12 to this writ petition).

(ii) issue a writ, order or direction in the nature of MANDAMUS directing the respondents to forthwith release the 'building completion certificate' in respect of remaining Towers D, E & F of the plot in question in favour of the petitioner and not to block any application/documents in view of this recovery.

(iii) issue a writ, order or direction in the nature of MANDAMUS directing the respondents not to adopt any coercive measure to recover Rs.2,60,40,168/- (Rupees 2.60 crores) from the petitioner."

109. By means of the impugned orders, 16.12.2019 and 24.12.2019, infrastructure surcharge of an amount of Rs.2,60,40,168.00 has been demanded from the petitioner which appears to be a Company. In the order dated 24.12.2019, the GDA has asked the petitioner to deposit the said amount so that further proceedings as per rules can be taken for issuance of completion certificate.

110. Despite time granted by this Court on 13.02.2020, no counter affidavits have been filed.

111. It is the contention of the learned counsel for the petitioner that pursuant to the sale deed dated 22.01.2007, Plot No.1/1 Vaishali Sector-1, Vaishali Scheme, Ghaziabad having an area of 18385.03 sq. mts. was transferred after payment of the entire amount of premium and freehold charges as well as lease rent. Another sale deed was executed between the GDA and the petitioner on 02.07.2010 with regard to an additional adjoining area of land admeasuring 5099.97 sq. mts. for which the entire amount of premium and lease rent was deposited by the petitioner. A letter dated 20.06.2016 was issued stating that till that date no amount was outstanding against that plot. The contention is that all the terms and conditions of the brochure pertaining to the land in question have been complied with by the petitioner and the entire amount demanded from the petitioner was deposited pursuant to which the aforesaid sale deeds were executed, but the petitioner is now being directed to pay the amount of infrastructure surcharge which is baseless and the completion certificate of Towers D, E and F is not being issued. As a result, the petitioner cannot deliver the flats to the buyers who have already paid the amount. It is contended that majority of the property in question has been sold by the petitioner and now it cannot demand any additional amount from any of the flat owners. It is further contended that the impugned orders are illegal and the demand is barred by principle of promissory estoppel.

112. A perusal of the brochure pertaining to the terms and conditions of the allotment by auction of group housing plot on freehold basis in the Vaishali Scheme that has been enclosed in the writ petition reveals that Clause 4(ii) and (vii) provide as follows:-

"4. Execution of Sale Deed and Free Hold Rights:

.....

(ii) The aforesaid property shall be held by the bidder as the allottee of the Ghaziabad Development Authority on the same terms and conditions prescribed by the Authority as contained in the sale deed to be executed by the bidder allottee.

.....

(vii) The bidder or his allottee shall be liable to pay rates, taxes, charges and assessment of every description in respect of the apportioned plot/building whether assessed, charge or imposed on that plot or on the building construction."

113. It appears from the record that a sale deed dated 22.01.2007 was executed between the GDA and the petitioner through their authorised representatives in respect of the plot in question. Clause 8 of the terms and conditions of the sale deed is as follows:-

"8. यह कि क्रेता समय समय पर गाजियाबाद विकास प्राधिकरण बोर्ड एवं शासनादेश द्वारा जारी किये गये नियमोँ विनियमोँ एवं प्रविधानो का पालन करता रहेगा।"

114. Thereafter, a supplementary sale deed was executed between the GDA and the petitioner on 02.07.2010 for an additional area of land admeasuring 5099.97 sq. mts. for which the entire amount was deposited by the petitioner. Clause 8 of the supplementary sale deed is as follows:-

"8. यह कि क्रेता समय समय पर गाजियाबाद विकास प्राधिकरण बोर्ड एवं शासनादेश द्वारा जारी किये गये नियमोँ विनियमोँ एवं प्रविधानो का पालन करता रहेगा।"

115. The demand for imposition of infrastructure surcharge by the GDA has already been upheld in the leading writ petition above and as such the reasons are not reiterated here for the sake of brevity. The relevant clauses of the sale deeds bind the petitioner to the various Government Orders, bye-laws etc. of the GDA as in force. The petitioner cannot claim any estoppel against the GDA with regard to the demand for infrastructure surcharge as the same is being demanded pursuant to the First Government Order.

116. In view of the discussion hereinabove, the demand for infrastructure surcharge from the petitioner, by means of the impugned orders, is justified.

117. Accordingly, the writ petition is dismissed.

(2022)02ILR A795
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ C No. 5031 of 2014

Mahipal ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Saxena

Counsel for the Respondents:
C.S.C., Smt. Archana Tyagi, Sri Pankaj Tyagi

A. Essential Commodity – Fair Price Shop licence – Cancellation – Complaint by the persons, who were not the card-holder – Locus standi of complainant – No finding recorded in the impugned order – Effect – Held, once the complainants are not found the card holders of the petitioner's shop, they cannot be treated as aggrieved person – In the light of the settled law, this Court is of the firm view that only

aggrieved person can file complaint and in the present case complainants are not the aggrieved person – High Court set aside the impugned order. (Para 17)

Writ petition allowed. (E-1)

List of Cases cited:

1. Mahendra Singh Vs St. of U.P. through Principal Secretary, Department of F & C Supply, U.P. at Lucknow & ors.; 2017 (120) ALR 866

2. Smt. Reeta Singh Vs State of U.P. through Secretary, Food and Civil Supply, Lucknow & ors.; 2020 (149) RD 748

3. Naval Kishore & ors. Vs St. of U.P. & ors.; 2017 (122) ALR 121

4. Writ-C No. 45899 of 2017; Zakir Vs St. of U.P. & ors. decided on 17.11.2021

5. M Venkataramana Hebbar (Dead) By LRS. Vs M. Rajagopal Hebbar & ors.; (2007) 6 SCC 401

6. Tribhuwan Nath Srivastava Vs Chairman and Managing Director I.O. Bank & ors.; 2003 (4) AWC 3055

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. This Court vide order dated 04.12.2021 directed the learned counsel for the petitioner to inform Sri Pankaj Tyagi and Ms. Archana Tyagi, learned counsel for the caveator in writing that on the next date of listing, case shall be heard in first call irrespective of presence of counsel for the caveator.

3. Pursuant to the aforesaid order, Sri Manu Saxena, learned counsel for the petitioner has given notice to Sri Pankaj Tyagi and Ms. Archana Tyagi, who received the same on 06.12.2021, but they are not present, therefore, case be decided on merits. The notice dated 06.12.2021 is taken on record.

4. Present writ petition has been filed for quashing the order dated 10.10.2011 passed by respondent no. 3 by which licence of fair price shop of the petitioner was cancelled and order dated 12.12.2013 passed by respondent no. 2 by which appeal filed by petitioner has been dismissed affirming the order of the respondent no. 3.

5. Learned counsel for the petitioner submitted that petitioner was running fair price shop. His licence of fair price shop was suspended by respondent no. 3 vide order dated 17.08.2011 and he was directed to submit reply. Petitioner filed explanation/objection in which he stated that complainants Ishwar Singh, Madan, Ali Hasan, Devi Singh, Ramdhan, Naresh, Sompal, Prem and Rajveer are not BPL Card holders of any shop and Ashok, Megha, Chandra Bhan, Bija, Palla and Raju are not card holders of the petitioner's shop. His reply was recorded and names and details of alleged complainants are mentioned by respondent no. 3 in the impugned order dated 10.10.2011, but while cancelling the licence of fair price shop of the petitioner, no finding was recorded and licence of fair price shop was cancelled only on the ground that petitioner has annexed the affidavits of certain card holders in his favour, which were denied by them. Against the said order, petitioner preferred Appeal No. 2 of 2013-14 before the respondent no. 2-Commissioner, Saharanpur Division, Saharanpur, which was dismissed vide order dated 12.12.2013. Like respondent no. 3, the respondent no. 2 has also recorded same finding and referred the names and details of the complainants, who are not having locus standi. He has also not returned any finding and affirmed the order of respondent no. 3 by which licence of fair price shop of the petitioner

was cancelled. In paragraphs 5, 6, 7 and 17 of the writ petition, petitioner has taken specific ground that some of the alleged complainants are neither card holders of petitioner's shop or any other shop. He further stated that no complaint has been filed against the petitioner by any card holders. He next submitted that in the counter affidavit, there are vague denial of the facts mentioned in paragraphs 5, 6, 7 and 17 of the writ petition which amounts to admission of facts. He lastly submitted that petitioner has taken specific ground that complainants are having no locus standi and, therefore, any complaint filed by them cannot be maintained on their behalf. Therefore, the impugned orders dated 10.10.2011 passed by respondent no. 3 and 12.12.2013 passed by respondent no. 2 are bad in law and liable to be quashed.

6. In support of his contention, learned counsel for the petitioner has placed reliance upon several judgments of the Apex Court as well as this Court in the cases of ***Mahendra Singh Vs. State of U.P. through Principal Secretary, Department of F & C Supply, U.P. at Lucknow and others, 2017 (120) ALR 866, Smt. Reeta Singh Vs. State of U.P. through Secretary, Food and Civil Supply, Lucknow and others, 2020 (149) RD 748, Naval Kishore and others Vs. State of U.P. and others, 2017 (122) ALR 121, Zakir Vs. State of U.P. and 4 others, passed in Writ-C No. 45899 of 2017, decided on 17.11.2021, M Venkataramana Hebbar (Dead) By LRS. Vs. M. Rajagopal Hebbar and others, (2007) 6 Supreme Court Cases 401, Tribhuwan Nath Srivastava Vs. Chairman and Managing Director I.O. Bank and others, 2003 (4) AWC 3055.***

7. Learned Standing Counsel vehemently opposed the submissions advanced by learned counsel for the petitioner and submitted that after adopting due procedure of law and considering the reply of the petitioner as well as statements given by the persons, who have filed their affidavits, impugned orders have rightly been passed, but could not demonstrate from the orders or counter affidavit about denial of contentions raised by the petitioner in paragraphs 5, 6, 7 and 17 of the writ petition nor any finding returned by respondent nos. 2 and 3 upon the grounds taken by petitioner about locus standi of the complainants.

8. I have considered the submissions raised by learned counsel for the parties and perused the record. The sole contention of the petitioner is that the complainants, who are not the aggrieved as they are not card holders, therefore, having no locus standi to file complaint. Petitioner has taken specific ground before the respondent nos. 2 and 3 and also before this Court, but the respondent nos. 2 and 3 have not returned any finding even not a single word and straightway cancelled the licence of fair price shop of the petitioner only on the ground of certain alleged forged affidavits. Once the petitioner has taken ground that the complainants are not the persons aggrieved, it is required on the part of the authorities concerned to first consider the objection raised by petitioner and then pass reasoned order, which is absolutely lacking in the present case. He has taken this specific ground in different paragraphs of the writ petition, but in the counter affidavit, there are very vague denial of the substantial facts, which amounts to admission.

9. I have also considered the judgments relied upon by learned counsel for the petitioner.

10. In the case of ***Mahendra Singh (supra),*** this Court has taken clear cut view that objections and grounds taken before the authorities must be dealt with in impugned order. Paragraph 8 of the said judgment is quoted below:-

"8. In my opinion non consideration of the petitioner's reply in respect of the charges levelled against him amounts to denial of effective opportunity of hearing which further amounts to breach of principle of natural justice. Therefore, the writ petition is being entrtained in view of the law laid down by the Apex Court in Whirpool Corporation v. Registrar of Trade Marks."

11. This Court in the matter of ***Smt. Reeta Singh (supra***) has also taken the same view. Paragraph 10, 11 and 13 of the said judgment are quoted below:-

"10. It is settled proposition of law that when an explanation is called and explanation is submitted raising certain pleas, the same is liable to be considered by the concerned authority before passing the order and recording a finding is must which may indicate the application of mind of the concerned authority and as to how he had come to conclusion but no such finding or reasons have been recorded by the opposite party no.3.

11. On being challenged in appeal, the appellate authority has also not recorded any finding in regard to the pleas raised by the petitioner and without recording any finding the appellate authority observed that the case law relied by the learned counsel for the petitioner is not applicable. The appellate authority also went a step ahead in recording a finding that the petitioner had not submitted the documents required by the concerned authority while no such finding was recorded by the opposite party no.3. The appellate authority could have recorded such finding but only after verifying from the records and in such a situation the appellate authority should have recorded a finding as to what documents were submitted by the petitioner.

13. In view of above, this Court is of the considered opinion that the impugned orders have been passed without considering the objections raised by the petitioner as well as the grounds raised in the appeal, therefore the same are non reasoned and non speaking and without application of mind hence not sustainable in the eyes of law and are liable to be quashed with a direction to the opposite party no.3 to consider and pass a fresh order in accordance with law."

12. This Court in the case of ***Naval Kishore (supra)*** is of the firm view that only aggrieved person can file complaint. Paragraph 4 and 5 of the said judgment are quoted below:-

"4. These submissions were denied by counsel for respondent no. 5, who submitted that petitioner has no locus standie to prefer this writ petition. He contended that the petitioner was only the complainant on whose complaint inquiry was initiated against respondent no. 5. After initiation of said inquiry, petitioner has no right to interfere either during inquiry or in appeal. He relied upon judgment passed by Divison Bench of this Court : [2008(4) ADJ 559 (DB), Amin Khan v. State of UP and others and [2016(6) ADJ 122], Sriram Prasad and another v. State of UP and others.

5. The meaning of the expression person aggrieved will have to be ascertained with reference to the purpose and the provisions of the statute. One of the meanings is that person will be held to be aggrieved by a decision if that decision is materially adverse to him. The restricted meaning of the expression requires denial or deprivation of legal rights. The expression person aggrieved means a person who has suffered a legal grievance i.e a person against whom a decision has been pronounced which has lawfully deprived him of something or wrongfully refused him something. The petitioner is not an aggrieved person by merely filing a complaint. The order of revocation of cancellation of fair price shop license do not affect him in any manner."

13. In the case of ***Zakir (supra),*** this Court is of the same view that only aggrieved person can file complaint. Relevant paragraph of the said judgment is quoted below:-

"In all the three cases referred herein above, Court has taken constant view that only aggrieved person, who has participated in the process of allotment of fair price shop can file appeal. Any appeal filed by stranger/ outsider is not maintainable. In present case too, undisputedly respondent no. 5 was never participant in the process of allotment of fair price shop, therefore, this Court is also of the same view that he is not the person aggrieved and cannot file appeal against the order of Sub Divisional Magistrate. It is required on the part of respondent no. 2 to first consider about the maintainability of appeal and return findings upon the ground taken by the petitioner in reply of appeal. In case, it was found that appellant is not the aggrieved person, appeal has to be rejected on the this ground alone, but here while partly allowing the appeal, respondent no. 2 has committed error of law as undisputedly appellant was not the "person aggrieved". Therefore, impugned order dated 22.08.2017 passed by respondent no. 2 is bad and liable to be set aside."

14. The Apex Court in the matter of ***M Venkataramana Hebbar (supra)*** is of the considered view that there must be specific and factual denial in the counter affidavit and vague and evasive denial amounts to admission by respondent. Paragraphs 12 and 13 of the said judgment is quoted below:-

"12. The contract between the parties, moreover was a contingent contract. It was to have its effect only on payment of the said sum of Rs. 15,000/- by the plaintiff and other respondents by the defendant Nos. 1 to 3. It has been noticed hereinbefore by us that as of fact, it was found that no such payment had been made. Even there had been no denial of the assertions made by the appellant in their written statement in that behalf. The said averments would, therefore, be deemed to be admitted. Order VIII Rule 3 and Order VIII Rule 5 of the Civil Procedure Code read thus:-

"3. Denial to be specific. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

5. Specific denial. [(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or

stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against person under disability.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub- rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]"

13. Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the Court was entitled to draw an inference that the same had been admitted. A fact admitted in terms of Section 58 of the Evidence Act need not be proved."

15. In the matter of ***Tribhuwan Nath Srivastava (supra),*** this Court has recorded its view about vague and evasive denial and held that specific averments and denial are required. Paragraphs 29 and 30 of the said judgment are quoted below:-

"29. It has been stated in para 22 of the writ petition that the petitioner never served in specialized areas like Foreign Exchange or in Overseas Credit and had never been given training in 'these fields, and hence the averments in the impugned order are baseless. The reply to para 22 of the writ petition is contained in para 13 of the counter-affidavit which is a very vague averment. No specific denial has been made to the petitioner's averments that he had not been given training in Foreign Exchange or in Overseas Credit and he had no experience in these fields.

30. Under Order VIII, Rule 5, C.P.C., if a specific averment in a petition has not been specifically denied in reply, it will be deemed to have been admitted. Although the C.P.C. does not in terms apply to writ proceedings, in our opinion, the general principles of the C.P.C. applied. Hence, Order VIII, Rule 5, C.P.C. is applicable to writ proceedings also. The petitioner's averments in paragraphs 15, 20, 43, 45, 46, 47, etc. of the writ petition have mentioned the names and details of a large number of officers who were Ineligible for grant of V.R.S. but they have been granted the same."

16. In the present case too, petitioner has taken specific ground before the respondent nos. 2 and 3 that complainants are not the card holders either in Gram Sabha or shop of the petitioner, but without returning any finding upon that, impugned orders have been passed. This Court is also of the firm view that once the objection has been taken by the petitioner, respondent nos. 2 and 3 ought to return its finding while not accepting the objection, but in the present case, same is absolutely lacking as no finding has been recorded. Therefore, impugned orders dated 10.10.2011 and

12.12.2013 are bad in law and liable to be set aside.

17. Secondly once the complainants are not found the card holders of the petitioner's shop, they cannot be treated as aggrieved poerson. In light of the settled law, this Court is of the firm view that only aggrieved person can file complaint and in the present case complainants are not the aggrieved person. Therefore, on this ground too, impugned orders dated 10.10.2011 and 12.12.2013 are bad in law and liable to be set aside.

18. Further, petitioner in the writ petition specifically pleaded that complainants are not card holders either in Gram Sabha or shop of the petitioner, but there is very vague denial in counter affidavit not supported with any documentary evidence or relevant facts. In light of Order 8 Rule 5 Civil Procedure Code as well as law laid down, this Court is of the firm view that there must have been specific denial supported with relevant documents and facts. In lack of specific denial it would be treated admission. Therefore, on this ground too, impugned orders dated 10.10.2011 and 12.12.2013 are bad in law and liable to be set aside.

19. Accordingly, under such facts of the case, writ petition is **allowed.** Writ of certiorari is issued quashing the impugned orders dated 10.10.2011 passed by respondent no. 3 and 12.12.2013 passed by respondent no. 2.

20. The respondents are directed to restore the licence of fair price shop of the petitioner and ensure supply of essential commodities to the petitioner's fair price shop for distribution.

21. No order as to costs.

(2022)02ILR A801
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2022

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Writ C No.10015 of 2021

M/s LML Ltd., Kanpur ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shubham Agarwal, Sri Amar Gupta, Sri Anuj Aggarwal, Sri Divyam Agarwal, Sri Navin Sinha

Counsel for the Respondents:
C.S.C., Ms. Bushra Maryam

A. Labour Law – UP Industrial Dispute Rules, 1957 – Rule 40 – Suo moto reference by the State Government – Workman's right of representation – Held, clause (i) of sub-rule (1) of Rule 40 of the U.P. Rules gives discretion to the workmen for opting for representation by the persons mentioned therein – The contention regarding non-entitlement of the respondent-Union to represent the interest of the workmen before the Industrial Tribunal would not be acceptable. (Para 19)

B. Labour Law – UP Industrial Dispute Act, 1947 – Sections 2(n) and 6-K – Lay off – Lay off compensation – Entitlement of workmen – Petitioner-company had gone into liquidation – Effect – Settlement occurred – Lay off compensation not duly paid to the workmen – Consequence – Industrial Tribunal answered the reference which pertained to the validity of the lay-off by means of the award and has recorded a definite finding about the lay-off being unjustified and illegal – Tribunal analyzed the settlement only for

consideration of the provisions and terms of lay-off – Validity challenged – Held, the finding of the Industrial Tribunal with regard to the lay-off done on 15.04.2007 by the petitioner-company being completely unjustified and illegal, is correct and deserves no interference. (Para 41, 43 and 45)

C. Company Law – Insolvency and Bankruptcy Code, 2016 – Sections 14, 33, 34, 36 and 53 – Company was declared sick by BIFR and is not continuing with its business – It is under the liquidation process – Effect – Workmen's dues – Payment – Liability to pay the back wages etc. of the workmen, on whom lie – Held, it is for the liquidator to assess the claims of the workmen, taking into account the impugned award of the Industrial Tribunal – If any monetary liability arises on the petitioner-company after the final disposal of the matter, the liquidator undertook to safeguard the interest of the workmen in accordance with Section 53 of the Code. (Para 46, 48, 50 and 61)

Writ petition disposed of. (E-1)

List of Cases cited:

1. Parry & Company Ltd. Vs P.C. Lal, Judge of the Second Industrial Tribunal; AIR 1970 SC 1334

2. B. Srinivasa Reddy Vs Karnataka Urban Water Supply & Drainage Board Employees' Assc. & ors.; (2006) 11 SCC 731

3. Tata Engineering and Locomotive Company Ltd. Vs Their Workmen; (1981) 4 SCC 627

4. Surendra Kumar Verma Vs Central Government Tribunal-cum-Labour Court, New Delhi & ors.; (1980) 4 SCC 443

5. National Engineering Industries Ltd. Vs State of Rajasthan and ors.; (2001) 1 SCC 371

6. Newspaper Limited Allahabad Vs U.P. State Industrial Tribunal; AIR 1960 SC 1328

7. Shree Chamundi Mopeds Ltd. Vs Church or South India Trust Association; (1992) 3 SCC 1

(Delivered by Hon'ble Jayant Banerji, J.)

1. This writ petition has been filed by the Company under liquidation through the authorized signatory of the liquidator against the following respondent:

"1. State of U.P. through State of U.P.

through its Principal Secretary, Labout Department,

Government of U.P. Secretariate, Bapu Bhawan, Lucknow

2. Presiding Officer, Industrial Tribunal(III), Kanpur,Uttar Pradesh

3. LML Mazdoor Ekta Sangathan

F-679, Barra-8, Kanpur"

2. The prayer in the petition is for quashing/setting aside the award dated 19.2.2020 published on 12.3.2020 made by the Industrial Tribunal. Further relief has been sought for restraining the respondents from proceedings against the petitioner-company pursuant to the aforesaid award.

3. The facts appearing in the present petition is that the Company was engaged in the business of manufacturing of geared scooters and had an employee strength of more than 6,000 employees including staff and workers. Around the late 1990s in view of the significant change in the consumer behavior towards motorcycles as opposed to scooters, the Company suffered substantial losses. On inability to arrange fresh working capital, the Company was only able to achieved partial restructuring in the year 2005. However, in view of the rapid erosion of the Company's net worth, a

reference was filed before the Board for Industrial and Financial Restructuring1 under the provisions of the Sick Industrial Companies (Special Provisions) Act, 19852. In the proceeding of BIFR held on 8.5.2007, an operating agency was appointed to prepare a revival scheme if feasible.

4. The workmen of the petitioner-Company resorted to strikes and demonstrations with effect from 27.2.2006, which paralyzed its functioning and a lockout was declared with effect from 7.3.2006. In order to salvage the Company's business, the management of the Company and its workmen represented by the registered union of the Company namely Lohia Machines (LML) Karmchari Sangh3, engaged in protracted tripartite discussions and arrived at settlement on 13.4.2007 before the Additional Labour Commissioner, Kanpur Region, Conciliation Officer and Additional Labour Commissioner (IR) U.P., Head Office Kanpur. It is stated that since the inception of the petitioner-Company, and at the time of the negotiations, the interests of the workmen were represented solely by LMLKS. In terms of the aforesaid settlement, it was decided that the workmen would withdraw the strike and the lockout would be lifted with effect from 15.4.2007; that the petitioner-Company will take steps to revive the establishment and only such number of workmen shall be taken on work and employment in phases as per requirement of work and production as far as on departmental seniority basis, and all other workmen, save and except those who were required to resume work and production, shall stand laid off. The settlement further provided that the laid off workmen would be entitled to receive lay off compensation in the manner specified.

5. Thereafter, the lockout was lifted with effect from 15.4.2007 and the settlement was implemented. However, a small splinter group of workmen describing themselves as LML Mazdoor Union which was neither a registered nor a recognized union filed a Writ Petition No. 25445 of 2007 seeking to dissolve the settlement, which petition was dismissed by this Court. Subsequently, by means of a reference order dated 21.5.2008, the State Government suo moto referred an industrial dispute for adjudication to the Industrial Tribunal (respondent no. 2) on the following terms:

"क्या सेवायोजकों द्वारा प्रतिष्ठान में दिनांक 15.04.2007 से किया गया ले–आफ उचित तथा /अथवा वैधानिक है? यदि नहीं, तो प्रतिष्ठान के ले–आफ से प्रभावित श्रमिकगण क्या हितलाभ/उपशम पाने के अधिकारी हैं व अन्य किन विवरणों सहित।"

"Whether the lay-off done by the employers in the industry from 15.04.2007 is correct and / or legal? If not, then what benefits / relief are the workman of the industry affected by lay-off are entitled to and what other details."

(English translation provided)

6. The respondent no. 3, LML Mazdoor Ekta Sangathan4, was granted a registration certificate on 18.1.2008 under the Trade Unions Act, 1926. The registration certificate issued to the respondent-Union was challenged before this Court by way of Writ Petition No. 5903 of 2008 and Writ Petition No. 13658 of 2008. The aforesaid petitions were allowed on 21.04.2008 holding that since all the members of the respondent-Union are laid off employees, therefore, the registration was granted dehors the statute. The Special Appeals, bearing numbers 834 of 2008 and 833 of 2008, filed by the

respondent-Union came to be dismissed by this Court by a judgement dated 1.2.2013. However, Special Leave Petitions filed against the aforesaid judgement passed in the Special Appeals are pending before the Supreme court in which the effect and operation of the order dated 1.2.2013 has been stayed until further orders.

7. The order of reference dated 21.5.2008 made under Section 4K of the Act was also challenged by the petitioner-Company in Writ Petition No. 33896 of 2007 which was dismissed by a judgement delivered on 17.09.2010. The Special Appeal No. 1699 of 2010 filed challenging the judgement of the writ Court was also dismissed by means of a judgement dated 31.1.2014.

8. A corporate insolvency resolution process of the petitioner-company, which is a corporate debtor, was initiated pursuant to an order dated 18.5.2017 passed by the NCLT admitting the company petition bearing CP No. (IB)-55/ALD./2017 filed under Section 10 of the Insolvency and Bankruptcy Code, 20165. The NCLT issued consequential directions while passing an order of moratorium under Section 14 of the Code. Since, the resolution plan submitted by one Rimjhim Ispaat Limited was rejected by the Committee of Creditors in the meeting held on 21.1.2018, the NCLT, by means of its order dated 23.3.2018 ordered liquidation of the petitioner-company in the manner laid down in Chapter III of the Code and passed consequential directions. By the order dated 9.4.2018, the NCLT appointed a Liquidator. Pursuant to the order dated 23.3.2018 passed by the NCLT, the petitioner-company made a public announcement dated 16.4.2018. Around 2016 claims of workmen/employees were received. However, on perusal of the books of accounts and record, the Liquidator in accordance with the provisions of Regulation 19(4) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 admitted claims of 6337 workmen/ employees. The petitioner-company started disbursing funds of the employees/workmen whose claims were admitted and till the date of filing of the petition, the Liquidator had disbursed funds amounting to Rs. 37,03,28,557/- to 2946 workmen/employees of the Corporate Debtor/petitioner-company. However, by means of the impugned award dated 19.2.2020, the Industrial Tribunal answered the reference in favour of the workmen and held that the lay off of workmen on 15.4.2007 was illegal and for the period of lay off from 15.4.2007, the workmen are entitled to entire wages, allowances and benefits. It was further held that from 15.4.2007 till the closure of production of the unit of the factory or till the date of appointment of the Liquidator, the workmen who have received lay off compensation, the same would be adjusted and the payable amount would be disbursed within 30 days of the award by the employer/Liquidator.

9. The contention of the learned counsel for the petitioner-company is that in view of the repeated strikes and unrest created by the workmen as well as the losses suffered by the Company, rapid erosion of the Company's net wealth took place whereafter a reference was filed before the BIFR under the provisions of SICA in which, in the proceedings of BIFR held on 8.5.2007, an operating agency was appointed to prepare a revival scheme, if possible. The discussions between the Company and the registered union of the

Company, LMLKS, before the Additional Labour Commissioner and the Conciliation Officer, resulted in a settlement on 13.4.2007 which was given effect to. The lockout was lifted with effect from 15.4.2007 and the settlement was implemented. It is contended that since the registration of the respondent-Union, was canceled by the order of the Court, therefore, under the provisions of Section 6(I) of the U.P. Act, none of its officers were entitled to represent the workmen before the Industrial Tribunal. It is contended that the validity of the settlement was upheld in Special Appeal before this Court, which order has become final and the lay off compensation contemplated in the settlement is strictly in accordance with the provisions of the U.P. Act. The contention is that after the repeal of the SICA, steps were taken by the Company before the NCLT under the provisions of the Code in which an order of moratorium was passed under the provisions of Section 14 of the Code. Given the order of the NCLT, the Labour Court ought not to have proceeded with the matter. It is further contended that once the order of liquidation was passed on 23.3.2018 and the Liquidator was appointed by NCLT by the order dated 9.4.2018, no award could have been made by the Industrial Tribunal for grant of full back wages and other dues in view of the provisions of Section 53 of the Code. It is contended that there was no material before the Industrial Tribunal to demonstrate want of gainful employment of the workmen after lay-off. Therefore, there was no occasion to grant back wages to the workmen. He has contended that the Tribunal has vaguely referred to new appointments being made without giving any specific details as to which new appointments were made and as such no adverse inference can be drawn against the petitioner-Company. Claims of 6337 workmen / employees of the petitioner-company had been admitted by the Liquidator and funds amounting to Rs.37,03,28,557/- had already been disbursed to the workmen/employees. It is contended that pursuant to the award of the Industrial Tribunal, the respondent-Union has called upon the Liquidator to compute the amount payable to the workers seeking implementation of the award. It is stated that the respondent-Union has not even submitted a list of workers, whose interest it claims to represent, and though, by a letter dated 05.11.2020, has claimed a sum of Rs.216.91 crores to be payable to 1338 workers, yet, it has sought payment of wages for the entire work-force by a letter dated 31.08.2020 that has been enclosed as Annexure-16 to the writ petition. No finding has been recorded in the award regarding the number of the workmen of the respondent-Union. Though the learned counsel for the petitioner-company has submitted a compilation of judgements and several judgements are mentioned in the pleadings, however, in support of his contentions, he has relied upon the following judgments:- **Parry & Company Ltd. Vs. P.C. Lal, Judge of the Second Industrial Tribunal6; B. Srinivasa Reddy vs. Karnataka Urban Water Supply & Drainage Board Employees' Association & Ors.7; Tata Engineering and Locomotive Company Ltd. v. Their Workmen8; Surendra Kumar Verma vs. Central Government Tribunal-cum-Labour Court, New Delhi & Ors.9; and National Engineering Industries Ltd. vs. State of Rajasthan and Ors.10.**

10. Learned counsel for the respondent-Union, on the other hand, has urged that wages were not paid to the employees of the petitioner-company since

December 2006. The Union with which the petitioner-company entered into the settlement, does not represent the majority of the workmen. The circumstances led to the workmen forming the respondent-Union, the registration of which was challenged in a writ petition. It is contended that in view of the interim order passed by the Supreme Court in a Special Leave Petition staying the operation of the order of the Division Bench of this Court passed in a Special Appeal, the registration of the respondent-Union stood revived. It is contended that even an unregistered Union is not debarred from representing the interest of a workman. In this regard, the learned counsel has referred to the aforesaid judgment of the Division Bench of this Court in Special Appeal No.1699 of 2010 in which, while observing that whether the circumstances existing after seven years of the settlement still justify its terms to be binding on more than 2500 workmen, which is about 80% of the total number of workmen, which were employed on the date of lock-out requires to be examined by the Industrial Tribunal, the Court held that it is not disputed that even the workmen of unregistered Union may make a reference by raising an industrial dispute. Learned counsel, in this regard, has referred to paragraph no. 4 of the judgment of the Supreme Court in the matter of **Newspaper Limited Allahabad vs. U.P. State Industrial Tribunal11.** The learned counsel has also urged that the Court had further observed that the industrial dispute had been referred suo moto by the State Government and as such the satisfaction of the State Government cannot be lightly interfered with by the High Court nor the settlement could be said to be binding on the State Government for all times to come if it is satisfied that there exists an industrial dispute which needs to be adjudicated and resolved. The Court had further observed that the settlement was inconclusive and was entered into to bring temporary industrial peace and it did not end the relationship of employer and employee. The learned counsel has referred to that part of the award which deals with whether the layoff done on 15.02.2007 is correct or legal, to contend that the settlement was never filed on behalf of the petitioner-company before the Industrial Tribunal. It is contended that given the definition of lay-off appearing in Section 2(n) of the U.P. Act, it was incumbent on the petitioner-company to have demonstrated before the Industrial Tribunal that circumstances existed justifying lay-off by the petitioner-company. That having not been done, it is contended, it is not open for the petitioner-company to challenge the award. It is further submitted that it is evident from the cross-examination made on behalf of the authorized representative of the petitioner-company that no documentary evidence was filed and neither was there any material placed to demonstrate that 50% of the lay-off compensation was paid.

11. In rejoinder, Shri Navin Sinha, learned Senior Advocate appearing on behalf of the petitioner-company, has contended that way back in the year 2006 itself, the petitioner-company had become sick which finally led to the order of liquidation passed by the NCLT under the Code. It is contended that the petitioner was not a healthy company where the production was going-on in full swing that could enable it to meet its statutory liability.

12. Having heard the learned counsel for the parties and perused the record, the issue that arises for consideration is

whether the award made by the Industrial Tribunal was justified. For consideration of the issue, the submissions on behalf of the learned counsel require to be analyzed.

Representation of the workmen before the Industrial Tribunal:

13. Annexure No.7 to the writ petition is an order issued on 21.05.2008 passed by the ex-officio Secretary to the Labour Department of the Government of Uttar Pradesh communicating the opinion of the Governor regarding the industrial dispute between the employer and its workmen and referring the same under Section 4-K of the U.P. Act suo moto. The aforesaid order of reference was challenged by the petitioner-company in a writ petition which came to be dismissed on 17.09.2010. In the Special Appeal filed by the petitioner-company, M/s L.M.L. Limited12, against the aforesaid order, the Appellate Court upheld the settlement to be binding despite it being unregistered, however, held that the settlement is not binding on all the workmen of the petitioner-company. It was held as follows:-

"26. We find that though learned Single Judge has committed an error in law in holding that the settlement or agreement to be binding must be registered under Section 6-B of the Industrial Disputes Act and has ignored the ratio of the judgment in Herbertsons Limited vs. The Workmen of Herbertsons Limited (supra) as well as the judgment of Supreme Court in National Engineering Industries Ltd vs. State of Rajasthan (supra), in respect of the validity and effect of the settlement arrived at during the course of conciliation proceedings, he did not commit any mistake on the other count namely that in the circumstances of the case the settlement is not binding on all the workmen of the petitioner-company. From the facts and documents available on record we find that the question, whether the agreement is valid, fair and reasonable and whether at such a distance of time, the open ended provisions in the settlement giving the option to the management-employer to take some of the employees at its discretion leaving the remaining employees with only 50% of lay off compensation and which has also not been paid in full or even in part awaiting finalisation of draft resettlement plan before BIFR, is a question, which requires to be considered by the Industrial Tribunal.

27. The reference made by the State Government, as to whether the lay off was legal and valid and if it is held to be illegal and invalid, the benefits to which the laid off workmen are entitled, is a question, which will also require adjudication of the validity of the settlement.

28. The argument, that the settlement is binding upon all the workmen, does not meet the question raised by Ms. Bushra Maryam that the settlement is not valid in law inasmuch as it is unfair, unconscionable and thus against public policy. In the circumstances, even if the settlement, which did not resolve the dispute with all or even majority of workmen and was not conclusive as it provided for only part payment of lay off compensation, when it was entered into on 13.4.2007, treated to be binding on all the workmen, the question whether the circumstances existing today, after seven years still justify its terms to be binding on more than 2500 workmen, which is about 80% of the total number of workmen which were employed on the date of lock-out requires to be examined by the Industrial

Tribunal. In case the settlement is not found to be illegal as it left an unguided discretion to the employer to take back a group of workmen in employment leaving the majority of workmen to be laid off for an indefinite period providing payment of only 50% of the laid of compensation, is not found to be legal and valid, its binding effect on all the workmen would not make the settlement valid for all the workmen for denying a reference.

29. The legal position, that even the workmen of unregistered union may make a reference, is not disputed and thus even if the LML Mazadoor Ekta Sangathan, Kanpur is not a registered union, it could have raised an industrial dispute. In the present case, the industrial dispute has been referred suo moto by the State Government, which makes the case of the petitioner still weaker inasmuch as the satisfaction of the State Government cannot be lightly interfered with by the High Court under Article 226 of Constitution of India, nor the settlement could be said to binding on the State Government for all times to come, if it is satisfied that there exists an industrial dispute which needs to be adjudicated and resolved. The settlement in any case on the face of its terms was inconclusive and was entered into to bring temporary industrial peace on 13.4.2007. It did not end the relationship of employer and employee.

30. We further find that even if the settlement dated 13.4.2007 for arguments sake was valid and binding on all the workmen, its effect and consequence on all the workmen cannot be considered to be valid for all times to come and that at this distance of time, when the settlement has not worked out to benefit all the workmen inasmuch majority of workmen being more than 80% of the employees at the time of lock out have not been paid the full laid off compensation and are still waiting for the settlement of such lay off compensation, it cannot be said that there is no bonafide or genuine industrial dispute, which requires to be decided by the Industrial Tribunal."

14. The validity of the registration granted in favour of the respondent-Union, is subject to adjudication before the Supreme Court. It is iterated that the registration certificate granted on 18.01.2008 was quashed in a writ petition which order was upheld in the intra-court Special Appeal. The order passed in the Special Appeal was stayed until further orders by the Supreme Court on 21.02.2014 in Special Leave to Appeal (Civil) (CC) No.21380-21381 of 2013 (Vijay Bahadur Kushwaha & Anr. vs. Registrar, Trade Unions, State of U.P. & Ors.).

15. The Supreme Court in the case of **Shree Chamundi Mopeds Ltd. vs. Church or South India Trust Association13,** observed that quashing of an order results in the restoration of the position as it stood on the date of 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 does not mean that the said order has been wiped out from existence.

16. Therefore, the order of cancellation of registration of the respondent-Union, remains in abeyance with effect from 21.02.2014 on which date the Supreme Court stayed the order dated 01.02.2013 passed by this Court in Special Appeal No.833 of 2008 and 834 of 2008.

17. Learned Senior counsel for the petitioner-company has relied upon the provision of sub-section (3) of section 6-I of the U.P. Act to demonstrate the ineligibility of the respondent-Union to represent the workmen before the Industrial Tribunal. Section 6-I of the U.P. Act reads as follows:-

"6-I. Representation of the parties.--*(1) Subject to the provisions of sub-sections (2) and (3), the parties to an industrial dispute may be represented before a Board, Labour Court, or Tribunal in the manner prescribed.*

(2) No party to any proceeding before a Board shall be represented by a legal practitioner, and no party to any proceeding before a Labour Court or Tribunal shall be represented by a legal practitioner, unless the consent of the other party or parties to the proceeding and the leave of the Presiding Officer of the Labour Court or Tribunal, as the case may be, has been obtained.

(3) No officer of a Union shall be entitled to represent any party unless a period of two years has elapsed since its registration under the Indian Trade Unions Act, 1926, and the Union has been registered for one trade only:

Provided that an officer of a federation of unions may subject to such conditions as may be prescribed represent any party."

18. It has been observed by this court in the Special Appeal of **L.M.L. Limited** (supra) that the reference was made suo moto by the State Government and that it was always open to the workmen of the petitioner-company who are members of the respondent-Union, which is stated to be unregistered, to raise an industrial dispute. Rule 40 of the U.P. Industrial Disputes Rules, 195714 reads as follows:-

"40. Representation of parties*. - (1) The parties may, in their discretion, be represented before a Board, Labour Court or Tribunal, -*

(i) in the case of a workman subject to the provision of sub-section (3) of Section 6-1, by -

(a) an officer of a Union of which he is member, or

(b) an officer of a Federation of Unions to which the union referred to in clause (a) above, is affiliated, and

(c) where there is no union of workmen, any representative, duly nominated by the workman who are entitled to make an application before a Conciliation Board under any orders issued by Government, or any member of the executive, or other officer;

(ii) in the case of an employer, by

(a) an officer of a union or Association of employers of which the employer is a member, or

(b) an officer of a federation of unions or associations of employers to which the union or association referred to in clause (a) above, is affiliated, or

(c) by an officer of the concern, if so authorized in writing by the employer :

Provided that no officer of a federation of unions shall be entitled to represent the parties unless the federation

has been approved by tire Labour Commissioner for this purpose.

(2) A party appearing through a representative shall be bound by the acts of that representative.

(3) .....

(4) .....

(5) .....

(6) .....

(7) .....

(8) ....."

19. Therefore, clause (i) of sub-rule (1) of Rule 40 of the U.P. Rules gives discretion to the workmen for opting for representation by the persons mentioned therein. It has not been stated in this petition that who was the person authorized by the workmen to represent them and appear before the Industrial Tribunal. It is also not known on which date was the authority letter filed on behalf of the workmen before the Industrial Tribunal. In any view of the matter, an authority letter filed after the aforesaid interim order of the Supreme Court dated 21.02.2014, even by an officer of the respondent-Union would anyway enable him to represent the workmen. For that matter, even if such letter of authority was filed prior to the aforesaid interim order of the Supreme Court, such an officer would be enabled to represent after 21.02.2014 in view of the interim order of the Supreme Court. Therefore, the contention regarding non-entitlement of the respondent-Union to represent the interest of the workmen before the Industrial Tribunal would not be acceptable.

20. While placing the judgment in the case of **B. Srinivasa Reddy**, the learned counsel for the petitioner-company has specifically referred to paragraph no.38 thereof in which it is held as follows:-

"38. In the writ petition filed by Respondents 1 and 2 their locus standi to challenge the appointment of the appellant was asserted in the following words:

"The petitioner Association is a trade union registered under the Trade Unions Act, 1926. The petitioner is the only registered trade union existing in the 2nd respondent Board. The Board has held several negotiations with the petitioner Union with regard to the service conditions of the employees of the 2nd respondent Board since its formation in the year 1986. The Board has entered into several settlements with the petitioner Union with regard to their service conditions. The petitioner which is a recognised trade union is entitled to agitate the matter with regard to the appointment of the 3rd respondent to the Board. The petitioner is concerned about the functioning of the 2nd respondent Board, and as such is entitled to question the appointment of the 3rd respondent as Managing Director on contract basis. Hence, the petitioner has locus standi to file this writ petition." (emphasis supplied)

These averments were established to be false. The registration of the first respondent under the Trade Unions Act had been cancelled as early as on 2-11-1992. It is not a registered and recognised union. In fact, it was pointed out that the

one recognised association is the Karnataka Urban Water Supply and Drainage Board Officers' and Employees' Association and the first respondent does not have even a handful of members. The fact of cancellation of registration of the first respondent came to the knowledge of the appellant long after the disposal of the earlier Writ Petition No. 44001 of 1995 wherein the Court had given a finding that the first respondent has locus standi to challenge the appointment of the appellant to the post of Managing Director of the Board solely on the ground that it is a registered trade union. In our opinion, the High Court gravely erred in refusing to examine the question of locus standi on the ground that it is decided in the earlier writ petition which operates as res judicata and that the petitioners even otherwise have locus standi. Chapter III of the Trade Unions Act, 1926 sets out rights and liabilities of the registered trade unions. Under the said enactment, an unregistered trade union or a trade union whose registration has been cancelled has no manner of right whatsoever, even the rights available under the ID Act have been limited only to those trade unions which are registered under the Trade Unions Act, 1926 by insertion of clause 2(qq) in the ID Act w.e.f. 21-8-1984 defining a trade union to mean a trade union registered under the Trade Unions Act, 1926."

21. In view of the facts and circumstances of the present case, the case of **B. Srinivasa Reddy,** is distinguishable. On the other hand, in the judgement of the Supreme Court in **Newspapers Ltd.** (supra) it was observed as follows:-

"4. Then it was urged that the association which sponsored the case of Respondents 3 to 5 was an unregistered body and that made the reference invalid. Both the courts have held, and rightly, that it is not necessary that a registered body should sponsor a workman's case to make it an industrial dispute. Once it is shown that a body of workmen, either acting through their union or otherwise had sponsored a workman's case it becomes an industrial dispute."

22. Under the circumstances, the challenge to the representation by the respondent-Union in seeking the reference or in appearing before the Industrial Tribunal cannot be sustained.

Consideration of the settlement by the Industrial Tribunal:

23. As regards the settlement dated 13.4.2007, its scope and extent has already been discussed by the judgement dated 31.1.2014 in the aforesaid Special Appeal of **M/s L.M.L. Limited** (supra). Lay-off by the petitioner-Company formed part of the settlement. The issue regarding lay-off was the subject matter of the reference made suo moto by the State Government to the Industrial Tribunal which, in turn, has answered the reference aforesaid in favour of the workmen.

24. It, however, needs to be mentioned that the reference by the State Government does not refer to the workmen who are the members of any particular Union, but, refers to the workmen who were laid off. Given the unrest among the workers with regard to their disengagement as a result of lay off, the State Government suo moto made the order of reference under Section 4-K of the U.P. Act. It is pertinent to mention here that the award of the Industrial Tribunal is in respect of the workers who were laid off by the

petitioner-company on 15.4.2007, and not only in respect of workmen having membership of any particular Union. Interestingly, it appears from the award itself that the registered Union which had signed the settlement, namely, LMLKS, had appeared before the Industrial Tribunal and had filed a copy of the settlement dated 13.04.2007 as an enclosure to its application 33/D. However, there is no material on record to demonstrate that it opposed the respondent-Union.

25. As far as the settlement dated 13.04.2007 being binding on the parties to the settlement is concerned, the Court in the Special Appeal of **M/s LML Limited** (supra) has already affirmed that position, but, the Court has also observed that in the circumstances of the case, the settlement is not binding on all the workmen of the petitioner-company. The Court went on to observe that whether the agreement is valid, fair and reasonable and whether at such a distance of time, the open ended provisions in the settlement giving the option to the management-employer to take some of the employees at its discretion leaving the remaining employees with only 50% of lay off compensation and which was also not paid in full or even in part awaiting finalisation of draft resettlement plan before BIFR, was a question, which required consideration by the Industrial Tribunal. The Court also held that the reference made by the State Government was one which would also require adjudication about the validity of the settlement dated 13.04.2007.

26. As referred to above, the settlement dated 13.04.2007 was not filed by the petitioner-company before the Industrial Tribunal, but it was filed by the registered Union, LMLKS. The Industrial Tribunal has observed that with regard to the rationale and legality of the settlement, no documentary or oral evidence was furnished by the employers which could have demonstrated that the settlement was lawful and logical. It is observed by the Industrial Tribunal that Section 2(n) of the U.P. Act specifies all conditions under which lay-off can be made, but the lay-off done by the employers was shown to be due to the crisis of working capital, which is contrary to the provisions of Section 2(n). It is pertinent to mention here that the Industrial Tribunal has observed that from 15.04.2007, for a continuous period of 10 years, the workmen are without any work and despite the respondent-Union opposing the lay off, the lay-off was not brought to an end and no work was allotted to them. The Industrial Tribunal has further held that in the settlement no additional benefit has been given to the workmen and they were entitled to lay-off compensation, but lay off compensation has not been paid in its entirety which is improper and illegal. The Industrial Tribunal further noticed that the partial payments of the compensation for the lay-off that was being made from the year 2017 was stopped from March, 2017 and accordingly, it held that it cannot be assumed that by means of the settlement, approval had been given to the petitioner-company to keep the workmen laid off for an indefinite period of time and not make payment of the entire compensation.

27. Section 2(n) of the U.P. Act reads as follows:-

*"**(n) 'Lay-off' (**with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials*

or the accumulation of stock or the breakdown of machinery, or for other reason, to give employment to a workman whose name is borne on the muster-rolls of his industrial establishment and who has not been retrenched;

Explanation. - Every workman whose name is borne on the muster-rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid off for that day within the meaning of this clause :

Provided that if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during the second half of the shift for the day and is given employment then, he shall be deemed to have been laid off only for one-half of that day:

Provided further that if he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day;"

28. Section 6-K of the U.P. Act, which deals with payment of compensation to laid-off workmen, reads as follows:-

6-K. Right of workmen laid-off for compensation.*--(1) Whenever a workman (other than a substitute or a casual workman) whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid-off, he shall be paid by the employer for all days during which he is so laid off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid-off:*

Provided that the compensation payable to a workman during any period of twelve months shall not be for more than forty-five days.

(2) Notwithstanding anything contained in the proviso to sub-section (1), if during any period of twelve months, a workman is laid-off for more than forty-five days, whether continuously or intermittently and the layoff after the expiry of the first forty five days comprises continuous periods of one week or more, the workman shall, unless there is any agreement to the contrary between him and the employer, be paid, for all the days comprised in every such subsequent period of lay-off for one week or more, compensation at the rate specified in sub-section (1):

Provided that it shall be lawful for the employer in any case falling within this sub-section to retrench the workman in accordance with the provisions contained in Section 6-N at any time after the expiry of the first forty-five days of lay-off and when he does so, any compensation paid to the workman for having been laid-off during the preceding twelve months may be set-off against the compensation payable for retrenchment.

Explanation--"Substitute workman" means a workman who is

employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year of continuous service in the establishment.

29. As observed by the Industrial Tribunal, no documentary or oral evidence was filed on behalf of the petitioner-company which could have demonstrated that the settlement was lawful and logical. A perusal of the award impugned reveals that despite adequate opportunity to the employers, no documents whatsoever were produced, whereas the respondent-Union had produced 27 documents along with a list numbered as 38-B(2). The fact that the petitioner-company had gone into liquidation was communicated to the Industrial Tribunal on 27.04.2018. On 27.08.2018, the nominated representative of the liquidator was present before the Industrial Tribunal and he filed his authority letter which was marked as paper no.51/A. On this authority letter, an objection was made by the respondent-Union that the nominated representative was an advocate and, after hearing the parties, the authority letter was rejected. Thereafter, Shri Umesh Chandra Tripathi filed his authority letter no.53/A on behalf of the petitioner-company. On behalf of the respondent-Union, Shri Vijay Bahadur Kushwaha testified which testimony was recorded and marked as paper no.54/C. This witness also proved the documents which were exhibited as D-1 to D-26. It was testified by this witness that the compensation in accordance with Section 6-K of the U.P. Act was not paid to the workmen affected by the lay-off declared on 15.04.2007. All the workmen affected by lay-off used to visit the Head Office of the Establishment for recording their attendance and they are still doing so. It was stated that payment of 50% of lay off compensation that was being paid by the employer was also stopped from March 2017. It was stated that the respondent-Union is representing all the affected workmen. The lay-off notice dated 15.04.2007 was opposed by the respondent-Union by sending representations to various authorities including the Labour Commissioner of Uttar Pradesh. Despite the employers being called by the Labour Department by means of a notice to give their clarification but they never appeared. It was testified that with regard to the lay-off, an agreement was entered into between the employers and their 'pocket' Union which was opposed by the respondent-Union as well as the 756 workers employed in the Establishment. The witness for the workmen also proved document no.23 which was a counter affidavit filed by the Labour Department in a writ petition filed by the employers (petitioner-company) in Writ Petition No.42868 of 2010. That it was evident from that counter affidavit that the lay-off done by the employers was not in accordance with law. The witness, while referring to document no.26, stated that it was an order made by the Labour Commissioner of Uttar Pradesh to make payment of lay off compensation in accordance with law, but the employer did not obey that order. The witness testified that after lifting of the lock-out, around 400 workmen were employed and those 400 workmen are not included in the case before the Tribunal.

30. On behalf of the petitioner/liquidator, Shri Suraj Narain Shukla appeared as witness E.D.-1. He testified in his examination-in-chief that the industrial dispute came to an end after the

settlement dated 13.04.2007. That 50% of the lay-off compensation was paid to the workmen. In his cross-examination, the witness stated that no document had been filed before the Industrial Tribunal with regard to the lay-off. The witness stated that no document with regard to payment of 50% of the lay-off compensation to the workmen had been filed before the Industrial Tribunal. The witness had no knowledge whether the settlement dated 13.04.2007 was registered or not. He stated that as per his knowledge, due amount of the lay-off compensation in terms of the settlement was paid alongwith two months wages. He, however, could not state that when did the lay-off period come to an end and how many workmen were affected by the lay-off. The witness also could not state that whether any rehabilitation package was approved in respect of the establishment or not. The witness also did not have any knowledge whether any calculation has been made by the liquidator with regard to computation of the balance amount of lay-off compensation.

31. The Industrial Tribunal noticed in the award that the settlement dated 13.04.2007 was brought on record by the registered Union, namely, Lohia Machine (LML) Karmchari Sangh, alongwith their application paper no.33/B. The Industrial Tribunal noticed that a letter signed by 756 workers was sent to the Labour Commissioner, Kanpur in which the lay-off of 2700 workmen was opposed with the demand of ending the lay-off and for the workmen to be provided work. Pertinently, it was noticed that in paragraph 19 of the counter affidavit filed on behalf of the State Government in Writ Petition No.42868 of 2010, which document was proved by the workmen's witness, it was stated that at the time of the settlement dated 13.04.2007, 2800 workmen were employed with the petitioner-company, of whom 743 workmen were members of LMLKS. Consequent to the agreement dated 13.04.2007, 743 workmen were employed and around 2000 workmen were not employed because of which the reference was made for adjudication. Again, in paragraph 22 of that counter affidavit, it was mentioned that only a small group of 743 workers were given benefit of the agreement dated 13.04.2007 and the rest of the workmen were not given the benefit and they were deprived of work and were laid off. The Industrial Tribunal noticed that in the evidence, an important point was reflected that during the period of lay-off, the petitioner-company made fresh appointments for carrying on production, but laid off workers were not given priority for employment. Reference has been made to a notice of the Labour Department on the complaint of the Union dated 02.08.2010 that in the months of October and November 2009, instead of laid off workmen, new appointments were made for carrying on production. In the said notice, it was mentioned that the period of the settlement dated 13.04.2007 had come to an end and the workmen laid off should be employed. It was noticed that this notice of the Labour Department was not opposed by the employers nor was any oral evidence led to contradict this fact. Thereafter, after detailed analysis of the evidence, the Industrial Tribunal held that the lay-off done on 15.04.2007, under cover of settlement dated 13.04.2007, was completely unjustified and illegal. It was further held that from the date of the lay-off, that is, from 15.04.2007, the workmen are entitled to full wages, allowances and other consequential benefits.

32. The memorandum of settlement dated 13.04.2007, that is the bone of contention between the contesting parties,

has been enclosed as Annexure No.4 to the writ petition. It is made in Form-1 and under Section 4-F of the U.P. Act read with Rule 5(1) of the U.P. Rules. The names of the parties and their addresses are mentioned as M/s. LML Limited, Scooter Unit, Site-II, C-10, Panki Industrial Estate, Kanpur (Company) and the workmen through their Union - Lohia Machines (LML) Karmchari Sangh, 117/533, Pandu Nagar, Kanpur. The representatives of the employer were (1) Shri R.K. Srivastava, Whole time Director, and (2) Shri K.P. Tripathi, Divisional Manager (P&IR). The representatives of the workmen are 15 in numbers headed by the acting President. In the recital of the case appearing in the settlement, it is narrated that the company's performance during the previous two years had been adversely affected due to the drastic shift in the market from geared scooters to motorcycles; and inspite of significant efforts, the company could achieve only partial financial restructuring in the year 2005 and could not obtain fresh working capital facilities with the result that liquidity constraints and high break even point continued to adversely affect the performance of the company causing it to incur heavy losses; due to strikes and demonstrations by the workmen with effect from 27.02.2006, the company's working was completely paralysed and lock-out was declared on 07.03.2006 which was continuing; as a result of huge losses of approximately Rs.411.44 crores, the company's net worth had been fully eroded and the company filed a reference before the BIFR under the provisions of SICA. The recital further narrates that for resolving various issues, a tripartite meeting had taken place before the Additional Labour Commissioner, Kanpur Region as well as the Additional Labour Commissioner, U.P. (I.R) which culminating in execution of a tripartite settlement dated 24.07.2006 in pursuance of which settlement, the Management had disbursed wages to the workmen for January and February 2006 which was accepted in full. In view of the extremely precarious financial position of the company, its business plan had to be totally recasted and with a view to revive the Unit, the company would favourably consider to restart its scooter operations on a limited scale, primarily for the export market. The parties agreed for the downsizing of manpower and all other measures, as may be required at the sole discretion of the management, would be adopted to make the Unit viable so as to ensure its survival and revival, and bring the company back to a position of sustained profitability. It is mentioned in the recital that the company would need time to complete the process required for formulation, consideration and approval of the revival package which, inter alia, would involve induction of fresh funds from financial/strategic investors, settlement/restructuring of liability etc. It was recognised by the parties that it is in the interest of the company and workmen that the company resumes its operations as contemplated for manufacture and export of scooters and also time would be needed by the company thereafter for formulation, consideration and approval of the revival package by the BIFR. It was finally mentioned in the recital that after meeting between the management and the office bearers of the registered and recognised Union working in the company, a tripartite meeting had taken place on 13.04.2007 before the Additional Labour Commissioner, Kanpur Region, Kanpur and the Additional Labour Commissioner, U.P. (I.R) head office at Kanpur wherein the following settlement had been arrived at between the parties with their consent.

The 11 clauses of the terms of the settlement are as follows:-

"Terms of Settlement

1. That it has been discussed and decided that the workman shall withdraw the strike with immediate effect and accordingly the Company shall lift the Lockout with effect from 15th April 2007. The Company, shall first start cleaning and carry out maintenance work of the plant & machinery which will take 7 to 10 days time and only thereafter normal production activity can be gradually restarted.

2. That since work and production of scooters is to be started in a phased manner depending on the market requirement and orders, it has been agreed and decided that only such number of workmen shall be taken on work and employment, in phases, as per requirement of work and production and as far as departmental seniority basis. That all other workmen, save and except those who are required to resume work and production and whose names shall be displayed at the notice board of the Company from time to time, shall stand Laid Off. The workmen so Laid Off shall be entitled to receive Lay Off Compensation ("LOC") in terms of the UP Industrial Disputes Act 1947 in the manner as discussed and decided hereunder.

a). That the workmen and the union agree that looking to the precarious financial condition of the Company, the LOC payable to the eligible laid off workmen will be paid in the following manner:

i) That only 50% of the LOC shall be paid to the laid off eligible workmen and remaining 50% shall be payable to them after the Revival Package of the company has been approved by Hon'ble BIFR and the necessary funds foreseen under the Revival Package has been received by the Company in the manner as would be set out under the said Revival Package.

ii) That the above LOC amount of 50% shall be paid to the Laid Off Workmen by crediting the same to the workmen's respective bank accounts in Indian Overseas Bank, LML Extension Counter, Panki, Kanpur on every 25th of the subsequent month.

b) That all the workmen so Laid Off shall have to present themselves every day for marking attendance at the Company's registered office at C-3, Panki Industrial Area, Kanpur at 10 a.m. and 3 p.m. as per the attendance schedule which will be displayed on the Notice Board. All those workmen who do not present themselves to punch their attendance on the above appointed time and place shall not be entitled for any LOC.

c) That, since large number of workmen have lost their cards for marking their attendance, the Management has, on the request of the Union and workmen, agreed to make arrangement for the issue of new cards for marking attendance to all the workmen. It is, therefore, agreed that all workmen including those who are Laid Off shall first receive the new cards from the Time Office at C-3, Panki Industrial Estate, Kanpur, and then mark their attendance accordingly.

d) That those Laid Off workmen who refuse to accept any alternative employment/job, offered by the Company shall not be entitled for any LOC whatsoever.

e) That any Laid Off workmen remaining absent for more than 15 consecutive days shall lose his lien on employment and shall be treated as having left the employment of the Company on his own accord as per the provisions of Certified Standing Orders of the Company and accordingly his name shall be struck off from the muster rolls of the Company.

3. That the workmen and their union agree that looking to the precarious financial condition of the company and for its revival, there will be moratorium on revision of salary/wages as on February 2006 of the employees for a period of three years from the date of lifting of the Lockout.

4. That the workmen and their union agree that the Canteen will be run on "No Profit No Loss basis" by a Contractor as per Factories Act. Management shall not give any subsidy what so ever.

5. That in terms of the agreement dated 24.07.2006 with regard to pending ACO lying in the name of workmen till December 2005, it is agreed that the ACO amount shall be adjusted from the workmen's earned monthly wages @ Rs. 1000/- per month, effective from the date of the lifting of the lockout. It is however, clarified that no adjustment of ACO will be made from the amount paid to the Laid Off workmen from their LOC.

6. That workmen and the union agree that while making full & final payment at the time of severance for any reason whatsoever of any workman, the company shall make adjustment of all advances including ACO in terms of the agreement dated 24.07.2006, PROVIDED that such payment shall only be made to the workmen after the Revival Package of the Company has been approved by the Hon'ble BIFR and the necessary funds foreseen under the Revival Package including for making of severance payment has been received by the Company in the manner as would be set out under the said Revival Package.

7. That as regards the payment of balance 50% Bonus for the year 2003-2005, it has now been finally decided that it shall be paid to the workmen in three equal installments as under:

a. First Installment by end of June 2007

b. Second Installment by end of August 2007

c. Third Installment by end of October 2007

8. With regard to the workmen, who are rendered surplus including but not limited to the scaling down, suspension of Motorcycle operations and/or any other operations and activities in the plant and/or for any reason whatsoever and/or should their services be not required shall be governed as per the law.

9. That all parties agree that Management shall outsource non core activities which it deems expedient to vendors and / or by or through contractors.

10. That it has been discussed and agreed between the parties that the workmen shall not be entitled for any wage and or salary and or any benefit for the strike/lockout period on "no work no pay" basis and as a result of this settlement all the issues pertaining to the strike / lockout stand fully and finally resolved.

11. That the workmen and the union assure the Management that they would extend their full co-operation for restoring normalcy in work and production to ensure the survival and revival of the Company and to make it viable."

33. At the end of the aforesaid memorandum of settlement, the representatives of the employers and the 15 representatives of the workmen have signed in the presence of Additional Labour Commissioner, Kanpur Region, Kanpur as well as the Additional Labour Commissioner, U.P. (I.R) Kanpur.

34. Before considering the aforesaid settlement with regard to lay-off and the award of the Industrial Tribunal on this aspect, it may be mentioned that in the counter affidavit filed by the respondent-Union, a copy of the certified Standing Orders dated 27.08.1984 has been enclosed as Annexure-CA-1 framed under the Industrial Employment (Standing Orders) Act, 1946. This document has not been specifically denied in the rejoinder affidavit filed by the petitioner-company. The provisions of lay-off of workmen, payment of compensation, and maintenance of muster rolls are mentioned in clauses 19, 20 and 21 respectively of the aforesaid Standing Orders. They are quoted below:-

"19. LAY OFF OF WORKMEN :

Lay off will have the same meaning as given in Section 2 of U.P. Industrial Disputes Act, 1947.

The employer may at any time or times in the event of fire, catastrophy, breakdown of machinery or stoppage of the power supply, epidemic, civil commotion or any other causes whether of a like nature or not, beyond the control of employer, stop any machine or machines or department or departments, wholly or partly, for any period or periods, and lay off of the workmen. The employer shall not be liable to pay compensation to the laid off workmen if the lay off is for reasons beyond the control of employer.

Provided that it shall be lawful for the employer to retrench the workman in accordance with the provisions contained in section 6-N of the U.P. Industrial Disputes Act, 1947, at any time after the expiry of the first forty five days of lay off and when he does so any compensation if paid to the workman for having been laid off during the preceding twelve months, may be set off against the compensation payable for retrenchment.

20. WORKMAN NOT ENTITLED TO COMPENSATION IN CERTAIN CASES :

No compensation shall be paid to a workman who has been laid off :

(i) If he refuses to accept any alternative employment in the Industrial Establishment, if in the opinion of the employer, such alternative employment does not call for any special skills or previous experience and can be done by the workman provided that the wages which would normally have been paid to the workman are offered for the alternative employment also.

(ii) If he does not present himself for work at the Industrial Establishment at the appointed time during normal working hours at least once a day.

(iii) If such laying off is due to a strike or slowing down of production or

partial working on the part of workmen in another part of the establishment.

No lay off compensation shall be payable if the strength of the workman employed is less than 50.

21. MAINTENANCE OF MUSTER ROLLS OF LAID OFF WORKMAN:

The employer shall maintain muster roll of laid off workmen and shall provide for the making of entries therein by laid off workman who present themselves for work at the Industrial Establishment at the appointed time during normal working hours."

35. There is nothing on record to demonstrate that a copy of the Standing Orders, that has been enclosed as Annexure CA-1 to the counter affidavit, was filed by any party before the Industrial Tribunal. Alongwith the aforesaid counter affidavit, the testimony of Shri Suraj Narain Shukla, who was authorised by the liquidator to testify in the adjudication case, has also been enclosed as Annexure CA-2. This document has also not been specifically denied in the rejoinder affidavit of the petitioner-company. The narration of the testimony as appearing in the award aforesaid, has already been referred to above and, therefore, is not being repeated here for the sake of brevity. Suffice to say that the witness for the petitioner-Company apparently had superficial knowledge of the settlement dated 13.04.2008 and did not prove from any record whether the terms of the settlement pertaining to lay-off were complied with. Under clause 19 of the Standing Orders, the employer has powers to lay-off workmen in the eventualities mentioned therein for any period or periods and the employer is not liable to pay compensation to the laid off workmen, if the lay-off is for reasons beyond the control of the employer. It is provided therein that it would be lawful for the employer to retrench the workmen in accordance with the provisions contained in Section 6-N of the U.P. Act at any time after the expiry of the first 45 days of lay-off, and when he does so, any compensation, if paid to the workmen, for having been laid off during the preceding 12 months, may be set off against the compensation for retrenchment.

36. A perusal of the terms of the settlement dated 13.04.2007, reveals that contrary to the Standing Order aforesaid, no period of lay-off has been specified therein. On the face of it, the settlement purports to keep the workers laid-off indefinitely and that too on a meagre lay-off compensation, and even that, as is recorded by the Industrial Tribunal, has not been paid. There was no material on record before the Industrial Tribunal on behalf of the petitioner-company to demonstrate that the laid-off workmen were paid compensation in accordance with the terms of the settlement. As a matter of fact, the authorised witness of the liquidator made no statement with regard to the fact whether laid off workmen had been paid compensation in terms of the settlement and, if so, to what extent.

37. With regard to the finding of the Industrial Tribunal that fresh appointments had been made without giving priority to the laid off workmen, it has been contended on behalf of the petitioner-Company that the finding is vague inasmuch as it does not give any specific details. However, a perusal of the award reveals that the finding has been recorded on the basis of a notice issued by the Assistant Labour

Commissioner, Kanpur Region, Kanpur (which was marked as Exhibit D-19) which referred to new appointments being made by the petitioner-company for production in place of the laid off workmen and that the lay-off be ended and the workmen be provided work. The Industrial Tribunal has noticed that the aforesaid notice had not been disputed by the employers by any document nor on the basis of oral testimony and therefore, Exhibit D-19 is completely believable and during the period of lay off, appointment of new workmen by the employer and not re-employing the laid off workmen, was unjustified and illegal. At the cost of repetition, it is mentioned here that no document whatsoever was filed on behalf of the petitioner-company as has been noticed by the Industrial Tribunal in the award. The Industrial Tribunal has also referred to the counter affidavit of the State Government filed in Writ Petition No.42868 of 2010 in which it was mentioned that only 743 workmen of the company were members of the registered Union by the name of Lohia Machines (LML) Karmchari Sangh whereas at the time of the settlement on 13.04.2007, 2800 workmen were employed and since under the settlement only 743 workmen were given employment and 2000 were deprived of employment, the reference was made. A perusal of the testimony of the witness on behalf of the petitioner-company reveals that no questions were put to him in the examination-in-chief with regard to the aforesaid counter affidavit.

38. At this stage it may be mentioned that in the judgement dated 21.4.2008 passed in Civil Misc. Writ Petition No. 5903 of 2008 (LMLKS Vs. Registrar, Trade Unions & others), by which the registration of the respondent-Union was quashed, it has been observed that "There is no denial that out of the work force of 3000, about 2500 are members of the petitioner-Union.....". However, in the present case, after considering the evidence, the Industrial Tribunal has recorded that only 743 workmen were members of LMLKS whereas at the time of the settlement, 2800 workmen were employed. A perusal of the record reveals that no perversity is attributable to this observation of the Industrial Tribunal.

39. However, the observation of the Industrial Tribunal that the lay-off being based on the crisis of lack of working capital is against the provision of Section 2(n) of the U.P. Act, is not correct. The phrase "for other reason" appearing in Section 2(n) and the phrase "any other causes whether of a like nature or not, beyond the control of employer" appearing in clause 19 of the Standing Orders, are wide enough to cover the lay-off made by the petitioner-Company. Nevertheless, this observation of the Tribunal would not have bearing on the finding of the Tribunal that the lay-off was unjustified and illegal.

40. Paragraph no.14 of the judgement of **Parry and Company Ltd.** (supra) has been relied upon by the learned Senior Counsel for the petitioner-company to contend that it was not open to the Industrial Tribunal to question the settlement because it was the prerogative of the petitioner-company to organise and arrange its business in the manner considered best, and if that leads to surplusage of employees no employer is expected to carry the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however unfortunate it is. The relevant part of paragraph no. 14 of the judgement is quoted below:-

"14. It is well established that it is within the managerial discretion of an employer to organise and arrange his business in the manner he considers best. So long as that is done bona fide it is not competent of a tribunal to question its propriety. If a scheme for such reorganisation results in surplus age of employees no employer is expected to carry the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however unfortunate it is. The Legislature realised this position and therefore provided by Section 25-F compensation to soften the blow of hardship resulting from an employee being thrown out of employment through no fault of his. It is not the function of the Tribunal, therefore, to go into the question whether such a scheme is profitable or not and whether it should have been adopted by the employer. In the instant case, the Tribunal examined the propriety of reorganisation and held that the Company had not proved to its satisfaction that it was profitable. ....."

41. In the present case, the Industrial Tribunal has answered the reference which pertained to the validity of the lay-off by means of the award and has recorded a definite finding about the lay-off being unjustified and illegal. The Tribunal has analyzed the settlement only for consideration of the provisions and terms of lay-off. Moreover, in the case of **Parry and Company Ltd.**, the workmen were retrenched, whereas in the present case, despite the Standing orders providing for retrenchment in circumstances where the lay off was extended, the lay-off was being indefinitely extended without resorting to retrenchment. This judgement is distinguishable in view of the facts and circumstances of the present case.

42. The learned counsel for the petitioner-company has then referred to paragraph no.10 of the judgement of the Supreme Court in the case of **Tata Engineering and Locomotive Company Ltd.,** which is as follows:-

"10. The conclusion reached by the Tribunal that the settlement was not just and fair is again unsustainable. As earlier pointed out, the Tribunal itself found that there was nothing wrong with the settlement in most of its aspects and all that was necessary was to marginally increase the additional daily wage. We are clearly of the opinion that the approach adopted by the Tribunal in dealing with the matter was erroneous. If the Settlement had been arrived at by a vast majority of the concerned workers with their eyes open and was also accepted by them in its totality, it must be presumed to be just and fair and not liable to be ignored while deciding the reference merely because a small number of workers (in this case 71 i.e. 11.18 per cent) were not parties to it or refused to accept it, or because the Tribunal was of the opinion that the workers deserved marginally higher emoluments than they themselves thought they did. A settlement cannot be weighed in any golden scales and the question whether it is just and fair has to be answered on the basis of principles different from those which come into play when an industrial dispute is under adjudication. In this connection we cannot do better than quote extensively from Herbertsons Ltd. v. Workmen [(1976) 4 SCC 736 : 1977 SCC (L&S) 48 : (1977) 2 SCR 15] wherein Goswami, J., speaking for the Court observed: (SCC pp. 743-45, paras 21, 24-25 and 27)

"Besides, the settlement has to be considered in the light of the conditions

that were in force at the time of the reference. It will not be correct to judge the settlement merely in the light of the award which was pending appeal before this Court. So far as the parties are concerned there will always be uncertainty with regard to the result of the litigation in a court proceeding. When, therefore, negotiations take place which have to be encouraged, particularly between labour and employer, in the interest of general peace and well being there is always give and take. Having regard to the nature of the dispute, which was raised as far back as 1968, the very fact of the existence of a litigation with regard to the same matter which was bound to take some time must have influenced both the parties to come to some settlement. The settlement has to be taken as a package deal and when labour has gained in the matter of wages and if there is some reduction in the matter of dearness allowance so far as the award is concerned, it cannot be said that the settlement as a whole is unfair and unjust.

* * *

We should point out that there is some misconception about this aspect of the case. The question of adjudication has to be distinguished from a voluntary settlement. It is true that this Court has laid down certain principles with regard to the fixation of dearness allowance and it may be even shown that if the appeal is heard the said principles have been correctly followed in the award. That, however, will be no answer to the parties agreeing to a lesser amount under certain given circumstances. By the settlement, labour has scored in some other aspects and will save all unnecessary expenses in uncertain litigation. The settlement, therefore, cannot be judged on the touchstone of the principles which are laid down by this Court for adjudication.

There may be several factors that may influence parties to come to a settlement as a phased endeavour in the course of collective bargaining. Once cordiality is established between the employer and labour in arriving at a settlement which operates well for the period that is in force, there is always a likelihood of further advances in the shape of improved emoluments by voluntary settlement avoiding friction and unhealthy litigation. This is the quintessence of settlement which courts and tribunals should endeavour to encourage. It is in that spirit the settlement has to be judged and not by the yardstick adopted in scrutinising an award in adjudication. The Tribunal fell into an error in invoking the principles that should govern in adjudicating a dispute regarding dearness allowance in judging whether the settlement was just and fair.

* * *

It is not possible to scan the settlement in bits and pieces and hold some parts good and acceptable and others bad. Unless it can be demonstrated that the objectionable portion is such that it completely outweighs all the other advantages gained the Court will be slow to hold a settlement as unfair and unjust. The settlement has to be accepted or rejected as a whole and we are unable to reject it as a whole as unfair or unjust. Even before this Court the 3rd respondent representing admittedly the large majority of the workmen has stood by this settlement and that is a strong factor which it is difficult to ignore. As stated elsewhere in the judgment, we cannot also be oblivious of the fact that all workmen of the company

have accepted the settlement. Besides, the period of settlement has since expired and we are informed that the employer and the 3rd respondent are negotiating another settlement with further improvements. These factors, apart from what has been stated above, and the need for industrial peace and harmony when a union backed by a large majority of workmen, has accepted a settlement in the course of collective bargaining have impelled us not to interfere with this settlement."

43. In the present case the settlement has been signed by 15 members of LMLKS. The observation of the Industrial Tribunal is that the petitioner-company did not produce any documentary or oral evidence regarding the appropriateness and validity of the settlement by which it could be proved that the settlement is justifiable and reasonable. On the basis of evidence it was found that at the time of the settlement around 2700-2800 workmen were employed in the establishment out of which only 743 workmen were members of LMLKS and only they were re-employed while the rest of the workmen remained without work from the date of their lay-off for nearly 10 years. The lay-off compensation also was not duly paid to the workmen. Therefore, the facts of the present case being distinguishable, under the circumstances, the petitioner-company would not be entitled to any benefit of the aforesaid judgement of **Tata Engineering and Locomotive Company Ltd.**

44. The learned counsel for the petitioner-company has also relied upon paragraph no.24 of the judgement of the Supreme Court in **National Engineering Industries Ltd.**(supra), but in view of the peculiar fact situation of the present case and the findings of the Industrial Tribunal, its benefit would not inure to the petitioner-company.

45. In view of the facts and circumstances mentioned above, the finding of the Industrial Tribunal with regard to the lay-off done on 15.04.2007 by the petitioner-company being completely unjustified and illegal, is correct and deserves no interference. There is no such perversity or arbitrariness in the impugned award of the Industrial Tribunal, with regard to this aspect of the matter, that would merit interference.

Award of back wages, allowances and consequential benefits:

46. Annexure No.2 to the writ petition is a summary record of proceeding of the hearing held on 08.05.2007 before the bench of the BIFR which reflects that the BIFR was satisfied that the petitioner-company had become a sick industrial company as on 31.08.2006 and had declared it to be so. The BIFR then appointed IDBI as the operating agency with directions to prepare a revival scheme for the petitioner-company, if feasible. The recital of the memorandum of settlement dated 13.04.2007, also reflects that the petitioner-Company was in precarious financial condition. It, therefore, appears that various unsuccessful efforts were made by the petitioner-company for revival of the Unit. Though the respondent-Union had successfully staked its claim before the Industrial Tribunal regarding the invalidity of the lay-off made pursuant to the settlement dated 13.04.2007, however, the recitals made in the settlement aforesaid with regard to the financial condition of the petitioner-company, as well as the fact that the company was declared sick by the

BIFR, have not been disputed by the respondent-Union.

47. In the case of **Surendra Kumar Verma (**supra), which has been relied upon by the learned counsel for the petitioner-company, the Supreme Court held as follows:

"6. We do not propose to refer to the cases arising under Sections 33 and 33-A of the Industrial Disputes Act or to cases arising out of references under Sections 10 and 10-A of the Industrial Disputes Act. Nor do we propose to engage ourselves in the unfruitful task of answering the question whether the termination of the services of a workman in violation of the provisions of Section 25-F is void ab initio or merely invalid and inoperative, even if it is possible to discover some razor's edge distinction between the Latin "void ab initio' and the Anglo-Saxon "invalid and inoperative'. Semantic luxuries are misplaced in the interpretation of "bread and butter' statutes. Welfare statutes must, of necessity receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make inroads by making etymological excursions. "Void ab initio', "invalid and inoperative' or call it what you will, the workmen and the employer are primarily concerned with the consequence of striking down the order of termination of the services of the workmen. Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

48. In the present case, the petitioner-company is under liquidation by the order of the NCLT as the Resolution Plan was rejected by the Committee of Creditors. The assets of the petitioner-company are being liquidated. It is not that the petitioner-company is continuing with its business or production, and that in that eventuality it would place an impossible burden on the employer if it is saddled with the liability of payment of back wages, etc. Under the facts and circumstances of the present case, the petitioner-company being under liquidation, the plea for remission of the back wages for reason of 'impossible burden on the employer' cannot be acceded to. It is for the Liquidator to assess the

claims of the workmen also taking into account the impugned award of the Industrial Tribunal. Thereafter the proceeds from the sale of the liquidated assets can be distributed in accordance with the Code. Therefore, the judgement of Surendra Kumar Verma (supra) is distinguishable.

49. At this stage, it is appropriate to consider certain facts and the provisions of the Code and the effect they would have on the impugned award made by the Industrial Tribunal.

50. On record as Annexure No. 14 to the writ petition is an affidavit dated 6.12.2019 given by the Liquidator before the Industrial Tribunal in which it is reflected that he was appointed Liquidator by the order of the NCLT dated 9.4.2018 and an undertaking was given by the Liquidator that if any monetary liability arises on the petitioner-company after the final disposal of the matter, the Liquidator undertook to safeguard the interest of the workmen in accordance with Section 53 of the Code.

51. Section 14 of the Code reads as follows:

*"**14. Moratorium.**- (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-*

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.- For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as

the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

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

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

52. Section 30 of the Code provides for submission of a resolution plan and Section 31 provides for its approval. Section 31 reads as follows:

*"**31. Approval of resolution plan.-** (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.*

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

53. Liquidation of the corporate debtor is initiated under Section 33 and a Liquidator is appointed under Section 34 of the Code. Sections 33 of the Code are as follows:

*"**33. Initiation of liquidation**.- (1) Where the Adjudicating Authority, -*

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein,

it shall-

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation.- For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (7) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating

Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

54. Sub-section (4) of Section 36 of the Code excludes from the liquidation estate assets, those assets which shall not be used for recovery in the liquidation. Sub-section (4) of Section 36 of the Code reads as follows:

"(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:-

(a) assets owned by a third party which are in possession of the corporate debtor, including-

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor."

55. The Liquidator is enjoined to receive and collect the claims of the creditors within a period of 30 days from the date of commencement of the liquidation process, verifying their claims under Section 39 and admitting or rejecting the claims under Section 40. The valuation of the admitted claims is required to be done by the Liquidator under section 41 of the Code in the manner to be specified by the Insolvency & Bankruptcy Board of India. An appeal lies to the Adjudicating Authority against the decision of the Liquidator accepting or rejecting the claims under Section 42 of the Code. Section 53 of the Code deals with distribution of assets and it reads as follows:

*"**53. Distribution of assets.**- (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :-*

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following :-

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order

of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.- For the purpose of this section-

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013."

56. It is not on record that what all orders were passed by the Industrial Tribunal after the order of the moratorium passed by the NCLT till the order of liquidation passed on 23.3.2018. However, the fact remains that the award of the Industrial Tribunal was made well after the order of liquidation dated 23.3.2018. Sub-section (5) of Section 33 of the Code prohibits the institution of any suit or other legal proceeding by or against the corporate debtor (in the present case, the petitioner-company) when a liquidation order has been passed subject to the proviso that the suit or legal proceeding may be instituted by the liquidator on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority. This provision is also subject to the provisions of Section 52 of the Code that provides for the role of a secured creditor in liquidation proceedings. Sub-section (7) of Section 33 of the Code provides that an order of liquidation under the Section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

57. The insolvency resolution process period has been defined in sub-section (14) of Section 5 of the Code, which reads as follows:

"(14) "insolvency resolution process period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;"

58. Insolvency commencement date is defined in sub-section (12) of Section 5 of the Code, which means that the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10, as the case may be. Sub-section (4) of Section 14 of the Code provides the order of moratorium to have effect from the date of such order till the completion of the corporate insolvency resolution process provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

59. As such, in view of the liquidation order passed by the NCLT on 23.3.2018, the order of moratorium passed under Section 14 ceased to have effect. Accordingly, further proceedings in the pending adjudicating case before the Industrial Tribunal was not barred after the order of liquidation passed by the NCLT.

60. Under Section 238 of the Code, the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Therefore, the distribution of the proceeds from the sale of liquidation assets are to be distributed in the order of priority as provided under Section 53 of the Code after determination of the claims by the Liquidator. The priority of distribution of the proceeds from the sale of the liquidation assets pertaining to workmen's dues for the period of 24 months preceding the liquidation commencement date rank equally with the debts owed to a secured creditor where the secured creditor has relinquished security, in view of clause (b) of sub-section(1) of Section 53 of the Code. Only workmen's dues for a period of 24 months preceding the liquidation commencement date are required to be distributed to the workmen in this priority. With regard to the other debts and dues pertaining to workmen, the sums would be required to be paid in the order of priority mentioned at clause (f) of sub-section (1) of Section 53 of the Code. In terms of clause (ii) of sub-section (3) of Section 53, the "workmen's dues" would have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 which reads as follows:

*"**326. Overriding preferential payments.**- (1) In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:-*

(a) workmen's dues; and

(b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues:

Provided that in case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the Explanation, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

(2) The debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that sub-section shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Explanation.- For the purposes of this section, and section 327-

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:-

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman or, in the case of his death, to any other person in his right on the termination of his employment before or by the effect of the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (19 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors."

61. Thus, in view of the manner of distribution of the assets of the company in liquidation as provided under Section 53 of the Code, the "workmen's dues" of the company in liquidation shall be made strictly in accordance with the priority, to the extent, and, in the manner provided in Section 53 of the Code.

62. As regards the direction of the Industrial Tribunal for payment of back wages, it is contended that there was no material before the Industrial Tribunal to demonstrate want of gainful employment of the workmen after lay-off and therefore, there was no occasion to grant back wages to the workmen. However, in this respect, in the testimony of the witness on behalf of the petitioner-Company, no question was put to him whether the workmen were gainfully employed elsewhere. Even otherwise, no negative evidence could have been led by the workmen in this regard. It is pertinent to note that in the testimony of the witness on behalf of the workmen, it was stated that all the workmen affected by lay-off used to visit the Head Office of the Establishment for recording their attendance and they are still doing so. Therefore, under the circumstances of the present case, this piece of evidence would suffice to demonstrate that the workmen were not gainfully employed elsewhere.

63. With regard to the submission that the list of workers has not been furnished by the respondent-Union, in my opinion, given the facts of the present case and the findings of the Tribunal, that alleged omission would not come in the way of the workmen's entitlement. It is pertinent to mention here that in paragraph no.19 of the

writ petition itself it is reflected that around 2016 claims of workmen / employees were received, but on perusal of the books of accounts and record, the Liquidator admitted claims of 6337 workmen/ employees. Therefore the details of all the workmen of the petitioner-Company are with the Liquidator.

64. The lay-off having been held to be unjustified and illegal by the Industrial Tribunal, what follows is that all the workmen who were not employed after lifting of the lock-out with effect from 15.04.2007 and were laid off, would be entitled to full wages, allowances and consequential benefits as directed by the Industrial Tribunal. Any amounts received by them towards lay-off compensation shall be adjusted. However, as observed above, the workmen would only be entitled to receive / recover their dues in accordance with the provisions of Section 53 of the Code.

65. Subject to the aforesaid observations, this writ petition is **disposed of.**

(2022)02ILR A834
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2021

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No. 23288 of 2021

F.C.I. & Anr. ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Kumar Dixit, Ashok Mehta (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I., Sri Gaya Prasad Singh, Sri Shri Krishna Mishra, Sri Ritesh Kumar

A. Labour Law – Contract Labour (Regulation and Abolition) Rules, 1971 – Rule 25(2)(v)(a)&(b) – Workmen employed by the contractor – However, the order for payment of wages was passed directly to the Principle employer – Validity challenged – Contractor was not made party – Effect – Held, no order could have been passed directly asking the principal employer for making the payment to the workmen who were employed by the contractor. Since the contractor himself had not been made a party in the proceedings before the Deputy Chief Labour Commissioner (Central), definitely no direction could be issued to the contractor and, therefore, the direction which had been issued to the principal employer could not have also been issued at all – Held further, if the contractor despite any order being made under Rule 25(2)(v)(a) &(b), did not pay wages, then the principal employer could be made liable to pay the wages (Para 15)

B. Constitution of India – Article 226 – Writ – Maintainability – Contract Labour (Regulation and Abolition) Rules, 1971 – Alternative remedy to file appeal u/s 15 of the Act – Impugned order was passed by the same authority, before whom the appeal is to be filed – Effect – Held, since the Appellate Authority was the Deputy Chief Labour Commissioner (Central) and the order was also passed by the Deputy Chief Labour Commissioner, no Appeal would lie – High Court entertained the writ petition. (Para 17)

Writ petition allowed. (E-1)

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

1. This writ petition has been filed for the quashing of the judgement and order dated 9.7.2017 passed by the respondent no. 1.

2. The respondent no. 2 had filed before the respondent no.1 an application under Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971, with regard to 40 workers working in the FSD Basti under the District Area Manager, Gorakhpur. The request was with regard to the payment of wages to the 40 workers which according to the respondent no. 2 ought to have been similar to the wages which were being paid to workers who were working for the Food Corporation of India, FSD Basti (hereinafter called "the FCI). The application which was filed by the respondent no. 2 on 5.11.2018 was filed with an allegation that the Union i.e. the respondent no. 2 was functioning in the FCI and watching the interest of its workers working in the FCI employed directly or through contract labour system. It had been stated in the application that the union had espoused the cause of its members who were working in the depot at Basti for the last several years and therefore they were praying for pay parity for the casual workers with the pay which was being paid to the workers who were directly employed under the FCI. In the application, it was also stated that the Union also expected that its member would also be regularized.

3. The petitioner filed its objections/written submissions in the month of January 2019 and, in fact, prayed that since the application of the Union was filed under the Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971, it was understood that the Union was asking for a payment from the contractor who had engaged the workers on behalf of the principal employer i.e. the FCI, and, therefore, if any order had to be passed by the Deputy Chief Labour Commissioner then it would be against the contractor who had employed the members of the Union. It was also stated in the objection that since the contractor who was an essential party was not made a party, the case could not continue. Still further it was alleged in the objection/written submissions of the petitioner that the allegation that 40 contract labourers were working was false. It was stated that the contractor had licence only to employ 21 labourers and, therefore, the allegation itself was misfounded. It was alleged that by the filing the application, indirectly, the Union wanted to get around 40 persons regularized.

4. After the objection was filed, an inspection was also done on 15.3.2021 and in the inspection which was done in the presence of the Division Manager, FCI, Gorakhpur; the Manager (S&C) FCI, Gorakhpur; the Manager (D) FCI Basti; the Manager (Contract) FCI R.O. Lucknow and the representatives of the contractor M/s. Radhey Shyam Yadav, Sri Rajeev Paswan, 22 persons were found working. The Division Manager, FCI, Gorakhpur, had informed the team which had made the inspection that the workers were casual employees and that they were being paid their wages by the contractor as per the wages fixed by the Government. The team was also informed that since there were no permanent workers at the place where the 22 workers were working there was no question of any parity. However, the complainant-Union was absent at the time of inspection.

5. Despite the objection made by the petitioner, the Deputy Chief Labour Commissioner (Central), the respondent no. 1, passed an order on 9.7.2021 directing the petitioner FCI to identify and ensure the payment of wages to the contract labourers

who were employed at the FSD Basti on the basis of the register of wages. It was also directed that any difference between the wages which were being paid and the wages which ought to have been paid was to be made good to the workers.

6. The petitioner instead of filing any Appeal which is provided under Section 15 of the Contract Labour (Regulation and Abolition) Act, 1970, approached the High Court directly as the Appellate Forum which has been provided by the notification dated 28.12.2016 by the Central Government itself was the Deputy Chief Labour Commissioner (Central), whose order has been impugned in this writ petition. Furthermore, learned counsel for the petitioner submitted that since the order impugned was so patently illegal as it was filed without the impleadment of the contractor that no useful purpose would have been served by filing any Appeal.

7. The petitioner while assailing the order of the Deputy Chief Labour Commissioner dated 9.7.2021 essentially argued that the application which was filed under Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971, itself was not maintainable under the Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971. If the contractor under whom the workmen were employed was not paying wages which were similar to the payments which were being made by the principal employer then a direction could only be issued to the contractor directing him to pay salaries to its labourers which would be similar to the salaries which were being given to the workers who were directly employed by the principal employer i.e. the FCI.

8. Learned counsel further, therefore, argued that without the impleadment of the contractor no order could have been passed under Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971.

9. Still learned counsel for the petitioner submitted that in the garb of the order which had been passed by the Deputy Chief Labour Commissioner, the respondent no. 2 virtually was praying for the regularization of its member. Since the learned counsel for the petitioner read out the provisions of Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971 they are being reproduced here as under:-

Rule 25(2)(v)(a) in cases where the **workmen employed by the contractor** perform the same or similar kind of work as the workmen directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of **service of the workmen of the contractor** shall be the same as applicable to the workmen directly employed by the principal employer of the established on the same or similar kind of work:

provided that in the case of any disagreement with regard to the type of work the same shall be decided by the [Deputy Chief Labour Commissioner (Central)];

Rule 25(2)(v) (b) in other cases the wage rates, holidays, hours of work and conditions of service of the workmen of the contractor shall be such as may be specified in this behalf by the [Deputy Chief Labour Commissioner (Central)];

Explanation:- While determining the wage rates, holidays, hours of work and other conditions of service under (b) above, the Deputy Chief Labour Commissioner (Central) shall have due regard to the wage rates, holidays, hours of work and other conditions of service obtaining in similar employment;

10. Learned counsel for the petitioners further argued that since the facts stated in the application were diametrically opposite to the inspection report, the matter ought to have been referred to the appropriate Government for a reference under the Industrial Disputes Act and, in fact, the matter should not have been dealt with at all by the Authority under Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971, i.e. the Deputy Chief Labour Commissioner (Central).

11. The counsel appearing for the respondent no. 2, however, submitted that there were 40 members working under the contractor and, therefore, a prayer had been made for the payment to the 40 members. Still further learned counsel for the respondent no. 2 submitted that if the order dated 9.7.2021 was perused then it would become clear that the petitioner was not asked to pay to all the 40 workers. In fact, the petitioner was asked to ensure the payment of wages on the basis of register of wages which was maintained by the contractor. Learned counsel, therefore, submitted that there was no error if the contractor was not impleaded as a party before the Deputy Chief Labour Commissioner (Central).

12. Learned counsel further submitted that since the exercise of finding out as to who were the actual workmen was left open to the principal employer there was no requirement to implead the contractor at all.

13. In the end, learned counsel for the respondent no. 2 submitted that the petitioner had an efficacious alternative remedy of filing an Appeal under Section 15 of the Contract Labour (Regulation and Abolition) Act, 1970.

14. Having heard Sri Ashok Mehta, Senior Advocate, assisted by Sri Vijay Kumar Dixit, learned counsel for the petitioners, Sri S.K. Mishra learned counsel for the opposite party no. 2 and Sri Gaya Prasad Singh learned counsel for the respondent no. 1 and 3, the Court is of the view that the order dated 9.7.2021 cannot be sustained in the eyes of law and, therefore, deserves to be quashed. A bare reading of Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971, definitely makes it clear that if any demand had to be made then it had to be made to the effect that the contractor had to pay the salary to its workers which ought to have been at par with the salary of the workers of the principal employer.

15. The contractor was such a person whose service was taken by the principal employer so that the contractor could make available the labour which was required by the principal employer. If the contractor despite any order being made under Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971, did not pay wages as per the order passed under Rule 25(2)(v)(a)&(b) of the Contract Labour (Regulation and Abolition) Rules, 1971, then the principal employer could be made liable to pay the wages and the expenses which would have been incurred by the principal employer in providing amenities could have

been taken by the principal employer from the contractor either by the deduction from any amount which was payable to the contractor or the amount paid by the principal employer would have become a debt payable by the contractor. Definitely, no order could have been passed directly asking the principal employer i.e. the petitioner for making the payment to the workmen who were employed by the contractor. Since the contractor himself had not been made a party in the proceedings before the Deputy Chief Labour Commissioner (Central), definitely no direction could be issued to the contractor and, therefore, the direction which had been issued to the principal employer could not have also been issued at all.

16. Further, the Court finds that there were various issues which had to be thrashed out before any order could be passed and a vague order could not have been passed directing the petitioner to ascertain as to who was working and who was not working.

17. The Court also holds that since the Appellate Authority was the Deputy Chief Labour Commissioner (Central) and the order was also passed by the Deputy Chief Labour Commissioner, no Appeal would lie.

18. With these observations, the writ petition stands allowed. The order dated 9.7.2021 passed by the Deputy Chief Labour Commissioner (Central) is quashed. The recovery etc. which might have been issued in pursuance of the order dated 9.7.2021 also stands quashed.

19. It shall be open for the respondent no. 2 to claim its dues under appropriate proceedings provided under the law.

(2022)02ILR A838
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 1003418 of 1980
and other cases

State Of U.P. & Anr. ...Petitioners
Versus
Sone Lal & Ors. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:

A. UP Bhoodan Yagya Act, 1952 – Section 14 – Bhoodan Yagna Committee (BYC) – Power of BYC to distribute the land to landless agricultural labours – Permissibility – Committee formed in 1953 and distribution of land made in 1978, this distribution was made beyond period of three years – Validity challenged – Held, the Bhoodan Committee, Kheri did not have power to distribute the land amongst the respondents in the 1978 and, it was the Collector, who could have distributed the land if there was no notification issued under Section 4 of the Act, 1927 to constitute the land as 'reserved forest' – Held further, the respondents did not become the Bhumidhars on the basis of the alleged patta/lease in their favour. (Para 36 and 37)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of U.P. Versus Mahant Avaidh Nath; AIR 1977 All 192

2. St. of U.P. Vs Dy. Director of Consolidation & ors.; (1996) 5 SCC 194

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

1 . This is the second round before this Court after the Supreme Court remanded the above writ petitions vide judgment and order dated 23.09.2010 setting-aside the judgment and order dated 04.02.1998 passed by this Court.

2. Challenge, in this bunch of writ petitions, is to the orders dated 28.02.1980 passed by the Forest Settlement Officer, Lakhimpur Kheri in Case No.85 of 1979 under Section 6/9 of The Indian Forest Act, 1927 (for short "Act, 1927") and dated 10.07.1980 passed by the District Judge, Kheri in Civil Misc. Appeal No.23 of 1980 whereby the petitioners' objection, in respect of land bearing Plot No.75-H, situated in Village Khairati Purwa, Pargana Ferozabad, Tehsil Nighasan, District Kheri, having an area of 50 Acres, was accepted and, it was directed to exclude the said area from the Notification dated 18.10.1952, as amended on 27.04.1960, declaring 1,343.87 Acres, including the land, bearing Plot No.75-H as "reserved forest'.

3. The facts, which are necessary for deciding this bunch of writ petitions, are stated briefly hereunder:-

I. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (for short "Act, 1950") came into force in the State of Uttar Pradesh on 26.01.1951;

II. The State Government issued Notification under Section 4 of the Act, 1927, declaring an area of 1,343.87 Acres, situated in Village Khairati Purwa, Pargana Ferozabad, Tehsil Nighasan, District Kheri, including the land bearing Plot No.75-H, having an area of 50 Ares as "reserved forest'; and

III. The said notification was amended on 27.04.1960 and one Mr. Shyam Lal, Deputy Collector was appointed as Forest Settlement Officer for District Kheri in exercise of powers conferred by Section 17 of the Act, 1927. The Additional Commissioner, Lucknow Division was appointed and empowered to hear appeals from the orders of the Forest Settlement Officer. The boundaries of the reserved forest so declared was also demarcated.

4. One Kunwar Shivendra Bahadur Singh was the recorded Sirdar in respect of 50 Acres land of Plot No. 75-H in Khatauni of 1361 Fasali.

5. It is said that the said land was recorded as Bhumidhari of Kunwar Shivendra Bahadur Singh, who donated this land to Bhoodan Committee, Kheri and Tehsildar Nighasan passed order dated 20.10.1957, directing mutation of the said land in favour of Bhoodan Committee, Kheri.

6. The respondents claimed that they had been given this land by the Bhoodan Committee, Kheri in the year 1978 and, vide order dated 30.06.1978, the Tehsildar Nighasan had directed for recording the name of the respondents in place of Bhoodan Committee.

7. On the date, when the Notification dated 27.04.1960 was issued, the respondents had no right, title or interest over land in question inasmuch, as allegedly, they had been given the land in the year 1978 by the Bhoodan Committee, which was donated by Kunwar Shivendra

Bahadur Singh. After their names came to be recorded in the revenue record, they filed objections belatedly on 14.06.1979 against the Notification dated 27.04.1960. The respondents claimed to be Sirdar of the land in dispute and, claimed that the land was in their cultivatory possession.

8. Written reply, on behalf of the State, was filed on 21.08.1979 to the objections of the respondents, stating therein that the entire land in Village Khairati Purwa was forest land and, that notification issued under Section 4 of the Act, 1927 was legal and valid. The Forest Settlement Officer, on the basis of the pleadings, framed the following issues for decision:-

a. whether the objectors were Sirdars of the land in dispute on the basis of patta/lease granted by the Bhoodan Committee and, was it their holding?

b. whether Bhoodan Committee was competent to grant patta/lease and, whether the alleged patta/lease was valid one?

c. whether the Notification under Section 4 of the Act, 1927 in respect of the land in dispute was illegal and invalid? If yes, then its effect?

c. whether the objections are time-barred? If so, what is its effect?

9. The Forest Settlement Officer held that the land in question was recorded in the name of Bhoodan Committee vide order of Tehsildar dated 20.10.1957 and, thereafter name of Bhoodan Committee was got registered in 1362-65 Fasali. It was held that the Notification under Section 4 of the Act, 1927 came to be issued on 27.04.1960. The land was holding of Bhoodan Committee, which had right to execute patta/lease in favour of the respondents. On the basis of the patta/lease given to the respondents by the Bhoodan Committee, the objectors became Bhumidhars of the land in dispute. It was further held that the land was initially Bhumidhari land of Kunwar Shivendra Bahadur Singh and, before the Notification issued under Section 4 of the Act, 1927, it was registered in the name of Bhoodan Committee, therefore, the Notification under Section 4 of the Act, 1927, in respect of the said land, was illegal and invalid and, the said land could not be declared as "reserved forest'. In respect of the limitation, it was held that since the Notification under Section 20 of the Act, 1927 was not issued in respect of the Village Khairati Purwa, therefore, objections could be treated to be on time.

10. Aggrieved by the said order passed by the Forest Settlement Officer on 28.02.1980, the State preferred appeals before the District Judge, Kheri. The appellate Authority, however, vide impugned judgment and order dated 10.07.1980 dismissed the said appeals and, held that the Forest Settlement Officer rightly held that the claimants/ respondents had sufficient cause for not preferring their claims within time fixed under Section 6 and, rightly entertained the objectors' claim. It was further held that there was no material to suggest that the land was forest land or waste land in the year 1960 when the State issued notification, declaring the land as reserved forest. It was further held that till the year 1953-54, the land being Plot No.75-H, area 50 Acres was Bhumidhari of Kunwar Shivendra Bahadur Singh. He was Bhumidhar of the land in question prior to 01.07.1952 i.e. prior to the date of vesting of the land under the Act,

1950. This land was recorded in his name till 1364 Fasali and, vide order dated 20.10.1957 passed by the Tehsildar Nighasan, name of Bhoodan Committee was mutated in respect of the said land. It was further held that though no Bhoodan declaration by Kunwar Shivendra Bahadur Singh, donating the land bearing Plot No. 75-H in favour of Bhoodan Committee was filed, as required under Section 10 of The Uttar Pradesh Bhoodan Yagya Act, 1952 (for short "Act, 1952"), but the order dated 20.10.1957 of the Tehsildar, directing mutation of the land in favour of Bhoodan Committee would show that the land in question had vested in Bhoodan Committee sometimes in the year 1957 and, it had become Bhumidhar in respect of the land in question and, was entitled to grant it to land-less persons under Section 14 of the Act, 1952. This land was not forest land or waste land in the year 1960. The Notification dated 27.04.1960 issued by the State Government, declaring the land in question as reserved forest was ultra-vires of its jurisdiction, void and ineffective. The appellate Authority upheld the order passed by the Forest Settlement Officer.

11. Aggrieved by the said decisions, passed by the appellate Authority as well as Forest Settlement Officer, the present writ petitions have been filed.

12. Initially, this Court vide judgment and order dated 04.02.1998 had dismissed the writ petitions, however, the Supreme Court vide judgment and order dated 23.09.2010 had allowed Civil Appeal Nos. 4608-4616 of 2004 and, remanded the matter to this Court for fresh decision, in accordance with law.

13. Mr. Madan Mohan Pandey, learned Additional Advocate General, assisted by Mr. H.P. Srivastava and Mr J.P. Maurya, learned Additional Chief Standing Counsels, appearing for the petitioners-State, has submitted that the Forest Settlement Officer as well as the learned District Judge had condoned the delay of 19 years in preferring the claims by the respondents under Section 6 of the Act, 1927, which was much beyond the period of 3 months prescribed under Section 6 of the Act, 1927. No application for condonation of delay was filed by the respondents along with the claim and, without recording any cogent and credible reason of satisfaction, as required under Section-9, the objections were decided on merits in favour of the respondents. It has been further submitted that the belated claim of the respondents after 19 years from the date of the Notification under Section 4 of the Act, 1927 cannot be said to be within the reasonable period of time. It has been further submitted that it is well settled that if an interested person approaches the Court beyond reasonable period of time with inordinate and unexplained delay, the claim is to be rejected as time-barred.

14. It has been further submitted by Mr. Madan Mohan Pandey, learned Additional Advocate General, that the respondents' contention that the Notification dated 27.04.1960 was not within their knowledge, should not have been accepted inasmuch as it could not be presumed that the respondents were not aware of the proceedings of declaring the land as "reserved forest' as huge chunk of land, ad-measuring 1,343.87 Acres, was notified, including the land bearing Plot No.75-H by means of Notification dated 27.04.1960 and, the land was entrusted to the Forest Department for its management. It has also been submitted by Mr. Pandey that in 1361 Fasali the land was recorded as

"Banjar' and, it was not in cultivatory possession of Kunwar Shivendra Bahadur Singh, as held by the Forest Settlement Officer and, the appellate Authority. The land, being Banjar land, got vested in the State on the date of vesting i.e. 01.07.1952. It has been further submitted that the finding recorded by the two Authorities that the land was given to the respondents on patta/lease by Bhoodan Committee, Lakhimpur Kheri and, they acquired Bhumidhari rights over the land and were in cultivatory possession is wholly incorrect and wrong. The respondents never produced any patta/lease allegedly executed in their favour by the Bhoodan Committee, Lakhimpur Kheri. It is well settled proposition of law that entries, in revenue record, do not confer ownership and title over the land. Merely on the basis of revenue entries of the year 1978, the two authorities have accepted the claims of the respondents. After coming into force the provisions of Act, 1950, the land, which was recorded as "Banjar' got vested in the State on 01.07.1952 and, thereafter neither Kunwar Shivendra Bahadur Singh nor Bhoodan Committee had any right for transferring this land in favour of the respondents as they had no right, title or interest over the land. It has been further submitted that by means of Notification dated 11.10.1952 issued under Section 117 of the Act, 1950, the Banjar land got vested in the Gaon-Sabha and, therefore, Bhoodan Committee did not have any right over the land to grant patta/lease in favour of the respondents and, any revenue entry made in favour of the respondents, would not confer any right in their favour.

15. By Notification dated 27.04.1960 issued under Section 4 of the Act, 1927 in respect of the land, ad-measuring 1,343.87 Acres, including the land in dispute, became the "reserved forest land' and two authorities have grossly erred in not taking into account the Notification dated 11.10.1952.

16. Kunwar Shivendra Bahadur Singh's Bhumidhari right might be higher right than the Sirdar/Asami, but still he was a tenure holder under the State, which was proprietor of the land in the areas in which the Act, 1950 was applied with effect from 01.07.1952. The Banjar land is the land under the management by the Gaon-Sabha and, it is State land and, therefore, declaration of the land as reserved forest by issuing Notification under Section 4 of the Act, 1927 cannot be held to be illegal or invalid.

17. It has been further submitted that the finding recorded by the Forest Settlement Officer that since Notification under Section 20 of the Act, 1927 was not issued in respect of the Village Khairati Purwa, the claim filed by the respondents under Section-6 of the Act, 1927 would be held to be within time is wholly incorrect and against the decisions in several cases.

18. The Forest Settlement Officer had ignored the provisions of Section-5 of the Act, 1927 which bars accrual of any right after issuance of notification under Section-4 of the Act, 1927 and, wrongly allowed the claims of the respondents on account of absence of Notification under Section-20 of the Act, 1927. It has been further submitted that in the Khatauni of 1360 Fasali, the land is mentioned as "Jangle Jhadi' and, thus, it was already a forest land when the Notification dated 27.04.1960 under Section-4 of the Act, 1927 was issued by the Government, declaring the land, including the land in dispute, as "reserved forest'.

19. It has been further submitted by the learned Additional Advocate General that in respect of the same land, this Court vide judgment and order dated 28.07.2006 allowed Writ Petition No.4213 (M/S) of 1982 and, held that since Notification dated 27.04.1960 issued under Section-4 (1)(C) of the Act, 1927 had not been challenged by any authority, the respondents could not be held to be in authorized occupation of the land in question and, therefore, the proceedings for ejectment were perfectly legal.

20. On the other hand, Dr. R.K. Srivastava, learned counsel for the respondents, has submitted that in the present petitions, challenge has been made to the order passed by the Forest Settlement Officer, Kheri as well as to the order passed by the appellate Authority/District Judge and, therefore, the writ petitions under Article 226 of the Constitution of India are not maintainable and, the same are liable to be dismissed.

21. It is submitted that Kunwar Shivendra Bahadur Singh was recorded as Bhumidhar of land bearing Plot No. 75-H situated in Village Khairati Purwa and, he donated the said land to Bhoodan Committee, Kheri and Bhoodan Committee came to be recorded in the revenue record on the basis of the order dated 20.04.1957 passed by the Tehsildar Nighasan. The Act, 1952 has overriding effect and, its provisions will have effect notwithstanding anything contained in the Act, 1950, the Act, 1939 and the Act, 1927 or any law in the matter of donation of land to Bhoodan Committee. The Forest Settlement Officer, the Competent authority under the Act, 1927, after examining the records of the case and, the provisions of the Act, 1952 had sustained the donation of land to Bhoodan Committee and, subsequent allotment of land to the respondents, who are agricultural labourers.

22. The orders passed by the Forest Settlement Officer and the appellate Authority i.e. the District Judge are well reasoned orders and, they need not be interfered with by this Court. It has been further submitted that the purpose of limitation is not to destroy the right of a person, it is the discretion of the Court to condone the delay, provided delay is bona fide and, not a device to defeat the right of other. The Forest Settlement Officer had given a finding that the objections were bona fide and did not smack of any manipulation. In view thereof, there is no ground to interfere in the well reasoned finding of the Forest Settlement Officer for condonation of delay in filing the objections by the respondents. Further, the Court is required to adjudicate the dispute and render substantial justice. The procedure is only hand-made to render the substantial justice. It has been further submitted that this Court in **AIR 1977 All 192 (State of U.P. Versus Mahant Avaidh Nath)** has held that right to file objections could not be extinguished and, the same could be filed before the Notification is issued under Section-20 of the Act, 1927.

23. Before adverting to the submissions advanced by the learned counsel for the parties, it would be relevant to take note of the relevant provisions of the Act, 1927, Act, 1950, as well as Act, 1952.

24. Section-3 of the Act, 1927 empowers the State Government to constitute any forest land or waste land, which is the property of Government or

over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, a reserved forest. The provisions of Section-3 of the Act, 1927 is extracted hereunder:-

*"**3. Power to reserve forests.**--The State Government may constitute any forest land or waste land or any other land (not being land for the time being comprised in any holding or in any village abadi) which is the property of the Government or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.*

Explanation.--The expression "holding" shall have the meaning assigned to it in U.P. Tenancy Act, 1939, and the expression "village abadi' shall have the meaning assigned to it in the U.P. Village Abadi Act, 1947."

25. If the State Government decides to constitute any land as "reserved forest', it shall issue a notification in the official gazette. Section 4 of the Act, 1927 is extracted hereunder:-

*"**4. Notification by [State Government].**-- (1) Whenever it has been decided to constitute any land a reserved forest, the [State Government] shall issue a notification in the Official Gazette--*

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying, as nearly as possible, the situation and limits of such land; and

(c) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits or in or over any forest-produce, and to deal with the same as provided in this Chapter.

Explanation.--For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries.

(2) The officer appointed under clause (c) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the [State Government] from appointing any number of officers not exceeding three, not more than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement-officer under this Act."

26. Section-5 of the Act, 1927 provides that after issuance of notification under section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or a contract with the Government. It, however, prohibits fresh clearing for cultivation or for any other purpose except in accordance with such rules as may be made by the State Government in this behalf.

27. One of the issues, which would be required to be considered, is that whether

the Bhoodan Committee, in whose name the land in dispute got mutated in the year 1957, could have any right to grant patta/lease over the land in favour of the respondents after issuance of the Notification Under Section-4 of the Act, 1927.

28. Sections-4, 6, 8 and 13 of the Act, 1950 are regarding vesting of estates in State and consequence of vesting, which are extracted hereunder:-

Section 4-Vesting of estates in the State. *- (1) As soon as may be after the commencement of this Act, the State Government may, by notification, declare that, as from a [date] to be specified, all estates situate in Uttar Pradesh shall vest in the State and as from the beginning of the date so specified (hereinafter called the date of vesting), all such estates shall stand transferred to and vest, except as hereinafter provided, in the State free from all encumbrances.*

(2) It shall be lawful for the State Government, if it so considers necessary, to issue, from time to time, the notification referred to in sub-section (1) in respect only of such area or areas as may be specified and all the provisions of subsection (1) shall be applicable to and in the case of every such notification.

Section 6- Consequences of the vesting of an estate in the State. *- When the notification under Section 4 has been published in the Gazette, then, notwithstanding anything contained in any contract or document or in any other law for the time being in force and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date of vesting, ensure in the area to which the notification relates, namely :*

(a) all rights, title and interest of all the intermediaries-

(i) in every estate in such area including land (cultivable or barren), grove-land, forests whether within or outside village boundaries trees (other than trees in village abadi, holding or grove), fisheries, [* *], tanks, ponds, water-channels, ferries, pathways, abadi sites, hats, bazars and melas (other than hats, bazars and melas held upon land to which Clauses (a) to (c) of sub-section (1) of Section 18 apply; and*

(ii) in all sub-soil in such estates including rights, if any, in mines and minerals, whether being worked or not;

shall cease and be vested in the State of Uttar Pradesh free from all encumbrances;

(b) all grants and confirmations of title of or to land in any estate so acquired, or of or to any right or privilege in respect of such land or its land revenue shall, whether liable to resumption or not, determine;

(c) (i) all rents, cesses, local rates and sayar in respect of any estate or holding therein for any period after the date of vesting and which, but for the acquisition would be payable to an intermediary, shall vest in and be payable to the State Government and not to the intermediary and any payment made in contravention of this clause shall not be valid discharge of the person liable to pay the same;

(ii) where under an agreement or contract made before the date of vesting any rent, cess, local rate or sayar for any period after the said date has been paid to or compounded or released by an intermediary the same shall, notwithstanding the agreement or the contract, be re-coverable by the State Government from the intermediary and may without prejudice to any other mode of recovery, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III;

(d) all arrears of revenue, cesses or other dues in respect of any estate so acquired and due from the intermediary [or an arrear on account of tax on agricultural income assessed under the U.P. Agricultural Income Tax Act, 1948] (U.P. Act III of 1949) for any period prior to the date of vesting shall continue to be recoverable from such intermediary and may, without prejudice to any other mode of recovery, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III;

(e) all amounts ordered to be paid by an intermediary to the State Government under Sections 27 and 28 of the U.P. Encumbered Estates Act, 1934 (U.P. Act XXV of 1934) and all amounts due from him under the Land Improvement Loans Act, 1883 (U.P. Act XIX of 1883), or the Agricultural Loans, Act, 1884 (U.P. Act XIX of 1884), shall notwithstanding any thing contained in the said enactments, become due forthwith and may, without prejudice to any other mode of recovery provided therefor, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III;

(f) the interest of the intermediary so acquired in any estate shall not be liable to attachment or sale in execution of any decree or other process of any Court, Civil or Revenue and any attachment existing at the date of vesting or any order for attachment passed before such date shall, subject to the provisions of Section 73 of the Transfer of Property Act, 1882 (IV of 1882), cease to be in force;

(g)(i) every mortgage with possession existing on any estate or part of an estate on the date immediately preceding the date of vesting shall, to the extent of the amount secured on such estate or part, be deemed, without prejudice to the rights of the State Government under Section 4, to have been substituted by a simple mortgage;

(ii) notwithstanding anything contained in the mortgage deed or any other agreement, the amount declared due on a simple mortgage substituted under sub-clause (i) shall carry such rate of interest and from such date as may be prescribed;

(h) no claim or liability enforceable or incurred before the date of vesting by or against suc As to whether h intermediary for any money, which is charged on or is secured by mortgage of such estate or part thereof shall, except as provided in Section 73 of the Transfer of Property Act, 1882 (IV of 1882), be enforceable against his interest in the estate;

(i) all suits and proceedings of the nature to be prescribed pending in any

Court at the date of vesting and all proceedings upon any decree or order passed in any such suit or proceeding previous to the date of vesting shall be stayed;

(j) all mahals and their sub-divisions existing on the date immediately preceding the date of vesting and all engagements for the payment of land revenue or rent by a proprietor, under-proprietor, sub-proprietor, co-sharer or lambardar as such shall determine and cease to be in force.

Section 8-Contract entered into after August 8, 1946, to become void from the date of vesting. *- Any contract for grazing or gathering of produce from land or the collection of forest produce or fish from any forest or fisheries entered As to whether into after the eighth day of August, 1946, between an intermediary and any other person in respect of any private forest, fisheries or land lying in such estate shall become void with effect from the date of vesting.*

Section 13- Estate in possession of a thekedar*. - (1) Subject to the provisions of Section 12 and sub-section (2) of this section a thekedar of an estate or share therein* shall, with effect from the date of vesting, cease to have any right to hold or possess as such any land in such estate.

29. The Act, 1952, which received the assent of the President on 27.02.1953 and, was made applicable in the State of Uttar Pradesh from the date of its publication i.e. 05.03.1953, is to facilitate donation and settlement of lands in connection with the Bhoodan Yagna initiated by Sri Acharaya Vinoba Bhave. Section-3 of the Act, 1952 provides for establishment of a Bhoodan Yagna Committee for the State having perpetual succession which shall be a body corporate vested with the capacity of suing and being sued in its corporate names acquiring, holding, administering and transferring property, both movable and immovable and of entering into contracts.

30. Section-7 of the Act, 1952 provides that it shall be duty of the committee to administer all lands vested in it for the benefit of the Bhoodan Yagna.

31. Section-8 of the Act, 1952 provides that Notwithstanding anything contained in any law for the time being in force, any person, being the owner of land, may donate and grant such land to the "Bhoodan Yagna" by a declaration in writing in that behalf in the manner prescribed and, this declaration is required to be filed with the Tehsildar as soon as it is made.

32. Section-10 of the Act, 1952 again provides that notwithstanding anything contained in the U.P. Zamindari Abolition and Land Reforms Act, 1950, U.P. Tenancy Act, 1939 or any other law relating to land tenure as may be applicable, an owner shall be competent for purposes of this Act to donate the land held by him as such to the Bhoodan Yagna.

33. Section-11 of the Act, 1952 provides that any person whose interests are affected by the Bhoodan declaration made under section-8 may within thirty days of the publication of the declaration, file objections on the same before the Tehsildar. If the Tehsildar confirms the Bhoodan declaration then notwithstanding anything contained in any law for the time being in force, all the rights, title and

interest of the owner in such land shall stand transferred to and vest in the Bhoodan Committee for purposes of the Bhoodan Yagna.

34. Section-12 of the Act, 1952 provides that certain lands cannot be donated by the owner as defined in the said sections. Section-12 of the Act, 1952 is extracted hereunder:-

"12. Notwithstanding anything contained in any law an owner shall not, for purposes of this Act, be entitled to donate the land falling in any of the following classes, namely:-

(a) lands which on the date of donation are recorded or by usage treated as common pasture lands, cremation or burial grounds, tank, pathway or threshing floor; and

(b) land in which the interest of the owner is limited to the life-time; and

(c) such other land as the State Government may by notification in the Gazette specify.

35. Section-14 of the Act, 1952 empowers to Bhoodan Committee to grant lands which have vested in it to the landless agricultural labourers and grantee of the lands acquires in such lands rights and liabilities of a Bhumidhar with non-transferable rights. Sub-section (2) of Section 14 of the Act, 1952 provides that if the Committee fails to grant any land in accordance with sub-section (1) within a period of three years from the date of vesting or commencement of the Uttar Pradesh Bhoodan Yagna (Amendment) Act, 1975, whichever is later, the Collector may himself grant such land to the landless agricultural labourers in the manner prescribed and thereupon the grantee shall acquire the rights and liabilities as mentioned in sub-section (1) of Section 14 of the Act, 1952. Section 14 of the Act, 1952 is extracted hereunder:-

*"**14. Grant of land to landless persons**. - [(1)] The Committee or such other authority or person as the Committee with the approval of the State Government, specify either generally or in respect of any area, may, in the manner prescribed, grant lands which have vested in it to the [landless agricultural labourers] and the grantee of the land shall-*

(i) where the land is situate in any state which has vested in the State Government under and in accordance with section 4 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, acquire in such land the rights and the liabilities of a [Bhumidhar with non-transferable rights] and;

(ii) where it is situate in any other area, acquire therein such rights and liabilities and subject to such conditions, restrictions and limitations as may be prescribed and they shall have effect, any law to the contrary notwithstanding.

[(2) Where the committee or other authority or person as aforesaid fails to grant any land in accordance with sub-section (1) within a period of three years from the date of vesting of such land in the committee or from the date of commencement of the Uttar Pradesh Bhoodan Yagna (Amendment) Act, 1975, whichever is later, the Collector may himself grant such land to the landless agricultural labourers in the manner prescribed, and thereupon the grantee shall acquire the rights and liabilities mentioned in sub-section (1) as if the grant were made by the committee itself.

(3) [* *]*

(4) In making grant of land under this section, the committee or other authority or person as aforesaid or the Collector, as the case may be, shall observe the following principles:

(a) At least fifty per cent of the land available for grant shall be granted to persons belonging to the Scheduled Castes, Scheduled Tribes and persons belonging to the Kol, Pathari, Khairwar, Baiga, Dharikar, Panika and Gond Tribes and such other tribes as the State Government on the recommendation of the Committee may notify in this behalf;

(b) The land situate in one village shall, as far as possible, be granted to persons residing in that very village.

Explanation. - For the purposes of this section; the expression "land-less agricultural labourer" means a person whose main source of livelihood is agricultural labour or cultivation and who at the relevant time either holds no land or holds land not exceeding 0.40468564 hectares (one acre) in Uttar Pradesh as a bhumidhar, [* *] asami or Government lessee."*

36. The case of the respondents is that the land in dispute was donated by Kunwar Shivendra Bahadur Singh in favour of Bhoodan Committee, Kheri in the year 1957. The Committee was, therefore, required to have distributed this land in favour of landless agricultural labourers within 3 years as provided under sub-section (2) of the Act, 1939. According to the respondents, they were distributed the land by the Bhoodan Committee, Kheri in the year 1978. Considering the provisions of sub-section (2) of Section-14 of the Act, 1939, the Bhoodan Committee, Kheri did not have power to distribute the land amongst the respondents in the 1978 and, it was the Collector, who could have distributed the land if there was no notification issued under Section-4 of the Act, 1927 to constitute the land as "reserved forest. It is important to take note of the fact that Bhoodan Committee never filed any objection to the notification issued under Section-4 of the Act, 1927 in respect of the land in question. The respondents, after they got their names mutated in the year 1978-79, came before the Forest Settlement Officer and filed objections in the year 1979. Once, it is held that the Bhoodan Committee did not have any right, title or interest over the land when allegedly the patta/lease were granted in favour of the respondents and, their objections could not have been entertained.

37. The respondents, on the basis of the alleged patta/lease in their favour, did not become the Bhumidhars and, even if it is assumed that the patta/lease, though no such patta/lease has been produced by them, was valid on the basis of which their names got mutated in the revenue record, they became only tenure holders and, proprietary rights in the lands vested in the State. The Supreme Court in **(1996) 5 SCC 194 (State of U.P. Vs. Dy. Director of Consolidation and others)** has held that a person, who was holding the land as Sirdar, was not vested with proprietary rights under the Act, 1950. He was a tenure-holder and the proprietary rights vested with the State. Paragraphs- 6, 7 and 8 of State of U.P. Vs. Dy. Director of Consolidation and others (supra), which are relevant, are extracted hereunder:-

"6. This Court in Mahendra Lal Jaini Vs. State of U.P. dealt with an identical question. Mahendra Lal Jaini, in

a petition under Article 32 of the Constitution of India, contended before this Court that he being a Bhumidhar in possession, the provisions of (the Forest Act, 1927) would not apply to the said land. Repelling the contention this Court held that though Bhumidhars have higher rights than Sirdars and Asamis, they were still tenure-holders under the State which was proprietor of the land in the areas to which the Abolition Act applied. It was further held that, even if it was presumed that the petitioner Mahendra Lal Jaini was a Bhumidhar, he could not claim to be the proprietor of the land. It was held that the provisions of the Act would be applicable to the land in dispute. It would be useful to reproduce the relevant part from the judgment of this Court in Mahendra Lals case :

"It is, however, urged on behalf of the petitioner that he claims to be the proprietor of this land as a bhumidhar because of certain provisions in the Act. There was no such proprietary right as bhumidhari right before the Abolition Act. The Abolition Act did away with all proprietary rights in the area to which it applied and created three classes of tenure by Section 129; Bhumidhar, Sirdar and Asami, which were unknown before. Thus Bhumidhar, Sirdar and Asami are all tenure-holders under the Abolition Act and they hold their tenure under the State in which the proprietary right vested under Section 6. It is true that Bhumidhars have certain wider rights in their tenures as compared to Sirdars; similarly Sirdars have wider rights as compared to asamis, but nonetheless all the three are mere tenure-holders-with varying rights - under the State which is the proprietor of the entire land in the State to which the Abolition Act applied. It is not disputed that the Abolition Act applies to the land in dispute and therefore the State it the proprietor of the land in dispute and the petitioner even if he were a Bhumidhar would still be a tenure-holder..... The petitioner therefore even if he is presumed to be a Bhumidhar cannot claim to be a proprietor to whom Chap. II of the Forest Act does not apply, and therefore Chap. V-A, as originally enacted, would not apply: (See in this connection, Mst. Govindi v. State of U.P.). As we have already pointed out Sections 4 and 11 give power for determination of all rights subordinate to those of a proprietor, and as the right of the Bhumidhar is that of a tenure-holder, subordinate to the State, which is the proprietor of the land in dispute, it will be open to the Forest Settlement Officer to consider the claim made to the land in dispute by the petitioner, if he claims to be a Bhumidhar."

7. It is thus obvious that a person who was holding the land as Sirdar was not vested with proprietary rights under the Abolition Act. He was a tenure- holder and the proprietary rights vested with the State. The High Court, therefore, fell into patent error in assuming that by virtue of their status as Sirdars the respondents were proprietors of the land. The State being the proprietor of the land under the Abolition Act it was justified in issuing the notification under Section 4 of the Act.

8. The nature of the land - whether covered by Section 3 of the Act or not - could only be determined on the date of the notification under Section 4 of the Act which was issued on 29-3-954. Neither the consolidation authorities nor the High Court have gone into the question as to what was the nature of the land on the relevant date. The consolidation authorities

recorded their findings in the year 1968-69. They were wholly oblivious of the nature of the land 14-15 years back in the year 1954."

38. As mentioned above, in Khatauni of 1351 Fasali, corresponding to 1953, which was filed by the respondents before the Forest Settlement Officer, the nature of the land was mentioned as "Banjar'. Once the notification under Section-4 of the Act, 1927 was issued on 27.04.1960, the land bearing Plot No.75-H had ceased to be the holding inasmuch as it had been given to Gaon-Sabha. Such land could be notified as reserved forest under Section-4 of the Act, 1927 and, thereafter the Bhoodan Committee had no right, title or interest over the land and, the said land could not be held to be holding of the Bhoodan Committee in view of provisions of Section-5 of the Act, 1927.

39. Once the notification was issued under Section-4 of the Act, 1927, no right could have been acquired in or over the land comprised in such notification except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued. No fresh clearing for cultivation or for any other purpose could have been made.

40. In view of the aforesaid discussion, it is held that the respondents, who claimed to have been allotted patta/lease by the Bhoodan Committee in the year 1978 and their names got mutated in the year 1978, had no right, title or interest over the land in question in asmuch as after notification dated 27.04.1960 under Section-4 of the Act, 1927 was issued, the land could not have been transferred by Bhoodan Committee in view of the bar created under Section-5 of the Act, 1927. Further, even otherwise the Bhoodan Committee ceased to have any right to transfer this land in favour of any person after three years from 1957 to 1960. Even otherwise, the land was recorded as "Banjar' in the revenue record and it got vested in the Gaon-Sabha. The two authorities have fallen in gross error of facts and law in directing to exclude the land in question bearing Plot No.75-H situated in Village Khairati Purwa, Pargana Ferozabad, Tehsil Nighasan, District Kheri from the boundaries of the reserved forest from the Notification dated 27.04.1960.

41. Thus, the writ petitions are **allowed**. Consequently, the impugned orders are quashed.

(2022)02ILR A851
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 1003453 of 1980
&
Writ C No. 1003454 of 1980

State Of U.P. & Anr. ...Petitioners
Versus
Chunnu & Ors. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Dr. R.K. Srivastava, C.S.C.

A. Indian Forest Act, 1927 – Section 4 – Land, in dispute, was notified under the Act – Adjudication by the Consolidation authority – Permissibility – Jurisdiction of

Consolidation authority, challenged – Held, once the notification is issued u/s 4 of the Act, the Consolidation Authorities would lack jurisdiction with respect to the land – High Court set aside the impugned order passed by the District Judge. (Para 9 and 13)

Writ petition allowed. (E-1)

List of Cases cited:

1. Mahendra Lal Jaini Vs St. of U.P. & ors.; AIR 1963 SC 1019

2. St. of U.P. Vs Dy. Director of Consolidation & ors.; (1996) 5 SCC 194

3. Prabhagiya Van Adhikari Awadh Van Prabhag Vs Arun Kumar Bhardwaj (Dead) Thr. LRs. & ors.; 2021 SCC OnLine SC 868

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

1. In this case, Khasra Plot No.134, admeasuring 9.25 Acres, situated in Village Ramuapur, Pargana Shrinagar, Tehsil Lakhimpur, District Kheri, was recorded as Gaon-Sabha land as "Jangal Jhadi' in the revenue record in the Khatauni of the Fasali Year 1372 to 1375. Non-Holding Certificate dated 04.01.1967 was issued after proper inquiry by the State Government under Section 117 of the U. P. Zamindari and Land Reforms Act, 1950 (for short "Act, 1950") and vested in Gaon-Sabha for protection and management of forest vide Notification dated 14.04.1967.

2. The said land, along with other lands, were notified under Section-4 of The Indian Forest Act, 1927 (for short "Act, 1927") vide Notification dated 14.04.1967 in order to declare the lands mentioned in the notification as "reserved forest'. Thereafter, the proclamation was issued under Section-6 of the Act, 1927 by the Forest Settlement Officer, Lakhimpur Kheri.

3. The respondents filed a time-barred objection after more than 11 years on 07.06.1978 from the date of publication of notification under Section-4 of the Act, 1927. The respondents had taken objection that the land in dispute was allotted to them by the Consolidation Authority and, they were delivered possession over the plots.

4. The Forest Department filed its reply on 14.07.1978, stating that Plot No.174 had been carved out from the old Plot No.134, which had already been notified under Section-4 of the Act, 1927 on 14.12.1967 and, as such, the Consolidation Authorities had no jurisdiction to adjudicate in respect of the land in dispute. It was also stated that the objections, filed by the respondents, were time-barred.

5. The Forest Settlement Officer vide order dated 20.02.1979 dismissed the claim of the objectors preferred under Section-6 of the Act, 1927 on the ground that the decision of the Consolidation Authority in respect of plots in dispute was ineffective and, not binding as the Consolidation Authority had no jurisdiction to adjudicate upon the rights of the parties in respect of the land notified under Section-4 of the Act, 1927. It was vested in the Gaon-Sabha under Section-117 of the Act, 1950 vide Notification dated 12.04.1969, which was issued after Non-Holding Certificate was issued by the Collector for management. The Forest Settlement Officer, however, condoned the delay of 11 years, without recording any satisfaction regarding sufficient cause being shown for condoning the delay of 11 years in filing the objection of the respondents. The respondents, thereafter filed Civil Appeal No.22-23/1979 under Section-17 of the Act, 1927

before the Additional District Judge, Kheri on 16.04.1979.

6. The Additional District Judge vide impugned judgment and order dated 15.05.1980 allowed the appeal on the basis of wrong entries made in the revenue record. It is well settled that once the notification in respect of the land is issued under Section-4 of the Act, 1927, the Consolidation Authorities would not have any jurisdiction with respect to the said land.

7. Against the said judgment and order dated 15.05.1980 passed by the Additional District Judge, Kheri, the Forest Department filed the present petitions, which were also clubbed along with other writ petitions, being Writ Petition Nos. 914 (M/S) of 1981 and 915 (M/S) of 1981. Initially, this Court vide judgment and order dated 04.02.1998 had dismissed the writ petitions, holding that the land in dispute was neither the forest land nor the waste land, however, the Supreme Court vide judgment and order dated 23.09.2010 had allowed Civil Appeal Nos. 4608-4616 of 2004 and, remanded the matter to this Court for a fresh decision, in accordance with law.

8. In this case notification under Section-4 of the Act, 1927 was issued on 14.12.1967 and Sub-Divisional Magistrate, Kheri was notified as Forest Settlement Officer under Section-17 of the Act, 1927. The respondents had no right over the land in question and, after the notification issued under Section-4 of the Act, 1927, the Consolidation Authorities could not have allotted the land to the respondents as the land was not holding of anyone or part of the holding of village Abadi. This land was not an agricultural land inasmuch the land got vested in Gaon-Sabha as a result of notification dated 12.04.1969 issued under Section-117 of the Act, 1950.

9. The findings recorded by the learned District Judge are contrary to the facts and evidence on record. Once the notification is issued under Section-4 of the Act, 1927, the Consolidation Authorities would lack jurisdiction with respect to the land under notification issued under Section-4 of the Act, 1927.

10. The Supreme Court in ***AIR 1963 SC 1019 (Mahendra Lal Jaini Vs. State of U.P. and others)*** in paragraph-29 has held as under:-

"29. It is next urged that even if Sections 38-A to 38-G are ancillary to Chapter II, they would not apply to the petitioner's land, as Chapter II deals inter alia with waste land or forest land, which is the property of the Government and not with that land which is not the property of the Government, which is dealt with under Chapter V. That is so. But unless the petitioner can show that the land in dispute in this case is his property and not the property of the State, Chapter II will apply to it. Now there is no dispute that the land in dispute belonged to the Maharaja Bahadur of Nahen before the Abolition Act and the said Maharaja Bahadur was an intermediary. Therefore, the land in dispute vested in the State under Section 6 of the Abolition Act and became the property of the State. It is however, contended on behalf of the petitioner that if he is held to be a bhumidhar in proper proceeding, the land would be his property and therefore Chapter V-A, as originally enacted, if it is ancillary to Chapter II would not apply to the land in dispute. We are of opinion that there is no force in this contention. We

have already pointed out that under Section 6 of the Abolition Act all property of intermediaries including the land in dispute vested in the State Government and became its property. It is true that under Section 18, certain lands were deemed to be settled as bhumidhari lands, but it is clear that after land vests in the State Government under Section 6 of the Abolition Act, there is no provision therein for divesting of what has vested in the State Government. It is, however, urged on behalf of the petitioner that he claims to be the proprietor of this land as a bhumidhar because of certain provisions in the Act. There was no such proprietary right as bhumidhari right before the Abolition Act. The Abolition Act did away with all proprietary rights in the area to which it applied and created three classes of tenure by Section 129; bhumidhar, sirdar and asami, which were unknown before. Thus bhumidhar, sirdar and asami are all tenure-holders under the Abolition Act and they hold their tenure under the State in which the proprietary right vested under Section 6. It is true that bhumidhars have certain wider rights in their tenure as compared to sirdars; similarly sirdars have wider rights as compared to asamis, but nonetheless all the three are mere tenure-holders-with varying rights under the State which is the proprietor of the entire land in the State to which the Abolition Act applied. It is not disputed that the Abolition Act applies to the land in dispute and therefore the State is the proprietor of the land in dispute and the petitioner even if he were a bhumidhar would still be a tenure-holder. Further, the land in dispute is either waste land or forest land (far it is so for not converted to agriculture) over which the State has proprietary rights and therefore Chapter II will clearly apply to this land and so would Chapter V-A. It is true that a bhumidhar has got a heritable and transferable right and he can use his holding for any purpose including industrial and residential purposes and if he does so that part of the holding will be demarcated under Section 143. It is also true that generally speaking, there is no ejectment of a bhumidhar and no forfeiture of his land. He also pays land revenue (Section 241) but in that respect he is on the same footing as a sirdar, who can hardly be called a proprietor because his interest is not transferable except as expressly permitted by the Act. Therefore, the fact that the payment made by the bhumidhar to the State is called land revenue and not rent would not necessarily make him a proprietor, because sirdar also pays land-revenue, though his rights are very much lower than that of a bhumidhar. It is true that the rights which the bhumidhar has to a certain extent approximate to the rights which a proprietor used to have before the Abolition Act was passed; but it is clear that rights of a bhumidhar are in many respects less and in many other respects restricted as compared to the old proprietor before the Abolition Act. For example, the bhumidhar has no right as such in the minerals under the subsoil. Section 154 makes a restriction on the power of a bhumidhar to make certain transfers. Section 155 forbids the bhumidhar from making usufructuary mortagages. Section 156 forbids a bhumidhar, sirdar or asami from letting the land to others, unless the case comes under Section 157. Section 189(aa) provides that where a bhumidhar lets out his holding or any part thereof in contravention of the provisions of this Act, his right will be extinguished. It is clear therefore that though bhumidhars have higher rights than sirdars and asamis, they are still mere tenure-holders under the State which is the

proprietor of all lands in the area to which the Abolition Act applies. The petitioner therefore even if he is presumed to be a bhumidhar cannot claim to be a proprietor to whom Chapter II of the Forest Act does not apply, and therefore Chapter V-A, as originally enacted, would not apply: (see in this connection, Mst Govindi v. State of Uttar Pradesh [AIR [1952] All 88] . As we have already pointed out Sections 4 and 11 give power for determination of all rights subordinate to those of a proprietor, and as the right of the bhumiidhar is that of a tenure-holder, subordinate to the State, which is the proprietor of the land in dispute, it will be open to the Forest Settlement Officer to consider the claim made to the land in dispute by the petitioner, if he claims to be a bhumidhar. This is in addition to the provision of Section 229-B of the Abolition Act. The petitioner therefore even if he is a bhumidhar cannot claim that the land in dispute is out of the provisions of Chapter II and therefore Chapter V-A, even if it is ancillary to Chapter II, would not apply. We must therefore uphold the constitutionality of Chapter V-A, as originally enacted, in the view we have taken of its being supplementary to Chapter II, and we further hold that Chapter II and Chapter V-A will apply to the land in dispute even if the petitioner is assumed to be the bhumidhar, of that land."

11. Similar view has been reiterated by the Supreme Court in the case ***(1996) 5 SCC 194 (State of U.P. Vs. Dy. Director of Consolidation and others)*** in paragraphs-2, 5 and 6, which are extracted hereunder:-

"2. We may briefly notice the facts of the case. The State Government issued a notification dated 29-3-1954 declaring its intention to constitute the land in dispute a reserved forest. After disposal of the objections filed under Section 6 read with Section 9 of the Act and the finalisation of the appeals under Section 17 of the Act, a notification dated 19-8-1963 declaring the land in dispute to be reserved for forest was issued. In the revenue records the respondents were recorded as Sirdari-holders of the land. The land was also recorded as a part of the forest department khata.

5. We are of the view that the High Court fell into patent error in appreciating the provisions of the Act and the Abolition Act. It is not disputed that the Abolition Act applied to the land in dispute and, therefore, the State was the proprietor of the land and the respondents, even if they were Sirdars, would still be tenure-holders.

6. This Court in Mahendra Lal Jaini v. State of U.P. [AIR 1963 SC 1019] dealt with an identical question. Mahendra Lal Jaini, in a petition under Article 32 of the Constitution of India, contended before this Court that he being a Bhumidhar in possession, the provisions of the Act (the Forest Act, 1927) would not apply to the said land. Repelling the contention this Court held that though Bhumidhars have higher rights than Sirdars and Asamis, they were still tenure-holders under the State which was proprietor of the land in the areas to which the Abolition Act applied. It was further held that, even if it was presumed that the petitioner Mahendra Lal Jaini was a Bhumidhar, he could not claim to be the proprietor of the land. It was held that the provisions of the Act would be applicable to the land in dispute. It would be useful to reproduce the relevant part from the judgment of this Court in Mahendra Lal case [AIR 1963 SC 1019] :

"It is, however, urged on behalf of the petitioner that he claims to be the proprietor of this land as a Bhumidhar because of certain provisions in the Act. There was no such proprietary right as Bhumidhari right before the Abolition Act. The Abolition Act did away with all proprietary rights in the area to which it applied and created three classes of tenure by Section 129; Bhumidhar, Sirdar and asami, which were unknown before. Thus Bhumidhar, Sirdar and asami are all tenure-holders under the Abolition Act and they hold their tenure under the State in which the proprietary right vested under Section 6. It is true that Bhumidhars have certain wider rights in their tenures as compared to Sirdars; similarly Sirdars have wider rights as compared to asamis, but nonetheless all the three are mere tenure-holders -- with varying rights -- under the State which is the proprietor of the entire land in the State to which the Abolition Act applied. It is not disputed that the Abolition Act applies to the land in dispute and therefore the State is the proprietor of the land in dispute and the petitioner even if he were a Bhumidhar would still be a tenure-holder. ... The petitioner therefore even if he is presumed to be a Bhumidhar cannot claim to be a proprietor to whom Chap. II of the Forest Act does not apply, and therefore Chap. V-A, as originally enacted, would not apply: (See in this connection, Mst. Govindi v. State of U.P. [AIR 1952 All 88 : 1952 All LJ 52]) As we have already pointed out Sections 4 and 11 give power for determination of all rights subordinate to those of a proprietor, and as the right of the Bhumidhar is that of a tenure-holder, subordinate to the State, which is the proprietor of the land in dispute, it will be open to the Forest Settlement Officer to consider the claim made to the land in dispute by the petitioner, if he claims to be a Bhumidhar."

12. Recently, the Supreme Court in ***2021 SCC OnLine SC 868 (Prabhagiya Van Adhikari Awadh Van Prabhag Vs. Arun Kumar Bhardwaj (Dead) Thr. LRs. and Others)*** in paragraphs-16 to 28 has held as under:-

"16. Learned counsel for the appellant submitted that the High Court has gravely erred in setting aside the order passed by the Deputy Director as there was no legal or factual basis to do so. The notification dated 11.10.1952 published in terms of Section 4 of the Abolition Act was to the effect that all estates situated in Uttar Pradesh shall vest in the State. The extent to which uncultivated land which not vests in Gaon Samaj was mentioned in Column 5 stating that 162 acres of Village Kasmandi Khurd would not vest in Gaon Samaj. Such notification has the effect that all rights, title and interest, shall be deemed to be vested in the State of Uttar Pradesh. In terms of Section 117 of the Abolition Act, the State can transfer the lands by a general or special order as prescribed therein including forests to Gaon Sabha and to other local authorities. It is not the case of any of the parties that the land, which was the subject matter of notification dated 11.10.1952, was subject to any general or special orders by the State to transfer the same in favor of Gaon Sabha and/or any other local authority. Therefore, the land comprising in notification dated 11.10.1952 unequivocally vests with the State.

17. It is thereafter that a notification dated 23.11.1955 was published in respect of 162 acres of land situated in Kasmandi Khurd. Such

notification describes the land with boundaries mentioned in the notification. Thereafter, another proclamation was published under Section 6 of the Forest Act in respect of 162 acres of land including 20 bighas 13 biswas and 10 biswansi of Khasra No. 1576 of Village Kasmandi Khurd. The notification under Section 4 of the Forest Act to declare any land as reserved forest could be issued if the State has proprietary rights over such land or if it is entitled to the produce thereof.

18. The State Government has the jurisdiction to declare a protected forest if the land is the property of the Government over which proprietary rights are exercised. The land measuring 162 acres was the property of the Government in terms of the notification dated 11.10.1952. In terms of Section 4 of the Forest Act, the State Government can issue a notification to constitute any land as reserved forest. The notification dated 23.11.1955 satisfies the three conditions mentioned in sub-section 4 i.e., (i) decision to constitute such land as reserved forest, (ii) situation and limits of such land, and (iii) appointing an officer to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits. The lessees were not in possession of any part of the land at the time of issuance of such notification under Section 4 on 23.11.1955. Therefore, they have rightly not claimed any right over the property nor the Gaon Sabha has claimed any right in the land measuring 162 acres notified under Section 4 of the Act.

19. Section 5 of the Forest Act bars that no right shall be acquired in or over the land comprised in notification under Section 4 of the Forest Act, except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government. Once the notification dated 23.11.1955 was published under Section 4 of the Forest Act, there could not be any transfer of right in the land so notified in favour of the lessee by the Gaon Sabha.

20. It is thereafter, a proclamation was required to be issued under Section 6 of the Forest Act publishing in the local vernacular in every town and village specified, as nearly as possible, the situation and limits of the proposed forest. In the proclamation under Section 6 of the Forest Act, different khasra numbers have been specified including Khasra No. 1576. Such khasra number forms part of the total forest land declared under Section 4 of the Act measuring 162 acres. The proclamation of publication was published in the locality but none including the Gaon Sabha objected to the declaration of land as forest area.

21. Mr. Khan, learned counsel for the lessee and Mr. Hooda, learned counsel for the Gaon Sabha vehemently argued that the details of land in respect of which notification under Section 4 of the Forest Act was issued are not mentioned, except providing the total area measuring 162 acres. It was argued that such notification is vague and does not comply with the conditions specified in Section 4 of the Forest Act. It was only in the proclamation published under Section 6 of the Forest Act that Khasra No. 1576 was mentioned.

22. We do not find any merit in the argument raised by Mr. Khan and Mr. Hooda. In the notification published on 23.11.1955, there was a declaration that land measuring 162 acres shall constitute

forest land. Explanation (1) to Section 4 of the Forest Act clarifies that it would be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries. The notification dated 23.11.1955 has the boundaries on all four sides mentioned therein. There is no other requirement under Section 4 of the Forest Act. It is only Section 6 of the Forest Act which needs to specify the situation and limits of the proposed forest. In terms of such clause (a) of Section 6 of the Forest Act, the details of khasra numbers which were part of 162 acres find mention in the proclamation so published. Therefore, the statutory procedural requirements stand satisfied.

23. Learned counsel for the appellant referred to a judgment reported as State of U.P. v. Dy. Director of Consolidation wherein the land was notified as a reserved forest under Section 20 of the Forest Act but the respondents in appeal before this Court claimed that they were in possession of the land and had acquired Sirdari rights. This Court held that in terms of the Abolition Act, the State was the proprietor of the land and the respondents, even if they were Sirdars, would still be tenure-holders. It was also held that the Consolidation Authorities have no jurisdiction to go behind the notification under Section 20 of the Forest Act. The Court held as under:

"7. It is thus obvious that a person who was holding the land as Sirdar was not vested with proprietary rights under the Abolition Act. He was a tenure-holder and the proprietary rights vested with the State. The High Court, therefore, fell into patent error in assuming that by virtue of their status as Sirdars the respondents were proprietors of the land. The State being the proprietor of the land under the Abolition Act, it was justified in issuing the notification under Section 4 of the Act.

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10. It is thus obvious that the Forest Settlement Officer has the powers of a civil court and his order is subject to appeal and finally revision before the State Government. The Act is a complete code in itself and contains elaborate procedure for declaring and notifying a reserve forest. Once a notification under Section 20 of the Act declaring a land as reserve forest is published, then all the rights in the said land claimed by any person come to an end and are no longer available. The notification is binding on the consolidation authorities in the same way as a decree of a civil court. The respondents could very well file objections and claims including objection regarding the nature of the land before the Forest Settlement Officer. They did not file any objection or claim before the authorities in the proceedings under the Act. After the notification under Section 20 of the Act, the respondents could not have raised any objections qua the said notification before the consolidation authorities. The consolidation authorities were bound by the notification which had achieved finality."

24. Mr. Khan further raised an argument that the final notification under Section 20 of the Forest Act has not been published. A reading of Section 20 of the Forest Act does not show that for a reserved forest, there is a requirement of publication of notification but no time limit is prescribed for publication of such notification under Section 20. Therefore, even if notification under Section 20 of the

Forest Act has not been issued, by virtue of Section 5 of the Forest Act, there is a prohibition against acquisition of any right over the land comprised in such notification except by way of a contract executed in writing by or on behalf of the Government. Since no such written contract was executed by or on behalf of the State or on behalf of the person in whom such right was vested, therefore, the Gaon Sabha was not competent to grant lease in favour of the appellant.

25. In a judgment reported as State of Uttarakhand v. Kumaon Stone Crusher an argument was raised that since notification under Section 20 of the Forest Act has not been published therefore, land covered by notification issued under Section 4 cannot be regarded as forest. This Court negated the argument relying upon Section 5 of the Forest Act as amended in State of Uttar Pradesh by U.P. Act No. 23 of 1965. It was held that regulation by the State comes into operation after the issue of notification under Section 4 of the Forest Act and that absence of notification under Section 20 of the Forest Act cannot be accepted. The Court held as under:

"145. At this juncture, it is also necessary to notice one submission raised by the learned counsel for the petitioners. It is contended that the State of Uttar Pradesh although issued notification under Section 4 of the 1927 Act proposing to constitute a land as forest but no final notification having been issued under Section 20 of the 1927 Act the land covered by a notification issued under Section 4 cannot be regarded as forest so as to levy transit fee on the forest produce transiting through that area. With reference to the above submission, it is sufficient to notice Section 5 as inserted by Uttar Pradesh Act 23 of 1965 with effect from 25-11-1965. By the aforesaid U.P. Act 23 of 1965 Section 5 has been substituted to the following effect:

*"5. **Bar of accrual of forest rights**.--After the issue of the notification under Section 4 no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or a contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land, nor any tree therein felled, girdled, lopped, tapped, or burnt, or its bark or leaves stripped off, or the same otherwise damaged, nor any forest produce removed therefrom, except in accordance with such rules as may be made by the State Government in this behalf."*

146. Section 5 clearly provides that after the issue of the notification under Section 4 no forest produce can be removed therefrom, except in accordance with such rules as may be made by the State Government in this behalf. The regulation by the State thus comes into operation after the issue of notification under Section 4 and thus the submission of the petitioners that since no final notification under Section 20 has been issued they cannot be regulated by the 1978 Rules cannot be accepted."

26. This Court in a judgment reported as Prahlad Pradhan v. Sonu Kumhar negated argument of ownership based upon entries in the revenue records.

It was held that the revenue record does not confer title to the property nor do they have any presumptive value on the title. The Court held as under:

"5. The contention raised by the appellants is that since Mangal Kumhar was the recorded tenant in the suit property as per the Survey Settlement of 1964, the suit property was his self-acquired property. The said contention is legally misconceived since entries in the revenue records do not confer title to a property, nor do they have any presumptive value on the title. They only enable the person in whose favour mutation is recorded, to pay the land revenue in respect of the land in question. As a consequence, merely because Mangal Kumhar's name was recorded in the Survey Settlement of 1964 as a recorded tenant in the suit property, it would not make him the sole and exclusive owner of the suit property."

27. The six yearly khatauni for the fasli year 1395 to 1400 is to the effect that the land stands transferred according to the Forest Act as the reserved forest. Such revenue record is in respect of Khasra No. 1576. It is only in the revenue record for the period 1394 fasli to 1395 fasli, name of the lessees find mention but without any basis. The revenue record is not a document of title. Therefore, even if the name of the lessee finds mention in the revenue record but such entry without any supporting documents of creation of lease contemplated under the Forest Act is inconsequential and does not create any right, title or interest over 12 bighas of land claimed to be in possession of the lessee as a lessee of the Gaon Sabha.

28. The High Court had referred to the objections filed by the lessees under the Consolidation Act and also objections by the Forest Department. It was held by the High Court that since no objections were filed by the Forest Department earlier, therefore, the objections would be barred by Section 49 of the Consolidation Act. We find that such finding recorded by the High Court is clearly erroneous. The land vests in the Forest Department by virtue of notification published under a statute. It was the lessee who had to assert the title on the forest land by virtue of an agreement in writing by a competent authority but no such agreement in writing has been produced. Therefore, the lessee would not be entitled to any right only on the basis of an entry in the revenue record.

13. Considering the fact that the allotment of the forest land in favour of the respondents was de hors the provisions of the Act, 1927 and, further the Consolidation Authorities had no jurisdiction to deal with the land under notification issued under Section-4 of the Act, 1927, the present writ petition is **allowed.** The impugned order dated 15.05.1980 passed by the IV Additional District Judge, Kheri, copy of which is contained in Annexure No. 1 to the petitions, is set-aside. However, it would be open to the respondents to claim the other lands in lieu of the land part of notification under Section-4 of the Act, 1927 if their holdings got reduced during consolidation proceedings because they were wrongly allotted the forest lands. If such proceedings are instituted, the limitation would not come in the way in instituting the proceedings by the respondents.

(2022)02ILR A861
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 3000031 of 1994

Ajay Pratap Singh ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
H.S. Sahai, Jai Prakash Dubey, Onkar Nath Tiwari, U.S.Sahai, Shankar Sahai

Counsel for the Respondents:
C.S.C.

A. Ceiling Law – U.P. Imposition of Ceiling on Land Holdings Act, 1960 – Sections 9 and 10(2) – General Clauses Act, 1897 – Section 21 – Second notice was issued u/s 10(2) – Objection filed on the ground that it was issued against his father, who was dead – Maintainability of second notice challenged – First general notice u/s 9 was already issued – Effect – Held, the prescribed authority has not committed any error in issuing second notice – It would not be prudent to institute two separate cases inasmuch as the notices have been issued in respect of the same land holding – High Court issued direction clubbing both notices, giving the petitioner one month time to file comprehensive objection. (Para 18 and 19)

Writ petition disposed of. (E-1)

List of Cases cited:

1. Lady Parassan Kaur Charitable Educational Trust Society, Gorakhpur Vs St. of U.P. & ors.; 2002 (93) RD 663

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

1. The present writ petition under Article 226 of the Constitution of India has been filed seeking quashing of the notice dated 4.1.1989 issued by the prescribed authority under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (for short 'the Act, 1960').

2. Initially, a notice under Section 10(2) of the Act, 1960 was issued to the petitioner on 24.11.1987. This Notice was issued against Bhanu Pratap Singh, father of the petitioner, who had died when the notice was issued.

3. The petitioner had filed objection to the first notice. The petitioner said that an area 14 bigha 18 biswas situated at Village Shekhpur was exclusive holding of the father of the petitioner which was transferred by gift by his father to the petitioner prior to the cut off dated i.e. 24.1.1971 and as a result of this gift, the petitioner had come into possession of the said land and he became bhumidhar of the said land during the life time of his father. It is alleged that no objection was filed by the State to the objection filed by the petitioner. The parties lead their evidence and arguments were heard on 30.11.1988 and the next date was fixed as 14.12.1988. However, no order was passed on 14.12.1988 and, thereafter, the case was fixed for 4.1.1989 for orders. On 4.1.1989, an application was moved on behalf of the state before the prescribed authority for withdrawing the notice dated 24.11.1987 with liberty to file afresh notice. The said application was allowed on the same date i.e. 4.1.1989 by the prescribed authority and notice was allowed to be withdrawn.

4. Against the order dated 4.1.1989 passed by the prescribed authority, the petitioner filed an appeal before the Divisional Commissioner, Faizabad (Now Ayodhya Ji). The petitioner also prayed for staying further proceedings before the prescribed authority. The Divisional commissioner vide order dated 16.5.1989 directed the parties to maintain status-quo till 30.5.1989. The appeal filed by the petitioner was decided by the divisional commissioner vide order dated 11.7.1991 and set aside the order dated 4.1.1989 and remanded the matter back to the file of the prescribed authority and directed him to decide the application after inviting objection from the petitioner.

5. After remand by the Divisional commissioner to the prescribed authority, the petitioner had filed objection to the application dated 4.1.1989 filed by the State for withdrawing the first notice dated 24.11.1987. The petitioner said that application for withdrawal of the first notice did not contain any reason that why such an application was moved. The petitioner prayed for rejection of the application. However, the prescribed authority vide order dated 15.12.1993 rejected the application dated 4.1.1989 for withdrawing the first notice dated 24.11.1987.

6. On 15.12.1993, second application for withdrawing the first notice was again moved by the State. It is said that when the application dated 15.12.1993 for withdrawing the first notice dated 24.11.1987 was still pending for disposal before the prescribed authority, second impugned notice under Section 10(2) of the Act, 1960 dated 4.1.1989 was issued. The petitioner had filed objection to the second notice and the proceedings in respect of the second notice are also pending before the prescribed authority. The petitioner thereafter has filed this writ petition challenging the issuance of the second notice.

7. The primary ground which has been urged by Sri U.S. Sahai, learned counsel for the petitioner is that there is no provision under the Act, 1960 or the rules made thereunder for issuing second notice. He further submits that second notice is wholly without jurisdiction and against law and is liable to be set aside.

8. Sri U.S. Sahai, learned counsel for the petitioner has also submitted that the first notice was later on corrected and the arguments were heard and when the judgment was to be pronounced, the State authorities came forward with an application for withdrawing the first notice.

9. On the other hand, Sri J.P. Maurya, learned Additional Chief Standing Counsel has submitted that adjudication has not taken place in respect of the first notice and if the authority concerned finds that first notice was defective or incorrect facts were mentioned in the first notice, therefore the authority can issue second notice. He also submits that Section 21 of the General Clauses Act provides power to issue, amend, vary or rescind notifications, orders, rules or bye-laws. Section 21 of the General Clauses Act, 1897 reads as under :-

"21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.?*Where, by any 1 [Central Act] or Regulations a power to 2 [issue notifications,] orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and*

subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any 3 [notifications,] orders, rules or bye-laws so 4 [issued].?

10. It is further submitted that it is the primary duty of the tenure holder to submit the statement in respect of the excess ceiling area of his land holding and this duty has been prescribed in Section 9 of the Act, 1960, which provides that as soon as may be, after the date of enforcement of this Act, the prescribed authority shall, by general notice, published in the Official Gazette, call upon every tenure-holder holding land in excess of the ceiling area applicable to him on the date of enforcement of this Act, to submit to him within 30 days of the date of publication of this notice, a statement in respect of all his holdings in such form and giving such particulars as may be prescribed. Sub-section (1) of Section 9 of the Act, 1960 prescribes that statement should also indicate the plot or plots for which the land holder claims exemption and also those which he would like to retain as part of the ceiling area applicable to him under the provisions of this Act. Section 9 of the Act, 1960 reads as under:-

"9. General notice to tenure-holders holding land in excess of ceiling area for submission of statement in respect thereof. *-[(1)]As soon as may be, after the date of enforcement of this Act, the Prescribed Authority shall, by general notice, published in the Official Gazette, call upon every tenure-holder holding land in excess of the ceiling area applicable to him on the date of enforcement of this Act, to submit to him within 30 days of the date of publication of this notice, a statement in respect of all his holdings in such form and giving such particulars as may be prescribed. The statement shall also indicate the plot or plots for which he claims exemption and also those which he would like to retain as part of the ceiling area applicable to him under the provisions of this Act.*

[(2) As soon as may be after the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, the Prescribed Authority shall, by like general notice, call upon every tenure-holder holding land in excess of the ceiling area applicable to him on the enforcement of said Act, to submit to him within 30 days of publication of such notice a statement referred to in sub-section (1)]:

[Provided that any time after October 10,1975, the Prescribed Authority may, by notice, call upon any tenure-holder holding land in excess of the ceiling area applicable to him on the said date, to submit to him within thirty days from the date of service of such notice a statement referred to in sub-section (1) or any information pertaining thereto],

(2A) Every tenure-holder holding land in excess of the ceiling area on January 24,1971, or at any time thereafter who has not submitted the statement referred to in sub-section (2) and in respect of whom no proceeding under this Act is pending on October 10, 1975 shall, within thirty days from the said date furnish to the Prescribed Authority a statement containing particulars of alt land -

(a) held by him and the members of his family on January 24, 1971

(b) acquired or disposed of by him or by members of his family between January 24, 1971 and October 10, 1975.

[(3) Where the tenure-holder's wife holds any land which is liable to be aggregated with the land held by the tenure-holder for purposes of determination of the ceiling area, the tenure-holder shall, along with his statement referred to in sub-section (1), also file the consent of his wife to the choice in respect of the plot or plots which they would like to retain as part of the ceiling area applicable to them and where his wife's consent is not so obtained the Prescribed I Authority shall cause the notice under sub-section (2) of Section 10 to be served on her separately]."

11. He further submits that if the land holder fails to perform his duty after publication of the notice under Section 9 of the Act, 1960, then notice under Section 10(2) of the Act, 1960 is issued for determination inviting the objections. He, therefore, submits that even if the first notice was issued since adjudication did not take place before issuing second notice, there is nothing in the Act which bars issuing the second notice.

12. Nowhere it is provided that in the provisions of the Act, 1960 that second notice can not be issued if the first notice is defective or some area is left out in the first notice. The only bar is that first notice ought not to have been adjudicated before issuing the second notice. He, therefore, submits that the judgment in the case of ***Lady Parassan Kaur Charitable Educational Trust Society, Gorakhpur vs. State of U.P. and others,*** *2002 (93) RD 663,* is not applicable to the facts of the present case inasmuch as in that case second notice was issued after adjudication of the first notice and, therefore, this court relying upon the said judgment held that after adjudication of the first notice, there is no provision in the Act, 1960 to issue second notice to a tenure holder.

13. I have considered the submissions advanced on behalf of the learned counsel for the petitioner as well as by the learned Additional Chief Standing Counsel.

14. The scheme of the Act, 1960 provides that after the date of enforcement of the Act, the prescribed authority is required to issue a general notice to be published in the Official Gazette calling upon every tenure holder holding land in excess of the ceiling area as applicable to him on the date of enforcement of the Act, to submit to him within 30 days from the date of publication of the notice, a statement in respect of his all land holdings. The tenure holder is also required to indicate the plot or plots for which he would claim exemption and also those which he would like to retain as part of the ceiling area applicable to him under the provisions of the Act.

15. It is further provided that at any point after 10.10.1975, the prescribed authority may, by notice, call upon any tenure holder holding land in excess of the ceiling area applicable to him on the said date, to submit to him within 30 days from the date of service of such notice a statement as required to be submitted in sub-section (1) of Section 9 of the Act, 1960. In case the tenure holder does not submit the statement or submits any incomplete or incorrect statement under Section 9 of the Act, 1960, the prescribed authority after making an inquiry, prepare a statement containing such particulars regarding the excess area of the tenure holder and indicate the land, if any, exempted and the plot or plots proposed to be declared as surplus land. The prescribed

authority shall thereupon cause to be served upon every such tenure holder a notice along with copy of the said statement for his reply if any. Thereafter, the prescribed authority is required to adjudicate the notice for declaring the surplus area as contained in the statement of the notice.

16. Thus, from the reading of Sections 9 and 10 of the Act, 1960, it is evident that there is duty cast upon the tenure holder to give correct statement of his land holding and excess area in the prescribed form after publication of the notice in the Official Gazette by the prescribed authority after enforcement of the Act. In case the tenure holder fails to declare or submits incorrect statement, then only proceedings under Section 10(2) of the Act, 1960 would be initiated against him.

17. In the present case, the first notice was issued against the father of the petitioner, who was no more. It is always open to the competent authority to correct the mistake as the notice could not have been issued against a dead person and that was precise objection of the petitioner in his objection to the first notice.

18. Considering the provisions of Section 21 of the General Clauses Act, I do not find that the prescribed authority has committed any error in issuing second notice. However, it would not be prudent to institute two separate cases inasmuch as the notices have been issued in respect of the same land holding. Anyway, the petitioner is not prejudiced by the second notice, if both the notices are clubbed together and a comprehensive objection is filed by the petitioner and, thereafter, the prescribed authority decides the objection in accordance with law after giving due opportunity to the petitioner.

19. In view thereof, let both notices dated 24.11.1987 and 4.1.1989 be clubbed together and the petitioner be given one month time to file comprehensive objection in respect of both the notices and the case be treated as one in respect of both the notices.

20. Let prescribed authority decide the case within a period of six months in accordance with law after giving due opportunity for leading evidence by the petitioner and by the State authorities.

21. With the aforesaid observation and direction, the present writ petition stands disposed of.

(2022)02ILR A865
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 755 of 2022

Sumit Kumar Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ashish Kumar Pathak

Counsel for the Respondents:
C.S.C., Shubham Tripathi

A. Service Law - The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974-Challenge to-appointment-petitioner had obtained appointment illegally on compassionate ground in KGMU, Lucknow after death of his father-the petitioner mother was employed in the University itself as female sick attendant-Petitioner deliberately concealed this fact in his application form-

Petitioner suppressed the material fact and played fraud for securing public employment and therefore, his long continuation (15 years) would not be of any help to him to continue to hold his post inasmuch as his appointment was void ab initio-In service law there is no place for the concepts of adverse possession or holding over.(Para 1 to 17)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Shesh Mani Shukla Vs Distt. Insp. of Schools, Deoria & ors. (2009) 15 SCC 436

2. Chairman & MD, FCI & ors. Vs Jagdish Balaram Bahira & ors. (2017) 8 SCC 670

3. M.S. Patil (Dr.) Vs Gulbarga University & ors. (2010) 10 SCC 63

4. Md Zamil Ahmed Vs St. of Bih. & ors. (2016) 12 SCC 342

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

1. The petitioner, who obtained employment on Class-IV post in King George's Medical University, Lucknow (for short "the University") under the provisions of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short "the Rules, 1974) after death of his father on 13.11.2007, who was working on the post of fireman in Construction Division of the University, has filed this writ petition, impugning the order dated 19.06.2021 passed by the Registrar of the University, terminating his services with immediate effect and the order dated 13.12.2021 passed by the Vice-Chancellor of the University, dismissing appeal of the petitioner filed against the order of termination.

2. A complaint was made against one Mr. Anand Kumar Mishra, Head Assistant, that he had obtained appointment illegally, after concealing material fact and by misrepresentation; Mr. Anand Kumar Mishra was issued charge-sheet as required under rule-5 of The U.P. Recruitment of Dependants of Government Servants (Dying in Harness) (5th Amendment) Rules, 1999; Mr. Anand Kumar Mishra, in his reply to the charge-sheet, had mentioned that like him, other employees were also appointed illegally.

3. In view of the aforesaid allegation, the University decided to examine appointment made on compassionate ground after 2002 and Prof. A.A. Mehndi, Biochemistry Department, was appointed as inquiry officer. In the inquiry conducted by Mr. Mehndi it was found that at the time of appointment of the petitioner on compassionate ground under the Rules, 1999, the petitioner's mother Smt. Kiran was employed as female sick attendant in Pediatric Department of the University. After receiving this report, the petitioner was issued charge-sheet on 05.10.2020 having been approved by the appointing authority

4. Mr. Ram Chandra, Administrative Officer, was nominated as inquiry officer. Thereafter, vide order dated 03.10.2020, Dr. Mhod Kalim Ahmad, Deputy Registrar was nominated as inquiry officer.

5. The petitioner filed his reply to the charge-sheet and, was given opportunity of hearing and the inquiry officer submitted his report on 04.03.2021. The petitioner was issued show-cause-notice along with inquiry report and, after considering his reply to the show-cause-notice, impugned order has been passed.

6. The petitioner admitted that he was appointed on compassionate ground after

death of his father and, he did not give details of employment of his parents in the form submitted by him. The petitioner has also admitted that at the time of his appointment, his mother was working as female sick attendant in the Pediatric Department of the University. Along with the writ petition, the form submitted by the petitioner, has also been annexed as Annexure-11. In column-11, while giving details of the dependents of his deceased father, he has mentioned name of his mother Smt. Kiran, aged about 40 years, but he did not give details of occupation nor monthly income of his mother. The petitioner gave details of his two brothers, Amit and Manish without giving details of their occupation.

7. Under the Rules, 1999, which came into force, the appointment under dying in harness can be made only if wife or husband, as the case may be, is not employed in any Central or State Government or in any corporation/organization owned by the Central or State Government and, no member of the family is employed in Central or State Government or corporation/organization owned by Central or State Government. Thus, there is a specific bar for giving appointment under the Rules, 1999, if wife or husband or any family member is employed in the Central or the State Government or in the corporation/organization owned/controlled by the Central/State Government. In the present case, the petitioner's mother was employed in the University itself as female sick attendant in Pediatric Department and, the petitioner deliberately concealed this fact in his application form and, thus, obtained the employment against rule-5 of the Rules, 1999.

8. Mrs. Bulbul Godiyal, learned Senior Advocate, assisted by Dr. Ashish Kumar Pathak, Advocate, representing the petitioner, has submitted that the petitioner has been working for 15 years from the date of his appointment. The petitioner's mother gave affidavit in favour of the petitioner. It has been further submitted that the petitioner did not conceal any fact and the Construction Division of the University itself recommended for giving appointment to the petitioner under the Dying in Harness Rules.

9. The recommendation of the Construction Division has been placed on record. However, in the recommendation of the Construction Division nowhere it is mentioned that the petitioner's mother is employed in the University inasmuch as neither in the affidavit nor in the form submitted by the petitioner, information regarding the employment of mother of the petitioner was given. If the recommendation had been made on the basis of incorrect and false facts given by the petitioner or recommendation was against law, employment obtained on the basis of the said recommendation would not come in the way of University for initiating disciplinary action against the petitioner, if he had secured appointment on the basis of misleading and incorrect information/facts given by him.

10. On the other hand, Mr. Shubham Tripathi, learned counsel for the respondents-University, has submitted that the petitioner's appointment on Class-IV post was against rule-5 of the Rules, 1999; the petitioner had obtained his appointment by giving misleading and incorrect facts and, concealing material fact regarding employment of his mother in the University itself. It has been further submitted that the petitioner's appointment was void ab initio and, thus, even if the petitioner has worked for a long time, the petitioner is not entitled

for any relief on the ground of sympathy and sentiments inasmuch as he has no legal right to continue in service inasmuch as he had no any legal right to get appointed at the first place and, he secured his appointment by playing fraud. The petitioner had secured appointment by giving false and incorrect information and by misleading the University.

11. The facts are not in dispute inasmuch as when father of the petitioner died on 13.11.2017, he was working on the post of Fireman, his wife, the mother of the petitioner, was employed as sick attendant in the Pediatric Department of the University. The petitioner did not give information regarding the employment of his mother in the application submitted by him, seeking employment under the Dying in Harness Rules after death of his father. If the petitioner would have disclosed true and correct information regarding employment of his mother, he could not have secured the employment. The petitioner did not have any legal right of his appointment on compassionate ground under the Dying in Harness Rules inasmuch as rule-5 of the Rules, 1999 puts a specific bar for appointing a person on compassionate ground, if any family member is employed in Central/State Government or in corporation/organization owned by the Central/State Government. Thus, the appointment, obtained by the petitioner, was void ab initio. The Supreme Court in **(2009) 15 SCC 436 (Shesh Mani Shukla Vs. District Inspector of Schools, Deoria and others)** in paragraph-19 has held as under:-

*"**19.** It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State. (See Food Corpn. of India v. Ashis Kumar Ganguly [(2009) 7 SCC 734 : (2009) 2 SCC (L&S) 413 : (2009) 8 Scale 218] .) Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ of or in the nature of mandamus. (See State of M.P. v. Sanjay Kumar Pathak)."*

12. The claim of the petitioner to be appointed on compassionate ground has been found untenable inasmuch his mother was employed when he sought appointment on compassionate ground after death of his father and, he gave false and incorrect information regarding unemployment of his mother. It would not be correct to say that the petitioner did not have any dishonest intention for securing the employment as contended by the learned Senior Advocate, appearing on behalf of the petitioner. Service, under the Union and the States, or for that matter under the instrumentality of the State, subserves a public purpose. These services are instruments of governance. The State, while offering public employment, has to adhere to the mandate of Articles 14 and 16 of the Constitution and, to ensure equal opportunity to the people. Selection of an ineligible person by the State or its instrumentality would be detrimental and deleterious to good governance.

13. The Supreme Court, while dealing with a case of employment having been secured on the basis of false caste

certificate in **(2017) 8 SCC 670 (Chairman and Managing Director, Food Corporation of India and others Vs. Jagdish Balaram Bahira and others)** in paragraph-56 has held as under:-

"56. Service under the Union and the States, or for that matter under the instrumentalities of the State subserves a public purpose. These services are instruments of governance. Where the State embarks upon public employment, it is under the mandate of Articles 14 and 16 to follow the principle of equal opportunity. Affirmative action in our Constitution is part of the quest for substantive equality. Available resources and the opportunities provided in the form of public employment are in contemporary times short of demands and needs. Hence, the procedure for selection, and the prescription of eligibility criteria has a significant public element in enabling the State to make a choice amongst competing claims. The selection of ineligible persons is a manifestation of a systemic failure and has a deleterious effect on good governance. Firstly, selection of a person who is not eligible allows someone who is ineligible to gain access to scarce public resources. Secondly, the rights of eligible persons are violated since a person who is not eligible for the post is selected. Thirdly, an illegality is perpetrated by bestowing benefits upon an imposter undeservingly. These effects upon good governance find a similar echo when a person who does not belong to a reserved category passes of as a member of that category and obtains admission to an educational institution. Those for whom the Constitution has made special provisions are as a result ousted when an imposter who does not belong to a reserved category is selected. The fraud on the Constitution precisely lies in this. Such a consequence must be avoided and stringent steps be taken by the Court to ensure that unjust claims of imposters are not protected in the exercise of the jurisdiction under Article 142. The nation cannot live on a lie. Courts play a vital institutional role in preserving the rule of law. The judicial process should not be allowed to be utilised to protect the unscrupulous and to preserve the benefits which have accrued to an imposter on the specious plea of equity. Once the legislature has stepped in, by enacting Maharashtra Act 23 of 2001, the power under Article 142 should not be exercised to defeat legislative prescription. The Constitution Bench in Milind [State of Maharashtra v. Milind, (2001) 1 SCC 4 : 2001 SCC (L&S) 117] spoke on 28-11-2000. The State law has been enforced from 18-10-2001. Judicial directions must be consistent with law. Several decisions of two-Judge Benches noticed earlier, failed to take note of Maharashtra Act 23 of 2001. The directions which were issued under Article142 were on the erroneous inarticulate premise that the area was unregulated by statute. Shalini [Shalini v. New English High School Assn., (2013) 16 SCC 526 : (2014) 3 SCC (L&S) 265] noted the statute but misconstrued it."

14. If a person obtains appointment illegally, against the statutory prescription, his long continuation in service (in the present case 15 years) would not justify this Court to uphold his appointment. The Supreme Court in ***(2010) 10 SCC 63 (M.S. Patil (Dr.) Vs. Gulbarga University and others)***, where a person continued on the post of Reader (17 years), has held that in service law there is no place for concepts of adverse possession or holding over. Paragraphs-16 and 17 of the said judgment read as under:-

*"**16**. But at this stage once again a strong appeal is made to let the appellant continue on the post where he has already worked for over 17 years. Mr Patil, learned Senior Counsel, appearing for the appellant, submitted that throwing him out after more than 17 years would be very hard and unfair to him since now he cannot even go back to the college where he worked as Lecturer and from where he had resigned to join to this post.*

***17.** We are unimpressed. In service law there is no place for the concepts of adverse possession or holding over. Helped by some University authorities and the gratuitous circumstances of the interim orders passed by the Court and the delay in final disposal of the matter, the appellant has been occupying the post, for all these years that lawfully belonged to someone else. The equitable considerations are, thus, actually against him rather than in his favour."*

15. The case relied on by the petitioner ***(2016) 12 SCC 342 (Md Zamil Ahmed Vs. State of Bihar and others***) is distinguishable inasmuch in the said case the Supreme Court did not find that the appellant had committed any fraud for securing appointment. Paragraph-15 of the said judgment, which has been relied on by the petitioner, reads as under:-

"**15**. In these circumstances, we are of the view that there was no justification on the part of the State to wake up after the lapse of 15 years and terminate the services of the appellant on such ground. In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State."

16. In the present case, from perusal of petitioner's application, it is evident that the petitioner has suppressed the material fact and played fraud for securing public employment and, therefore, his long continuation (15 years) would not be of any help to him to continue to hold his post inasmuch as his appointment was void ab initio.

17. In view of aforesaid discussions, this Court does not find that the impugned order suffers from any illegality or from gross inaccuracy and, therefore, this writ petition fails and is, accordingly, **dismissed** at this stage itself.

(2022)02ILR A870
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 17421 of 2020

Mohammed Naseem Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ravi Shanker Tewari, Sheo Pal singh

Counsel for the Respondents:
C.S.C., Dibyam Mishra, Gajendra Kumar Mishra, Sudhir Pande, Umesh Kumar Srivastava

A. Service Law - Compulsory retirement-Petitioner was working as Administrative Officer in Zila Panchayat-Screening committee recorded that the petitioner is indolent, quarrelsome and has become 'dead wood' in the organization-Petitioner obtained interim order on the basis of false and misleading averments and concealing material facts-petitioner work and conduct was found unsatisfactory-he has been compulsorily retired by adopting due procedure of law-no illegality of any procedural or substantive law in passing the impugned order-Petiitoner has not approached this Court with clean hands.(Para 1 to 19)

B. To obtain favourable order the petitioner misguided the Hon'ble Court. Truth of the matter is that the screening committee was duly constituted and reported the matter to authorities. Administrative Committee also recommended compulsory retirement in its meeting. In the instant case the petitioner approached the Court stating that no such procedure was adopted.(Para 5)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. MP St. Coop. Federation & anr. Vs Rajnesh Kumar Jamindar & ors. (2009) 15 SCC 221

2. St. of Guj. Vs Umedbhai M. Patel (2001) 3 SCC 314

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

1. The petitioner, who was working as Administrative Officer in Zila Panchayat, Hardoi, having been compulsorily retired from service vide order dated 15.09.2020, has filed this writ petition, impugning the said order of compulsorily retirement passed by the Chairman, Zila Panchayat, Hardoi.

2. The petitioner was selected and appointed on the post of Second Grade Clerk vide order dated 20.12.1989 passed by the Uper Mukhya Adhikari, Zila Panchayat, Hardoi; his services were confirmed vide order dated 27.12.1990; in 1999, he was promoted as First Class Clerk and Departmental Selection Committee in its meeting dated 14.05.2012 recommended him to be promoted as Section Head Clerk (Tax) on temporary basis and, the said recommendation was accepted by the Chairman of the Zila Panchayat; the petitioner assumed the charge of the Section Head Clerk (Tax) on 17.05.2012; the petitioner was further promoted as Administrative Officer vide order dated 19.05.2015.

3. The petitioner's integrity was not certified for the Financial Year 2016-17. The Uper Mukhya Adhikari, respondent no. 4, considering service record of the petitioner and, his work and conduct, recommended for his premature retirement vide order dated 15.04.2017.

4. Learned counsel for the petitioner has submitted that the Screening Committee constituted for assessing the service record of Class-III and Class-IV employees of the Zila Panchayat in the year 2017 did not assess the petitioner for being compulsorily retired. It has been further submitted that on 11.09.2020 a meeting of the Board of Zila Panchayat was scheduled for which agenda/karya soochi was published on 28.09.2020, which was sent to all the members of the Zila Panchayat. In the agenda, there was no proposal to take action against the petitioner. Despite the

premature retirement of the petitioner, not being in the Agenda, the Zila Panchayat, in its meeting dated 11.09.2020, approved the resolution of the Board of Zila Panchayat dated 11.09.2020 for petitioner's retirement compulsorily. It has been further submitted that neither the Agenda of compulsorily retirement of the petitioner was published nor served on any members of the Zila Panchayat and, therefore, the resolution of the Board of the Zila Panchayat dated 11.09.2020, so far as the petitioner's compulsorily retirement is concerned, is wholly not sustainable in law. The Chairman of the Zila Panchayat, on the basis of the decision taken by the Board, has passed the impugned order dated 15.09.2020 whereby the petitioner has been directed to be retired compulsorily.

5. Paragraphs 31, 32 and 33 of the petition are extracted herein below in which it has been specifically stated that no screening committee was constituted to assess the petitioner's service record for taking a decision of his retirement compulsorily from services:-

"31.That the petitioner humbly submits that to declare an employee as deed wood and to take further action to have his premature retirement it was incumbent upon the opp. parties to constitute a screening committee which could look into the A.C.R. of the petitioner and recommend accordingly by forming its opinion regarding the employee under screening, which in the instant case nothing was done and the compulsory retirement was sought to be doe by way of punishment which is not sustainable under law.

32. That the Government of U.P. vide G.O. dated 06 February, 1989 has mandated to form screening committee to assess an employee for the purposes of the premature retirement and further it was mandated that once a report is obtain and the employee is not retired compulsorily, he should not be subjected every year for being screened. The true photo copy of the G.O. dated 06 February, 1989 is being annexed herewith as ***Annexure NO. 23*** *to this writ petition.*

33. That the petitioner craves leave of this Hon'ble Court to State that once the opp. parties did not take action in pursuance the entry dated 15.04.2017 and no screening committee was formed to assess the petitioner for being compulsorily retired, no such action could have been taken."

6. On behalf of the petitioner, it has further submitted that in subsequent years i.e. 2017-18, 2018-19 and 2019-20 the petitioner's work and conduct was found satisfactory as nothing adverse was communicated to the petitioner and, as such, he had never been declared as 'dead wood' and, therefore, the order of compulsorily retirement of the petitioner is bad in law.

7. Considering the stand of the petitioner that no screening committee was constituted to consider the entire service record of the petitioner and, no recommendation was made by the screening committee for his compulsorily retirement, this Court passed interim order dated 19.10.2020, which reads as under:-

"Notices on behalf of opposite party no.1 has been accepted by the office of learned Chief Standing Counsel whereas notices on behalf of opposite parties no.2 to 4 have been accepted by Mr. Sudhir Pande, learned Advocate.

By means of instant writ petition, the petitioner has sought for the following main prayers:

"(i). To issue a writ, order or direction in the nature of certiorari quashing the

order dated 15.09.2020 passed by opposite party no.2 (contained in Annexure No.1 to the writ petition.).

(ii). To issue a writ, order or direction in the nature of mandamus commanding the opposite parties not to give effect the impugned order dated 15.09.2020 and permit the petitioner to working on his post as he was working before."

Learned Counsel for the petitioner has submitted that the petitioner has been retired compulsorily by the impugned order dated 15.09.2020 passed by opposite party no.2 which is illegal and arbitrary. He has further submitted that the impugned order has been passed without following the procedure prescribed. The impugned order has been passed without any recommendation of Screening Committee. He has further submitted that no Screening Committee has ever been formed after 2017 when the petitioner was awarded bad entry but he was excluded from being screened and thereafter, no complaint whatsoever in this nature was found against the petitioner.

Learned Additional Chief Standing Counsel appearing on behalf of opposite party no.1 is present whereas Mr. Sudhir Pande appearing on behalf of opposite parties no.2 to 4 is not present and, therefore, this Court is left with no option except to issue notice to the opposite parties no. 2 to 4.

Issue notice to opposite parties no.2 to 4, returnable at an early date.

Steps be taken within a week.

List this case o n 19.11.2020.

Till the next date of listing, the operation and implementation of order dated 15.09.2020 passed by the Chairman, Zila Panchayat, Hardoi (opposite party no.2) shall be kept in abeyance."

8. Learned counsel for the petitioner has relied on judgment in ***(2009) 15 SCC 221 (Madhya Pradesh State Cooperative Federation and another Vs. Rajnesh Kumar Jamindar and others)*** to submit that provisions for compulsory retirement is for the purpose of weeding out 'dead wood'. The Supreme Court placed reliance on judgment in **(2001) 3 SCC 314 (State of Gujarat Vs. Umedbhai M. Patel**). In the said judgment compulsory retirement was crystallized into definite principles and broadly summarized them as under:-

*"**11**. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summarised thus:*

(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

9. Learned counsel for the petitioner has further submitted that since the compulsory retirement has been imposed as punitive measure, the same is liable to be set-aside.

10. On the other hand, Mr. U.K. Srivastava, learned counsel for respondent no. 4, has submitted that the writ petition has been filed on falsehood and by stating wholly incorrect and false averments of facts, the petitioner obtained the interim order. It has been further stated that the petitioner has approached this Court with unclean hands and, by misleading this Court by making false, incorrect and wrong statements of facts, he could obtain the interim order. It has been further stated that a person, who approaches this Court with unclean hands and, has relied on falsehood, cannot be given any indulgence by this Court in exercise of equity jurisdiction under Article 226 of the Constitution of India. It has been further stated that the writ petition is liable to be dismissed on this ground alone.

11. Mr. U.K. Srivastava, learned counsel for respondent no. 4, has also sought dismissal of the writ petition on the ground of availability of alternative remedy to the petitioner under the provisions of Government Order No.5/1/1976-Karmik-1 dated 12th May, 1976, which provides that all employees, whose appointing authority is not the Governor, may approach the higher authority than one who has passed the order of compulsory retirement. He, therefore, submits that the writ petition is not maintainable on the ground of availability of alternative remedy and, therefore, the same is liable to be dismissed.

12. On behalf of respondent no. 4, it has been further stated that the petitioner has concealed the material facts inasmuch as he deliberately has not filed the proceedings dated 11.09.2020 referred to in the impugned order, which specifically mentions the screening committee recommendation dated 14.07.2020, considering case of the petitioner for compulsory retirement. A person, who approaches the writ-Court by concealing the material fact is not entitled to get any relief in exercise of writ-jurisdiction and, therefore, he prays for dismissal of the writ petition on this ground also. It has been further submitted that the impugned order dated 15.09.2020 has been passed on the basis of the recommendation of the screening committee dated 14.07.2020 and minutes of the Administrative Committee Meeting held on 01.09.2020 on which the resolution dated 11.09.2020 was passed by the Board of Zila Panchayat.

13. The petitioner's work and conduct has been much wanting. He was given warnings. He has been habitual of flouting the orders of superior authorities. He has been given warning several times, but he did not care about those warnings and showed his negligence in discharge of duty. Various orders dated 17.05.2017, 20.12.2017, 08.05.2018 and 08.08.2018 have been annexed with the counter affidavit, warning him of committing indiscipline and flouting the orders passed by the superiors. It has been further submitted that the petitioner was duly informed about adverse entry given in 2016-2017 vide letter dated 14.06.2017. In case of any grievance regarding adverse entry in his character roll, an employee has right to

appeal under rule-41 of the Uttar Pradesh Zila Panchayat Sewa Niyamawali, 1970. It has been further submitted that the petitioner has claimed that he had no knowledge about entry for the 2016-2017 and, therefore, no adverse entry was given up to 2018 is false and incorrect. It has been further submitted that adverse entry was given by the competent Authority to the petitioner for the year 2017-2018 as well and, the said entry was communicated vide letter dated 13.07.2018, however, the petitioner refused the accepted the said letter. It has been further submitted that the recommendation was made by the screening committee held in the year 2017, however, since age of the petitioner was less than 50 years, his case was not forwarded for compulsory retirement. The minutes of the screening committee dated 09.08.2017 and 14.07.2020, minutes of the Administrative Committee Meeting dated 01.09.2020 and copy of the resolution of the Zila Panchayat dated 11.09.2020 have been placed on record along with the counter affidavit. The petitioner had filed an appeal against the adverse entry given to him in the year 2016-2017 before the Commissioner, Lucknow Divison, Lucknow, however, the said appeal was dismissed on 13.12.2018 and adverse entry was confirmed. It has been further submitted that there have been serious complaints by several employees against the petitioner about his indecent behaviour with the colleagues, including the female employees.

14. Reply of paragraphs-31, 32 and 33 of the writ petition has been given in paragraph-34 of the counter affidavit, which reads as under:-

"34. That the contents of paragraphs 31 to 33 of the writ petition are not only false but are also misrepresentation of fact with a view to misguide the Hon'ble Court to have obtained a favourable order. Truth of the matter is that the screening committee was duly constituted which held its meeting on 14.7.2020 and reported the matter to authorities. Administrative Committee also recommended compulsory retirement in its meeting dated 1.9.2020. The petitioner was not compulsorily retired in 2017 as his age was less than 50 years. The action taken is perfectly right."

15. Mr. U.K. Srivastava, learned counsel for respondent no. 4, has further submitted that earlier an adverse entry was also awarded in 2017-18 and in 2018-19 yearly entry was not given, but yearly increment was not given to the petitioner in 2019-20 for the petitioner's work and conduct was found unsatisfactory and, was recommended for compulsory retirement. It has been further submitted that the petitioner has been compulsorily retired by adopting due procedure of law and, there is no illegality or infarction of any procedural or substantive law in passing the impugned order. It has been further submitted that the petitioner has been in habit of flouting the orders passed by his superiors. The petitioner was directed to deposit all the records in the office but, he did not do the same and, as a result thereof, public work has been suffering.

16. In rejoinder, while giving reply to the paragraph-34 of the counter affidavit, the petitioner has stated that the meeting of the screening committee dated 14.07.2020 and minutes of the Administrative Committee Meeting dated 01.09.2020 are forged documents and, have been antedated only to fill up the lacunae.

17. Except for making bald allegations, the petitioner has not substantiated the said allegation of forging

or antedating the official records. From perusal of the recommendation of the screening committee dated 14.07.2020, it is evident that after considering the work and conduct of the petitioner, the screening committee had recorded that the petitioner is indolent, quarrelsome, disturber of peace, religious bigot, harasser of females and scheduled caste people, malignant and wholly useless employee and, the same has been confirmed by the Commissioner, Lucknow Division, Lucknow.

18. The petitioner's misconduct has been taken note of in detail in the minutes and, need not to be further dwelled upon by this Court. From the pleadings, it is evident that the petitioner had approached this Court for exercising its extraordinary jurisdiction by adopting falsehood, misrepresentation and concealing the material facts and, thus, abusing the process of the Court. He obtained the interim order on the basis of false and misleading averments and concealing material facts. One, who approaches this Court, is expected to come with clean hands inasmuch this Court exercises writ jurisdiction to maintain rule of law. The petitioner has not approached this Court with clean hands and, thus, the writ petition is liable to be dismissed on this ground alone. Further, from looking at the service record of the petitioner, the petitioner has become 'dead wood' in the organization and, is wholly unuseful. The employer is entitled to remove the dead woods from service, if on consideration of the service record, it is found that the work of such an employee has not been upto the mark or he has become 'dead wood' for the organization. This Court does not find from the pleadings that the order has been passed as punishment and, therefore, the sole ground, urged by the petitioner, has no substance.

19. In view of aforesaid, for making false and incorrect averments and misrepresenting this Court, concealing material facts from the Court, the writ petition is **dismissed and a cost of Rs. 25,000/- (Rupees twenty five thousand) is imposed** upon the petitioner to be deposited in the 'Army Battle Casualties Welfare Fund' within a period of four weeks, failing which the District Magistrate concerned shall recover the same, as arrears of land revenue and, deposit in the account of Army Battle Causalities Welfare Fund.

20. Let a copy of this order be forwarded to the District Magistrate concerned for compliance.

(2022)02ILR A876
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 4215 of 2019

C/M Sri Shanker Junior High School & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:
Pt. S. Chandra, Manoj Kumar Pandey

Counsel for the Respondents:
C.S.C., Ajay Kumar, Dwijendra Nath Pandey

A. Service Law - U.P. Basic Education (Teachers) Service Rules, 1981-challenge to-forged appointment-petitioners did not fulfill the eligibility condition for appointment on the post of Head Master and Asst. Teacher-if the petitioners do not have essential qualification as prescribed under the statute, their appointment is void ab initio and they cannot claim any

benefit of any alleged inaction on the part of the Basic Shiksha Adhikari-The void and illegal appointments would not become valid and legal if the Basic Shiksha Adhikari did not take decision within a period of one month as required under Rule 10 of Rules, 1978-In the present case, the selection has not been made free and fair inasmuch as three candidates had received envelops containing blank papers sent by petitioners no. 1 intimating the date of interview-if the Basic Shiksha Adhikari was not granting approval, petitioner no.1 could have approached the higher authorities or the Court against the alleged inaction of the Basic Shiksha Adhikari, but petitioner no. 1 went ahead to advertise the posts-Hence, no irregularity found in the impugned order.(Para 1 to 47)

The writ petition is dismissed. (E-6)

List of Cases cited:

Sanjay Kumar Singh Vs St. of U.P. & ors. (2019) 5 ADJ 583 LB

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

On C.M. Application No.78457 of 2021

Herd.

This application seeks substitution of the legal heirs of Aditya Kumar, petitioner no.3

Application is ***allowed.***

Necessary amendment to be carried out in the memo of parties during the course of the day.

On Memo of Writ Petition

1. The present writ petition has been filed seeking quashing of the order dated 3.12.2018 passed by the Director of Education (Basic), Government of Uttar Pradesh as well as the order dated 5.5.2012 passed by the Basic Shiksha Adhikari, Auraiya. Further prayer is for a Writ of Mandamus/direction to the opposite parties to accord approval to the appointment of petitioner nos.2 and 3 and pay their salary w.e.f. 24.12.2011 and 2812.2011 along with arrears of salary etc.

2. Petitioner no.1 is the committee of management of Sri Shanker Junior High School, Sirsani, Sahar, District Auraiya and petitioner nos.2 and 3 are claiming to have been appointed in the said Junior High School by the committee of management and are working in the said Junior High School on the post of Head Master and Assistant Teacher (Basic) from the date of their appointment.

3. The institution is recognized as Junior High School as per the provisions of the Uttar Pradesh Basic Education Act and it is governed under the provisions of the Uttar Pradesh Basic Education Act, 1972 and the Rules and Regulations framed thereunder. It is said that the said Junior High School was established in the year 1982-83 and recognition was granted on 11.4.1983 for imparting education up to Class-VIII. The State Government granted grant-in-aid to the said Junior High School in the year 1998 and thus, the provisions of Uttar Pradesh Junior High School (Payment of Salaries of Teachers and Other Employees) Act, 1978 (for short "Act, 1978') were made applicable to the teaching and non-teaching staff of the said Junior High School. The recruitment and conditions of services of Teachers are governed under the provisions of U.P.

Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rules, 1978 (for short "Rules, 1978').

4. As per the averments made in the writ petition, the Government had sanctioned one post of Head Master, 8 Assistant Teachers, one clerk and 3 Class-IV posts in the said Junior High School. It is further said that on 30.6.2007, post of Head Master fell vacant in the High School due to retirement of Sri Jagdish Narain Agnihotri from the said post and, thereafter, two posts of Assistant Teachers fell vacant due to retirement of two teachers, namely, Vishnu Dutt Tripathi and Rajendra Prasad Agnihotri on 30.6.2007 and 30.6.2010 respectively. It is also said that management of the school had written various letters and reminders to the Basic Shiksha Adhikari to grant permission and send Observer for making appointment against the aforesaid vacant posts of Head Master and Assistant Teachers. When no action was taken by the Basic Shiksha Adhikari, petitioner no.1 filed Writ-A No.25139 of 2010 before this Court at Allahabad. This Court disposed of the said writ petition vide order dated 6.5.2010, which reads as follow:-

"Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

Supplementary affidavit filed today is taken on record.

Petitioner before this Court claims to be Manager for Shree Shankar Junior High School, Sirsani, District Auraiya. He has made an application for grant by permission to initiate the process of selection on the post of Headmaster by making appropriate advertisement. It is stated that the post of Headmaster is lying vacant since July 2007. Similarly, there are other vacancies on the post of Assistant Teachers also.

Prayer so made is opposed by Shri S.K. Mishra, Advocate on the ground that the petitioner has been removed from the office of the Manager of the Institution and therefore he has no right to maintain the petition.

This Court is of the opinion that regular selection on the post of Headmaster in accordance with the U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rule, 1978 at the earliest in view of Rule 20 which permits temporary appointment for 6 months only. Let the Basic Shiksha Adhikari pass appropriate orders on the application made for permission to advertise. Caveator is at liberty to point out that the permission to hold selections may be granted to the duly constituted and recognised committee of management only.

Subject to the aforesaid observation made hereinabove, writ petition is disposed of."

5. It is further said that the committee of management sent a letter dated 31.5.2010 to the Basic Shiksha Adhikari to give permission for the advertisement for making appointment on the vacant post of Head Master. However, no action was taken by the Basic Shiksha Adhikari on the said request despite the order passed by this Court on 6.5.2010 in the aforesaid writ petition. Thereafter, the committee of management issued advertisement for filling up the vacant posts of Head Master and Assistant Teachers in two newspapers, Swatantra Bharat and Dainik Dinrat on 12.10.2011 and the date for holding interview was fixed on 30.10.2011. The said advertisement has been annexed as

Annexure No.4 to the writ petition, which on translation reads as under :-

"For filling up three unreserved posts (one post of Head Master and two posts of Assistant Teachers) and one unreserved post of Class-IV in Shiv Shanker Junior High School, Auraiya, the candidates having qualifications as prescribed in the Basic Education Act in the pay scale fixed by the Government, may send their applications along with complete details and certified photocopies in respect of the claim regarding educational qualifications training, experience, age etc. by Registered Post or be given at the school by 27.10.2011 For interview, the candidates should come with original documents on 30.10.2011 at 10.30 AM."

The candidates, who had sent their applications before the advertisement are not required to send again applications."

6. It would be relevant to note here that the advertisement did not give the details of the qualifications, place of interview and the pay scale, which is otherwise required to be specifically stated in the advertisement. The date for holding interview was extended further to 11.11.2011 and request was sent to the Basic Shiksha Adhikari for sending the observer.

7. The Basic Shiksha Adhikari vide letter dated 4.11.2011 demanded information regarding creation of posts in the school and it is said that the Manager of the School personally met the Basic Shiksha Adhikari and gave necessary information as desired by him. It is said that when despite various requests, observer was not sent for participating in the interviews, the committee of management held the interviews for selecting the candidates for one post of Head Master and two posts of Assistant Teachers and one post of Peon on 11.11.2011. The selection committee found petitioner no.2 most suitable candidate for appointment on the post of Head Master and requisite documents pertaining to selection of Smt. Madhu Tiwari, petitioner no.2 were sent to the Basic Shiksha Adhikari for granting approval on 14.11.2011.

8. It is further submitted that Aditya Kumar, petitioner no.3 and Awadhesh Kumar were selected on two posts of Assistant Teacher and the proceedings of selection committee in respect of them were also sent to the Basic Shiksha Adhikari on 14.11.2011 for approval.

9. Basic Shiksha Adhikari did not take any action for approving the appointments of one post of Head Master and two posts of Assistant Teachers in the school and, therefore, the committee of management issued appointment letter dated 21.12.2011 appointed Smt. Madhu Tiwari, petitioner no.2 on the post of Head Master and in pursuance thereof, petitioner no.2 joined the school on 24.12.2011 on the post of Head Master. Aditya Kumar, petitioner no.3 joined the post of Assistant Teacher on 28.12.2011 having been issued appointment letter dated 21.12.2011. However, Awadhesh Kumar, another candidate, who was selected for the post of Assistant Teacher, did not join the school. Therefore, appointment letter was issued to one Muneesh Kumar Shukla, who was at serial no.2 in the merit list on 6.1.2012, who joined the school on 10.1.2012.

10. Information regarding joining of the school by the aforesaid three selected persons was given to the Basic Shiksha

Adhikari. Again request was made for approval of the aforesaid appointments of the Head Master and two Assistant Teachers and for release of their salary from the date of their respective joining. When no action was taken by the Basic Shiksha Adhikari, the committee of management filed Writ-A No.75497 of 2011 before this Court at Allahabad. The said writ petition was disposed of by this Court on 29.2.2012 with following directions :-

"(i) Respondent No.3 shall nominate a person as contemplated under Rule 9 of Rules 1978 to be the member of Selection Committee forthwith and in any case within one week from the date of production of a certified copy of this order before him.

(ii) Regarding his conduct, inaction and inefficiency shown, as discussed above, Secretary (Secondary Education) shall take appropriate disciplinary action and complete proceedings with further information/communication of the ultimate order passed by him, to this Court, within six month from today.

(iii) On the laxity shown by S.P. Auraiya, the matter shall be looked and enquired by State Government with completion of proceedings within six months.

(iv) The petitioner shall be entitled to cost which I quantify to Rs.10,000/- against respondent No.3 which shall be paid by him to the petitioner within one week failing which on an application submitted by petitioner before Registrar General, he shall issue a requisite certificate to recover the amount of cost as arrears of land revenue from respondent no.3."

11. It is relevant to note here that the Basic Shiksha Adhikari took a specific stand before the Court in the said writ petition that in pursuance to the judgement and order dated 6.5.2010 passed by this Court in Writ-A No.25139 of 2010, the Basic Shiksha Adhikari had passed the order dated 13.1.2012, which was dispatched on 16.1.2012, rejecting the petitioners' request with regard to selection of two Assistant Teachers, but had permitted the selection for the post of Head Master by taking fresh steps for advertisement etc. subject to restriction of observance of Teacher's Eligibility Test and other directions and notifications of National Council for Teacher Education. The said order was never challenged by the petitioners. In due deference of the order passed by this Court on 29.2.2012 in Writ - A No.75497 of 2011, the Basic Shiksha Adhikari nominated Sri Jagdish Kumar Srivastava, Khand Shiksha Adhikari, Bhagya Nagar, Auraiya as observer in the selection committee.

12. Thereafter, petitioner no.1 filed another writ petition being Writ-A No.16973 of 2012 before this Court at Allahabad against nomination of the observer and for payment of salary to the alleged selected Head Master and the Assistant Teachers. However, the said writ petition was dismissed by this Court vide order dated 5.4.2012. This Court took note of the fact that the Basic Shiksha Adhikari had only nominated the Khand Shiksha Adhikari, Bhagya Nagar as his nominee to the selection committee to be constituted for appointment on the post of Head Master of the institution and, therefore, no interference was called for at that stage. It was further said that as and when the selection process would get completed and papers forwarded to the Basic Shiksha Adhikari for approval, the Basic Shiksha Adhikari would examine all aspects of the mater for approving or disapproving the

selection. The order dated 5.4.2012 reads as under:-

"Heard learned counsel for the petitioner, learned counsel for the District Education Officer and learned Standing Counsel for the State-respondents.

Under the order impugned, the District Basic Education Officer has only nominated the Khand Shiksha Adhikari, Bhagyanagar as his nominee to the Selection Committee to be constituted for appointment on the post of headmaster of the institution.

No interference at this stage of the proceedings is called for. As an when, selection process is completed and papers are forwarded to the District Basic Education Officer for approval, petitioner will have every opportunity to question the said selection on the ground that the selection has not been made by the competent Committee of Management. It is for the District Basic Education Officer to examine all aspect of the mater while approving or disapproving the said selection.

The present writ petition is dismissed subject to the observations made above."

13. In compliance of the order dated 5.4.2012 passed by this Court in the aforesaid writ petition, the Basic Shiksha Adhikari vide order dated 5.5.2012 rejected the financial approval for disbursing the salary to petitioners no.2 and 3. On the basis of the report of the Observer, the Basic Shiksha Adhikari held that the advertisement was not issued as per the provisions of Rules, 1978. The minimum experience for appointment on the post of Head Master was five years and not three years and the age was 30 years and not 25 years. The committee of management had not submitted any experience certificate, which was taken into consideration in the interview held on 8.4.2012 nor experience of the candidates was mentioned by the committee of management in its report.

14. It was further said by the Basic Shiksha Adhikari that for appointment on the post of Assistant Teacher, only nine applications were received till the last date of applications, however, in the interview held on 8.4.2012, it was said that 19 applications were received. It was held by the Basic Shiksha Adhikari that if on the last date of submission of application forms, only nine applications were received, then how on the date of interview, there could be 19 application forms and, therefore, the whole selection was bogues and suspicious one. Three candidates, namely, Vaibhav Pandey, Arti Pandey and Savita Kumari had made available the letters for interview received by them, in which only the blank paper was kept inside the envelop. It was further said that under Right to Education Act, 2009, National Council for Teacher Education had made compulsory for Teachers to be appointed for Class-I to VIII, vide notification dated 23.8.2010 that a candidate must possess minimum qualification plus Teachers Eligibility Test conducted by the State Government. Two Teachers appointed did not possess the Teachers Eligibility Test and, therefore, finding that the selection and appointment of the Head Master, two Assistant Teachers and one Peon was against the Rules, 1978, the Basic Shiksha Adhikari declined the financial approval for the said appointments.

15. It is also said that the committee of management received a letter dated 30.4.2013 sent by the Basic Shiksha Adhikari on 3.5.2013 to note that the Basic Shiksha Adhikari had appointed Kaushal

Kishore Trivedi, opposite party no.5 on the post of Head Master, Saurabh Kumar Pandey and Km. Beena, opposite parties no.6 and 7 as Assistant Teachers and gave approval. The allegation is that the said appointment was made in the office of the Basic Shiksha Adhikari with the collusion of Sri Jagdish Kumar Srivastava, Khand Shiksha Adhikari. The committee of management, however, did not issue appointment letters to the aforesaid alleged selection of opposite parties no.5, 6 and 7 by the Basic Shiksha Adhikari. Further, the Basic Shiksha Adhikari forcibly gave joining to opposite party no.5 on the post of Head Master and opposite parties no.6 and 7 on the posts of Assistant Teacher respectively.

16. It is also said that one Mohan Lal Dubey, resident of Village Darashah, Post Sahar, District Auraiya sent a complaint regarding the alleged selection made by the Basic Shiksha Adhikari of opposite parties no.5, 6 and 7 in the school to the Regional Assistant Director of Education (Basic), Kanpur Region, Kanpur. The Regional Assistant Director of Education (Basic) vide letter dated 8.8.2013 directed the Basic Shiksha Adhikari to produce the entire record pertaining to the aforesaid alleged selection held on 21.4.2013 by him.

17. When despite several complaints regarding alleged forged appointments made by the Basic Shiksha Adhikari of opposite parties no.5, 6 and 7, did not yield any result, petitioner no.1 filed a detailed complaint before the Secretary of Education (Basic), Uttar Pradesh, Lucknow with copy to the Director of Education (Basic), opposite party no.2.

18. When no action was taken on the complaint regarding alleged illegal appointments of opposite parties no.5, 6 and 7, petitioner no.1 filed Writ Petition No.6877 (SS) of 2018 before this Court. This Court disposed of the said writ petition vide order dated 13.3.2018 with direction to the Director of Education (Basic) as well as Secretary of Education (Basic), U.P., Lucknow to look into the issue and pass appropriate order strictly in accordance with law by providing an opportunity of hearing to the aggrieved persons expeditiously, say, within a period of four months. Petitioner no.1 was given liberty to provide copy of other documents and also list of aggrieved persons to the competent authority so that disposal of the representation dated 8.1.2018 of petitioner no.1 would be made strictly in accordance with law by following the principles of natural justice to all the parties concerned. In compliance of the order dated 13.3.2018 passed by this Court in the aforesaid writ petition, the Director of Education (Basic) decided the representation of the petitioner no.1 vide detailed impugned order dated 3.12.2018.

19. The Director of Education (Basic) held that vide letter dated 5.5.2012 issued by the Basic Shiksha Adhikari, Auraiya, the committee of management of the school was given permission for issuing new advertisement for filing up the said posts. In pursuance thereof, interviews were held on 21.4.2013 and Sri Jagdish Kumar Srivastva, Khand Shiksha Adhikari was present as observer in the proceedings for selection held on 21.4.2013 and he made signature on the selection proceedings. Manager and members of the committee of management and the candidates earlier selected by the committee of management had made complaints about the said selection and it was said that the selection proceedings were sham and a mere

formality and the papers were prepared in the office of the Basic Shiksha Adhikari. Considering the said complaint, the Basic Shiksha Adhikari, Auraiya was directed to make available the original documents/minutes of proceedings of selection held in pursuance to the interview held on 21.4.2013.

20. From perusal of the original papers in respect of the alleged selection, it transpired that in the proceedings, which were made available in respect of the proposal etc. by the Manager, Shiv Prakash Dubey on 13.4.2012 in the office of the Basic Shiksha Adhikari, Auraiya, the signatures in the said papers were completely different from the signatures on the papers earlier sent regarding selection in the office of the Basic Shiksha Adhikari. The Manager, Shiv Prakash Dubey had filed an affidavit and said that the selections made subsequently were completely forged and forged signatures were made on the selection proceedings. Sri Rakesh Bihari Shukla, another member of the selection committee, in his affidavit had specifically said that his signatures were forged in the proceedings of selection held by the Basic Shiksha Adhikari. There were quite difference in the selection proceedings of 2011 and 2012 and it was said that, prima facie, the proceedings of selection sent on 13.4.2012 appeared to be forged.

21. It was said that approval for selection and appointment made on the basis of forged proceedings sent vide the letter dated 13.4.2012 of Kaushal Kishore Tripathi on the posts of Head Master and Saurabh Kumar Pandey and Km. Beena on the post of Assistant Teacher were result of the forged documents, for which concerned Prabudh Kumar, Dealing Clerk, Sri Jagdish Kumar Srivastava, the then Khand Shiksha Adhikari and the observer and the Basic Shiksha Adhikari were found completely guilty.

22. So far as the selection and appointment of petitioner nos.2 and 3 made by the committee of management in pursuance to the proceedings held without permission by advertising the same on 12.10.2011 in Swatantra Bharat newspaper, it was said that the said selection proceedings were not in accordance with the provisions of the Act and the Rules and it was held so by this Court in judgment and order dated 29.2.2012 passed in Writ-A No.75497 of 2011 and, therefore, the same was declared illegal. The Director found that for giving financial approval to the appointments of petitioner no.2 on the post of Head Master and petitioner no.3 and Maneesh Kumar on the post of Assistant Teacher was not possible under law.

23. In view thereof, the Director was of the view that appointment of Kaushal Kishore Tripathi on the post of Head Master and Saurabh Kumar Pandey and Km. Beena on the posts of Assistant Teacher and for their payment of salary was not possible and for making selection and appointment on the basis of forged papers, he held Prabudh Kumar, Dealing Clerk, Jagdish Kumar Srivastava, then then Khand Shiksha Adhikari and observer and Manoj Kumar Gupta, Basic Shiksha Adhikari found guilty and directed for placing them under suspension and institution of disciplinary proceedings against them.

24. Sri Pt. S. Chandra, learned counsel for the petitioners submits that petitioners no.2 and 3 were appointed following due process of law as envisaged

in Rules, 1978 and their appointments were deemed to have been approved on 5.1.2012. He further submits that petitioners no.2 and 3 are continuously discharging their duties w.e.f. 24.12.2011 and 28.12.2011 receptively. He also submits that petitioners no.2 and 3 were fully eligible and qualified for the posts of Head Master and Assistant Teacher. It is further submitted that the impugned orders are wholly illegal and unsustainable. It is also submitted that vide notification dated 5.12.2012, Rules of 1978 were amended, whereby the requiremenet of qualifying the Teachers Eligibility Test has been made compulsory for the appointment of Assistant Teacher (Basic). The said notification had come into force w.e.f. 1.7.2012. It is further submitted that all relevant documents pertaining to the selection of petitioners no.2 and 3 were sent by petitioner no.1 to the Basic Shiksha Adhikari on 14.11.2011. As per Rule 10(5)(iii) of Rules, 1978, if the Basic Shiksha Adhikari does not take decision to approve the appointments, the same would be deemed to have been approved after 30 days. This Court vide judgement and order dated 5.4.2012 gave direction to the Basic Shiksha Adhikari to take decision for approval, but nothing was done by the Basic Shiksha Adhikari and instead he adopted forged and fabricated selection process in his office for making selection and appointment of opposite parties no.5, 6 and 7. It is, therefore, submitted that writ petition may be allowed and the opposite parties be directed to grant financial approval to the appointments of petitioners no.2 and 3 from the date of their joining in the institution.

25. In support of his submission, learned counsel for the petitioners has placed reliance on the judgment rendered in the case of ***Sanjay Kumar Singh vs. State of U.P. and others, 2019 (5) ADJ 583 (LB).***

26. On the other hand, Sri Ashutosh Shukla, learned Standing Counsel and Sri Ajay Kumar, learned counsel for opposite parties no.3 and 4 have supported the impugned orders and has submitted that this Court in its judgment and order dated 29.2.2012 passed in Writ-A No.75497 of 2011 did not find the claim of the petitioners for financial approval as valid and, therefore, directed for nomination of a person as contemplated under Rule 9 of Rules, 1978 to be the member of the selection committee. Once this Court itself did not find selection held valid and directed Basic Shiksha Adhikari for nominating a person in the selection to be held afresh after issuing fresh advertisement, the financial approval can not be granted in pursuance to the earlier selection, which was not in accordance with law. It is further submitted that this Court in subsequent order dated 5.4.2012 passed in Writ-A No.16973 of 2012 did not find any ground to interfere with the nomination of Khand Shiksha Adhikari, Bhagyanagar, Auraiya as nominee in the selection committee to be constituted for appointment on the posts of Head Master and Assistant Teacher and, it was said that the Basic Shiksha Adhikari would examine the selection process for giving approval or disapproval after selection. It is further submitted that once this Court has directed that their selection is invalid, there is no question of granting approval to the earlier selection inasmuch the same was cancelled vide order dated 5.5.2012 by the Basic Shiksha Adhikari, which was never challenged before this Court by the petitioners except in the present writ petition.

27. It is further submitted that Director had considered the order dated 5.5.2012 passed by the Basic Shiksha Adhikari in his order dated 3.12.2018 impugned in this writ petition. The Director has found that the order dated 5.5.2012 was in accordance with law. The said order dated 5.5.2012 was passed by the Basic Shiksha Adhikari in compliance of the order dated 29.2.2012 passed in Writ-A No.75497 of 2011. The selection and appointment of the teaching and non-teaching staff of the school is required to be made strictly in accordance with the provisions of Rules, 1978 as well as, as per the relevant extant Government Orders. It is also submitted that in the letter dated 24.4.2011 allegedly written by petitioner no.1 seeking permission for advertisement and demand of observer, there were cuttings and erasing in the sanctioned posts, as such the same was being got verified, but before the said exercise could get completed, petitioner no.1 illegally selected and appointed petitioners no.2 and 3 and submitted their papers for financial approval.

28. It is also submitted that as per Rule 4(2)(iii) of Rules, 1978, in which fifth amendment was made in the year 2008, minimum five years experience was required for the post of Head Master in place of three years teaching experience. The minimum age of the Head Master has been provided as 30 years in place of 25 years, but in the alleged interview proceedings dated 8.4.2012, no documents regarding experience had been enclosed.

29. It is further submitted that till the last date of receipt of applications, only nine application forms were received, however, in the interview, it was said that 19 application forms were received. The Director has found substance in the allegations that three candidates, namely, Vaibhav Pandey, Arti Pandey and Savita Kumari vide letter dated 29.3.2012 informed that they had received the registered envelop dated 24.3.2012 sent by the institution having blank papers. It is further submitted that under the Right to Education Act, 2009, National Counsel for Teacher Education had issued notification dated 23.8.2010 for having the minimum eligibility criteria for the Teachers of Class-I to VIII to qualify the Teachers Eligibility Test conducted by the State Government. It is further submitted that petitioner no.1 had selected and appointed ineligible persons on the post of Head Master and Assistant Teacher and Class-IV employee and, therefore, financial approval has not been granted.

30. Once the Director has held that appointments of Kaushal Kishore Tripathi on the post of Head Master and Saurabh Kumar Pandey and Km. Beena on the post of Assistant Teachers were on the basis of forged documents in the institution and the selection of these candidates was made in collusion and conspiracy with the Basic Shiksha Adhikari, Dealing Clerk and Khand Shiksha Adhikari, the Basic Shiksha Adhikari had cancelled the selection of such persons and disciplinary proceedings have been initiated against the guilty officials. Therefore, submission is that petitioners no.2 and 3 are not eligible to be appointed and before the sanctioned strength could be verified, in a hurried manner, the advertisement was issued. The advertisement is also illegal inasmuch as it did not contain the details of the post, qualification, eligibility criteria, experience, pay scale and the place of interview etc. It is submitted that correct decision has been taken for not granting the

financial approval and this Court may not grant any indulgence in this writ petition.

31. I have considered the submissions advanced on behalf of the learned counsel for the petitioners as well as by the learned counsel for the opposite parties and perused the record.

32. It is not in dispute that the Junior High School in question is governed under the provisions of Act, 1972 and the Rules framed thereunder as well as the provisions of Uttar Pradesh Junior High School (Payment of Salaries of Teachers and Other Employees) Act, 1978 and the provisions of Rules, 1978. The State Government has framed Rules in pursuance to the powers vested under Section 19 of the Act, 1972, which are called "Uttar Pradesh Basic Education (Teachers) Service Rules, 1981".

33. Rule 4 of the Rules, 1978 provides the minimum qualification for the post of Assistant Teacher and Head Master of a recognized School, which reads as under :-

*"**4. Minimum qualification**. - (1) The minimum qualifications for the post of Assistant Teacher of a recognised school shall be a Graduation Degree from a University recognised by U.G.C., and a teachers training course recognized by the State Government or U.G.C. or the Board as follows :-*

1. Basic Teaching Certificate.

2. A regular B.Ed. degree from a duly recognized institution.

3. Certificate of Teaching.

4. Junior Teaching Certificate.

5. Hindustani Teaching Certificate.

(2) The minimum qualifications for the appointment to the post of head master of a recognized school shall be as follows -

(a) A degree from a recognized University or an equivalent examination recognized as such.

(b) A teacher's training course recognized by the State Government or U.G.C. or Board as follows :-

1. Basic Teaching Certificate.

2. A regular B.Ed. degree from a duly recognized Institution.

3. Certificate of Teaching;

4. Junior Teaching Certificate.

5. Hindustani Teaching Certificate.

(c) Five years teaching experience in a recognized school]."

34. It is also important to note here that how the advertisement has to be published. Rule 7 of Rules, 1978 provides the procedure for issuing advertisement, which reads as under :-

*"**7. Advertisement of vacancy**. -[(1) No vacancy shall be filled, except after its advertisement in at least two newspapers one of whom must have adequate circulation all over the State and the other in a locality the school is situated.]*

(2) In every advertisement and intimation under clause (1), the Management shall give particulars as to the name of the post, the minimum qualifications and age-limit, if any, prescribed for such post and the last date for receipt of applications in pursuance of such advertisement."

35. From perusal of Rule 7 of Rules, 1978, it is evident that Rule 7(2) provides that the advertisement for the post shall give particulars as to the name of the post, the minimum qualifications and age-limit, if any, prescribed for such post and the last date for receipt of applications in pursuance of such advertisement. The advertisement as noted above, does not satisfy the

conditions of Rule 7 of Rules, 1978. If the advertisement is defective, it is sufficient to cancel the selection and for not giving approval to the appointment made in pursuance to such a defective advertisement.

36. The defect in advertisement would be fatal in selection proceedings. The law is well settled that a defective advertisement may preclude the eligible candidates from applying for selection. A valid advertisement ensure the recruitment process as it enable the eligible candidates to participate in the selection. In case such eligible candidates are prevented from participating in the selection due to the defect in the advertisement, the selection proceedings would stand vitiated.

37. When the statute provides for issuing advertisement in a particular manner and the advertisement has not been issued in compliance of the said statutory prescription, the selection made in pursuance to the said defective advertisement would get vitiated.

38. From perusal of the advertisement, it would be evident that the advertisement was not issued for making selection from the most eligible candidates, but an information was published for holding the interview. Such advertisement is wholly defective and cannot be considered to be issued in accordance with requirement of Rule 7 of Rules, 1978. It is also relevant to note here that requirement is that the advertisement should be issued in two newspapers having wide circulation. Newspaper, Dainik Dinrat, wherein the advertisement was also issued along with advertisement in Swatantra Bharat virtually has no circulation. Thus, the advertisement was highly defective on this ground also inasmuch the advertisement was not issued in two newspapers having wide circulation.

39. U.P. Basic Education (Teachers) Service Rules, 1981 provides the essential qualification for appointment of the Head Master of a Junior High School. Minimum age for appointment on the post of Assistant Teacher and the Head Master is provided under Rule 8 of the Rules, 1978, which reads as under:-

*"**8. Age limit**. - The minimum age shall on the first day of July of the academic year following next after the year in which the advertisement of the vacancy is made under Rule 7 be :*

(1) In relation to the post of an Assistant Teacher 21 years.

(2) In relation to the post of Head Master 30 years.]"

40. It is also important to note here that after coming into force the Right to Education Act, 2009, National Council for Teacher Education had issued notification dated 23.8.2010 for providing the minimum eligibility criteria for the Teachers of Class-I to VIII as well as requirement of quantifying the Teacher's Eligibility Test conducted by the State Government. It can not be disputed that the eligibility as prescribed by the notification dated 23.8.2010 for appointment of Teachers was made applicable to all the Primary and Junior High Schools since the date of issuance of the notification even though the Rules were amended in 2012 to incorporate the said qualification. Thus, the appointment of Assistant Teachers made after 23.8.2010 has to satisfy the qualifications as prescribed in the said notification. The constitution of the

selection committee and procedure for selection are provided in Rules 9 and 10 of Rules, 1978, which read as under:-

*"**9. Selection Committee**. -For appointment of Headmaster and Assistant Teacher in institutions other than minority institutions and in the minority institutions, tire Management shall constitute a Selection Committee as follows :]*

A - Institutions other than Minority Institutions :

(i) For the post of headmaster :

(1) Manager;

(2) a nominee of the District Basic Education Officer;

(3) a nominee of the Management;

(ii) For the post of Assistant Teacher;

(1) Manager;

(2) Headmaster of the recognised school in which appointment is to be made;

(3) a nominee of the District Basic Education Officer;

B - Minority Institutions :

(i) For the post of Headmaster;

(1) Manager;

(2) two nominees of Management;

(ii) For the post of Assistant Teacher;

(1) Manager;

(2) Headmaster of the recognised school in which the appointment is to be made;

[(3) A specialist in the subject nominee by the District Basic Education Officer.]

***10. Procedure for selection**. -(1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment.*

(2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of the candidates and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the management.

(4) The Manager shall within one week from the date of receipt of the papers under clause (3) send a copy of the list to the District Basic Education Officer.

(5) (i) If the District Basic Education Officer is satisfied that -

(a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) the procedure laid down in these rules for the selection of Headmaster or Assistant Teacher, as the case may be, has been followed he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the Management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee."

41. The next issue which needs to be considered, is that whether petitioner no.1 was justified in going ahead with the selection process when the Basic Shiksha Adhikkari was verifying the creation of

posts and requirement of posts in the institution inasmuch as in the letter dated 24.4.2011, whereby the permission was sought for filing up one post of Head Master, two posts of Assistant Teachers and one Class-IV post, there were cuttings and over writings and for verifying the facts as mentioned in the letter dated 24.4.2011 written by the committee of management, the Basic Shiksha Adhikari vide letter dated 26.5.2011 to the Divisional Assistant Director of Education (Basic), IVth Region, Allahabad to verify the correct facts. However, before the facts could get verified, a defected advertisement was issued and a request was made for nominating a nominee in the selection committee.

42. After coming into force the Right to Education Act, 2009, the Government issued Government Order No.1828/15.11-2011 on 7.9.2011, whereby for appointment of the teachers for Class-I to VIII, Teacher's Eligibility Test was made an essential qualification as per the notification dated 23.8.2010 issued by the National Council for Teacher Education. Basic Shiksha Adhikari vide letter dated 4.11.2011 in pursuance to the letter written by the Assistant Director of Education (Basic), Allahabad Division, Allahabad dated 30.9.2011 requested following information from petitioner no.1:-

(i) The proposal for creation of posts;

(ii) Papers of registration of sale deed in respect of the land of the school;

and directed petitioner no.1 to submit the above information as desired by the Assistant Director of Education (Basic), Allahabad Division, Allahabad within a period of one week.

43. Purpose of giving permission before making advertisement, is to verify the strength of the students, requirement of teachers and employees in the institution. Therefore, when the inquiry was still on at the level of the Assistant Director of Education (Basic), Allahabad Division, Allahabad, petitioner no.1 could not have gone ahead with the selection proceedings in pursuance to the advertisement and thus, the selection and appointment of petitioners no.2 and 3 is also vitiated on this ground.

44. In the writ petition, it has been nowhere stated that petitioner no.2 had five years experience as required under Rule 4(2)(3) of Rules, 1978 and she had minimum age of 30 years and petitioner no.3 had qualification of having passed Teacher's Eligibility Test examination as prescribed in the notification dated 23.8.2010 issued by the National Council for Teacher Education and the State Government Order No.1828/15.11-2011 on 7.9.2011.

45. The specific stand of the opposite parties is that petitioners no.2 and 3 did not fulfill the eligibility condition for appointment on the post of Head Master and Assistant Teacher. If petitioners no.2 and 3 do not have the essential qualification as prescribed under the statute, their appointment on the post of Head Master and Assistant Teacher is void ab initio and they cannot claim any benefit of any alleged inaction on the part of the Basic Shiksha Adhikari. The void and illegal appointments would not become valid and legal if the Basic Shiksha Adhikari did not take decision within a period of one month as required under Rule 10 of Rules, 1978.

46. The judgment cited by the learned counsel for the petitioners in the case *Sanjay Kumar Singh* (supra) would be applicable, if the advertisement was issued

in accordance with Rule 7 of the Rules, 1978 and the candidates do possess the requisite essential qualification and the selection is made free and fair. In the present case, the selection has not been made free and fair inasmuch as three candidates had received envelops containing blank papers sent by petitioner no.1 intimating the date for interview. If the Basic Shiksha Adhikari was not granting approval, petitioner no.1 could have approached the higher authorities or the Court against the alleged inaction of the Basic Shiksha Adhikari, but petitioner no.1 went ahead to advertise the posts. Therefore, I do not find any ground to interfered with the impugned orders.

47. In view thereof, the writ petition fails, which is hereby ***dismissed.***

(2022)02ILR A890
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.02.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Special Appeal No. 38 of 2022

Shivam Das Chandani & Ors. ...Appellants
Versus
Prabhu N Singh & Ors. ...Respondents

Counsel for the Appellants:
Virendra Kumar Dubey

Counsel for the Respondents:
Ratnesh Chandra

A. Service Law - Maintainability of special appeal-no appeal is maintainable under Chapter VIII Rule 5 of this Rules of the Court against any order passed in proceedings under Contempt of Courts Act as it is a self contained Code and it also provides for a remedy of appeal under section 19 though only against specific type of orders or decisions-In the present case also since the Hon'ble single Judge has refused to entertain contempt petition, the appeal is not maintainable under Chapter VIII Rule 5 of the Rules to such proceedings where an order dismissing an application for contempt is challenged would not be attracted except when the contempt court decides to pass orders issuing directions in exercise of powers beyond the Contempt of Courts Act, which order would be referable to the powers vested in the High Court under Article 226 of the Constitution of India rather than Contempt of Courts Act.(Para 1 to 23)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Pune Municipal Corp. & anr. Vs Harakchand Misirimal Solanki & ors. (2014) 3 SCC 183

2. St. of Har. & ors. Vs G.D. Goenka Tourism Corp. Ltd. & anr. (2018) 3 SCC 585

3. Indore Development Authority Vs Shailendra (Dead) thru LRs & ors. (2018) 3 SCC 412

4. Midnapore Peoples' Coop. Bank Ltd. & ors. Vs Chunilal Nanda & ors. (2006) 5 SCC 399

5. Roop Singh Vs Vinay Kumar Jauhari & ors. (2020) 142 ALR 144

6. Hub Lal Yadav Vs Mahendra & ors., Spl. Appeal No. 23 of 2017

7. Sheet Gupta Vs St. of U.P. & ors. (2020) AIR All 46 FB

8. Smt. Shubhawati Devi Vs R.K. Singh & anr.(2004) 3 AWC 2414

9. Chandra Shekhar Vs J.P. Rajpoot & ors. (2006) 3 AWC 2904

10. Vinita M. Khanolkar Vs Pragna M. Pai & ors. (1998) 1 SCC 500

11. J.S. Parihar Vs Ganpat Duggar (1996) 6 SCC 291

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J. &
Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Mr. O.P. Srivastava, learned Senior Advocate assisted by Mr. Virendra Kumar Dubey, learned counsel for the appellant and Mr. Ratnesh Chandra, learned counsel for the respondent no. 1.

2. A preliminary objection regarding maintainability of the special appeal under Chapter VIII Rule 5 of the Rules of the Court has been raised on the ground that the order impugned dated 05.01.2022 has been passed in the Contempt Application (Civil) No. 1261 of 2017; Shivam Das Chandani and 3 others vs. Prabhu N. Singh posted as Vice Chairman and others; whereby the learned Contempt Judge finding that the judgment and order dated 07.10.2015 passed by the Division Bench in Review Petition No. 7291(MB) of 2005 has been complied with, has dismissed the contempt application and consigned it to record.

3. The learned Senior Counsel appearing on behalf of the appellants says that the order impugned is not a judgment dismissing the contempt application as no finding has been recorded regarding the compliance of the judgment and order dated 07.10.2015 passed by the writ Court. It has been submitted that the Hon'ble Contempt Judge has only mentioned the facts as argued by the learned counsel for the appellants and as argued by the learned counsel for the contemnors and thereafter observed that no cause of action survives and the contempt application was accordingly consigned to record. He has read out the relevant portion of the order dated 05.01.2022 which is being quoted hereinbelow:

"3. This contempt application has been filed for wilful disobedience of judgment and order dated 07.10.2015 passed by this Court in Review Petition No.7291 (M/B) of 2005.

4. Learned Senior counsel for the applicants submitted that the opposite party has deliberately not complied with the aforesaid order of this Hon'ble Court.

5. On the other hand, learned counsel for the opposite party has opposed the submission of learned counsel for the applicants and drawn attention of this Court towards compliance affidavit filed on 27.09.2018, wherein in paragraphs 5 to 8 it has been mentioned that compliance of the order dated 07.10.2015 has been made.

6. In view of the above, no cause of action survives in the present contempt application.

7. The contempt application is, accordingly, consigned to record."

It has been submitted that by referring to "cause of action" and by referring to the expression by the Court "consigned to record", the contempt Judge has exercised writ jurisdiction and not the contempt jurisdiction.

4. It has been submitted that a writ petition was filed for compensation for land acquired by the respondents which writ petition was initially dismissed. Later on, on the basis of the judgment of the Apex Court in the case of ***Pune Municipal Corporation and another vs. Harakchand***

Misirimal Solanki and others (2014) 3 SCC 183 a Review Petition was filed which was entertained and the writ petition eventually allowed and the acquisition proceedings relating to the plots of the appellants were held to have lapsed and a direction was issued that the respondents will make payment of compensation to the review-petitioners according to the provisions of the Act of 2013. Later on, a reference had been made to a Larger Bench of the Supreme Court to decide the question with regard to "whether if compensation is not actually paid to the tenure holder on acquisition of his land, Section 24 (2) of the New Act of 2013 would apply and it would mean that the entire acquisition would lapse?"

5. It has been submitted by the learned counsel for the appellants that when the compensation was not paid in accordance with the Act of 2013 a contempt application was filed, namely, Contempt Application (Civil) No. 1261 of 2017. A compliance affidavit was filed therein by the respondents wherein they stated that the compensation had been paid after constitution of a committee in this regard for the determination of such compensation and as per the decision taken in its meeting dated 14.08.2017. The appellants had filed objection to such compliance affidavit and this Court by its order dated 25.04.2018 granted time to the counsel for the respondents to place relevant documents to substantiate their claim that calculation has been done in accordance with the Act of 2013 and the appellants are entitled to get the compensation according to the circle rate prevalent at the time of acquisition in the year 1986.

Another affidavit of compliance was filed by the contemnors in which in paragraph 5 to 8 the details of the Members of the Committee constituted for determining the compensation by the State Government were mentioned and also the preparing of calculation sheet by the ADM (Land and Acquisition) regarding the compensation to the affected persons. The calculation sheet was reconsidered in compliance of the Court's order passed in Contempt Application on 09.05.2018 and compensation for a total area of 1 bigha 2 biswa of the three plots in question was redetermined to the tune of Rs. 6,07,666.09.

6. It has been submitted by the learned counsel for the appellants that the compliance affidavit was refuted by filing another objection by the appellants. In the meantime, the Vice Chairman of the Lucknow Development Authority was transferred out and a new Vice Chairman came and an impleadment application was filed which was placed on record but no order for impleadment of the new incumbent was passed thereon. When the case came up before the Court on two subsequent occasions, the Contempt Judge deferred the hearing of the contempt application in view of the orders passed by the Supreme Court in the case of *State of Haryana and others vs. G.D. Goenka Tourism Corporation Limited and another; (2018) 3 SCC 585 and Indore Development Authority vs. Shailendra (Dead) through Legal Representatives and Ors; (2018) 3 SCC 412* observing that an application for review of the judgment of the writ Court dated 07.10.2015 has been filed which was pending and directed the matter to listed in the month of January, 2022.

7. When the matter was listed on 05.01.2022, the contempt Judge relying upon the paragraphs 5 to 8 of the affidavit

of compliance filed on 27.09.2018 observed that the compliance has been made and no cause of action survives in the contempt application and the contempt application be consigned to record.

8. The learned Senior Counsel appearing on behalf of the appellants stated before the Court that while on earlier two dates there was an observation that the writ Court's order has not been complied with, by the order dated 05.01.2022 the learned Contempt Judge dismissed the contempt application without recording any finding with regard to whether writ Court's order has been complied with and only observed that no cause of action survives and the application be consigned to record. Such an order could not have been passed in the contempt jurisdiction and was actually passed as if the Contempt Judge was sitting in the Writ jurisdiction and, therefore, the Special Appeal under Chapter VIII Rule 5 of the Rules of the Court shall lie against such an order.

9. The learned Senior Counsel has placed reliance upon the judgment of the Apex Court in the case of ***Midnapore Peoples' Coop. Bank Ltd. & Others vs. Chunilal Nanda and others; (2006) 5 SCC 399*** wherein the Supreme Court had observed that if any directions are given by the Contempt Judge that go beyond his jurisdiction, but not punishing the contemnors for contempt of the writ Court's order, no appeal would lie under Section 19 of the Contempt of Courts Act. However, the petitioner is not without remedy and an intra Court appeal under Clause 15 of the Letters Patent may be entertained.

10. The learned Senior Counsel read out the paragraphs 6, 7 and 8 of the judgment rendered in ***Midnapore Peoples' Coop. Bank Ltd. & Others (supra***) and also read out its paragraph 10.3 and paragraph 11 in their entirety to say that the Contempt Judge cannot make observations on the merits of the case, if such observations are made, but not punishing the contemnors in the contempt petition, the said order would be appeallabe under Chapter VIII Rule 5 of the Rules of the Court.

11. The learned Senior Counsel has also referred to the judgment rendered by the Division Bench of this Court in the case of ***Roop Singh vs. Vinay Kumar Jauhari and others; 2020 (142) ALR 144*** and read out paragraph 7 of the said judgment wherein paragraph 11 of the judgment in the case of ***Midnapore Peoples' Coop. Bank Ltd. & Others (supra)*** has been relied upon to say that if any directions are made by the Contempt Judge which go beyond the original order passed by the writ Court, then special appeal would lie in such a case.

12. Mr. Ratnesh Chandra, learned counsel appearing for the respondent no. 1 in reply to the said submissions of the learned counsel for the appellants has pointed out from the judgment rendered by the Supreme Court in ***Midnapore Peoples' Coop. Bank Ltd. & Others (supra)*** paragraph 4, and referred to the facts of the said case where an employee had been suspended and had approached the writ Court pending initiation of disciplinary proceedings against him. The employee had filed a writ petition challenging the suspension order on the ground that the charge-sheet had not been issued. The said writ petition was disposed of directing the Bank to deliver a copy of the charge-sheet which had been issued by the Bank and also directing the delinquent employee to

submit his reply and the Enquiry Officer to conclude the enquiry within a period of three months from the date of communication of the order, subject to the employee rendering full cooperation for the conduct of the disciplinary proceedings. The Bank in compliance issued the charge-sheet. The employee filed his reply. The Enquiry Officer concluded the enquiry and submitted his report holding the delinquent employee to be guilty on all the charges. A show cause notice was issued on the basis of the said report to the employee giving him opportunity to submit a representation.

At this stage, the employee filed another writ petition before the High Court for quashing the enquiry proceedings, which writ petition was allowed and the writ Court directed the enquiry proceedings and the consequential action taken by the Bank to have become non est and the same were set aside. A direction was issued to the Chairman of the Bank to appoint someone who is not a Member of the Bank's Board of Directors as Enquiry Officer, and to conduct the enquiry de novo and to complete the same within four months from the date of its first sitting and the disciplinary authority was directed to take suitable action on the basis of such report. The Bank was directed to pay suitable subsistence allowance to the employee during the period of suspension. No order was passed by the writ Court setting aside the suspension order. The Bank in its wisdom and on the basis of the legal advice complied with the writ Court order, however, the enquiry was not completed within four months.

The employee moved a contempt petition impleading the Officers of the Bank, the Enquiry Officer "eo-nominee" as respondents no. 1 to 4 in the said contempt petition. The contempt Judge summoned the enquiry report from the Enquiry Officer and made observations that the Enquiry Officer had not proceeded with due diligence. The contempt Judge passed an order directing the Enquiry Officer to show cause as to why he should not be punished for committing contempt and that the respondents to remain present personally on all the dates thereafter and held him to be disqualified to be Enquiry Officer and directed that he shall cease to be Enquiry Officer and directed the Chairman of the Bank to appoint another persons as Enquiry Office. The contempt Judge further proceeded to direct immediate reinstatement in service of the delinquent employee by the Bank and the that he should be deemed to be in service and to be paid his salary including all arrears within four weeks from the date of passing of the order and revoking the suspension order with immediate effect.

Aggrieved by the such directions passed by the contempt Judge the Bank approached the Division Bench in a Contempt Appeal which was rejected on the ground that the order of the contempt Judge did not punish the contemnors. The Division Bench directed the appellant to forthwith implement the order of the contempt Judge. It had also observed in its order that the appeal did not satisfy the requirements of Clause 15 of the Letters Patent and, therefore, could not be entertained as a Letters Patent Appeal. The Bank left with no other remedy approached the Supreme Court under Article 136 of the Constitution. The Supreme Court having considered the arguments raised by the Bank as well as the respondents therein, framed three questions for it to decide as mentioned in paragraph 9 of the judgment.

13. Paragraph 9 of the judgment has been read out and is being quoted hereinbelow:

"9. On the aforesaid facts and the contentions urged, the following questions arise for consideration :

(i) Where the High Court, in a contempt proceedings, renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, whether it is appealable under Section 19 of the Contempt of Courts Act, 1971 ? If not, what is the remedy of the person aggrieved ?

(ii) Where such a decision on merits, is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal is available under clause 15 of the Letters Patent ?

(iii) In a contempt proceeding initiated by a delinquent employee (against the Enquiry Officer as also the Chairman and Secretary in-charge of the employer-Bank), complaining of disobedience of an order directing completion of the enquiry in a time bound schedule, whether the court can direct (a) that the employer shall reinstate the employee forthwith; (b) that the employee shall not be prevented from discharging his duties in any manner; (c) that the employee shall be paid all arrears of salary; (d) that the Enquiry Officer shall cease to be the Enquiry Officer and the employer shall appoint a fresh Enquiry Officer; and (e) that the suspension shall be deemed to have been revoked ?"

14. It has been argued by Mr. Ratnesh Chandra that in ***Roop Singh (supra***), the Division Bench was considering whether a special appeal would be maintainable where the Contempt Judge did not decide the rights of the parties and only directed listing of the case by making certain observations with regard to charges having been framed, and directing the counsel for the respondents therein to take further instructions. The Court observed that under Section 19 of the Contempt of Courts Act and also under Chapter VIII Rule 5 of the Rules of the Court, no direction on the merits of the case having been given, no appeal would lie and the appeal was held to be not maintainable and dismissed.

15. The learned counsel for the respondents, Mr. Ratnesh Chandra, has referred to several judgments of this Court given in the cases of ***Hub Lal Yadav vs. Mahendra and 4 Others (Special Appeal No. 23 of 2017)*** decided on 27.07.2017; ***Sheet Gupta vs. State of U.P. & Others, AIR 2010 All 46 (FB); Smt. Shubhawati Devi vs. R.K. Singh and another; (2004) 3 AWC 2414*** and in the case of ***Chandra Shekhar vs. J.P. Rajpoot and Ors; 2006 (3) AWC 2904.***

16. In response to the arguments raised by the learned counsel for the respondent no. 1, Mr. O.P. Srivastava, learned Senior Counsel in rejoinder has submitted that on earlier two occasions when the contempt petition was listed before the Contempt Judge and objection was raised that the order of the Writ Court has not been complied, the counsel for the respondents had been given time to seek instructions i.e., on 25.04.2018 and again by the order dated 13.07.2019. The learned counsel for the appellants has referred to the objection raised and filed before the Contempt Judge regarding the allegations that the Writ Court's order had not been complied with to say that the compensation should have been given in accordance with the Act of 2013 on the market value of the land determined in 2014 and 2015 and not as if the land had been acquired in 1986 as this Court sitting in the Writ jurisdiction had held that the earlier acquisition proceedings had lapsed lapsed due to non payment of compensation to the tenure

holder with respect to the alleged plots of land in question.

17. The Supreme Court in ***Midnapore Peoples' Coop. Bank Ltd. & Others*** (supra) while referring to question 1 made observations that the appeal as of right would lie under Section 19 of the Contempt of Courts Act if the High Court exercises it jurisdiction to punish for contempt. The jurisdiction of the High Court in a contempt petition is to punish. When no punishment is imposed by the High Court it is difficult to say that the High Court has exercised its jurisdiction or power as conferred on it by Article 215 of the Constitution. If no such jurisdiction is exercised a Contempt Appeal would not lie under Section 19 of the Act. It further observed in paragraph 11 with reference to the issues framed by it as follows:

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarized thus :

I. An appeal under section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of 'jurisdiction to punish for contempt' and therefore, not appealable under section 19 of CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever 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). The first point is answered accordingly."

18. In ***Hub Lal Yadav*** *(supra*), the Court was considering the order passed by the Contempt Judge dated 05.12.2016 dismissing the contempt application as not maintainable and observing that the applicant had remedy under Order XXXIX Rule 2A of the Code of Civil Procedure. The Division Bench referred to the judgments rendered by the Supreme Court in *Baradakanta Mishra Vs. Justice Gatikrushna Misra; (1975) 3 SCC 535, Purshotam Dass Goel Vs Justice B.S.*

Dhillon; (1978) 2 SCC 370, Union of India Vs. Mario Cabral e Sa; (1982) 3 SCC 262, D.N.Taneja Vs. Bhajan Lal; (1988) 3 SCC 26, State of Maharashtra Vs. Mahboob S. Allibhoy;(1996) 4 SCC 411 and J.S. Parihar Vs. Ganpat Duggar; (1996) 6 SCC 291 and observed that in all the aforesaid cases, it has been held that if the contempt Court refuses to initiate contempt proceedings, an appeal would not be maintainable under Section 19 of Contempt of Courts Act. It referred to the judgment in the case of ***Midnapore Peoples' Coop. Bank Ltd. & Others (supra)*** and quoted paragraph 11 thereof and also the judgment rendered in ***Vinita M. Khanolkar vs. Pragna M. Pai and others; (1998) 1 SCC 500*** to say that no appeal even under Chapter VIII Rule 5 of the Rules of the Court would be maintainable. It observed that the contempt proceedings are quasi criminal in nature and, therefore, provisions of Chapter VIII Rule 5 of the Rules of the Court to such proceedings where an order dismissing an application for contempt is challenged would not be attracted except when the contempt court decides to pass orders issuing directions in exercise of powers beyond the Contempt of Courts Act, which order would be referable to the powers vested in the High Court under Article 226 of the Constitution of India rather than the Contempt of Courts Act.

19. In ***Sheet Gupta (supra),*** the Larger Bench observed in paragraph 18 as follows:

"18. Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not lie in the following circumstances:

1. The judgment passed by one Judge in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court;

2. the order made by one Judge in the exercise of revisional jurisdiction;

3. the order made by one Judge in the exercise of the power of Superintendence of the High Court;

4. the order made by one Judge in the exercise of criminal jurisdiction;

5. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by

(i) the tribunal,

(ii) Court or

(iii) statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of

(i) the Government or

(ii) any officer or

(iii) authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India."

20. In ***Smt. Shubhawati Devi*** (supra), this Court observed in paragraph 38 and 39 as follows:

"38. There may be another ground for holding that an appeal under Chapter VIII. Rule 5 of the Rules against an order discharging the contempt notice is not maintainable, in law. A Division Bench of this Court in Sheo Charan v. Naval and Ors., 1997 (2) UPLBEC 1215 : 1997 AWC 1909, has held that Section 19 of the Act has created a right of appeal from an order or decision of the Court imposing punishment for contempt. There is no provision for appeal under the Act against the decision discharging the notice of contempt and/or dismissing the contempt petition. In view of the fact that the Act provides for appeal and also lays down the orders/decisions against such an appeal can be filed, the intention of the Legislature must be said to be that an appeal cannot be filed under Clause 10 or under Clause 15 read with Chapter VIII, Rule 5 of the Rules as the Contempt of Courts Act is a complete Code wherein provision for appeal has been specifically provided.

39. Under Chapter VIII, Rule 5 of the Rules appeal is provided before the Division Bench of this Court from a judgment not being a judgment specified therein, of one of the learned Judges of this Court. Therefore, the question that needs to be decided as to whether an appeal from a decision of the learned Judge made in the exercise of his power under the Act is maintainable even though the Act itself has provided for an appeal from such a decision. We are in full agreement with the views expressed by the Division Bench of this Court in Sheo Charan (supra), in which it has been clearly established that if the Statute, which has conferred the jurisdiction on the Court, itself lays down the procedure, and provides for appeal from its decision, the appeal can be filed only under and in accordance with such a statute. In such a case general right of appeal from a decision of the Court stands excluded by the statute, which has conferred the jurisdiction on the Court. Such being the position, we are, therefore, of the view that an appeal against a decision rejecting the contempt petition was not maintainable also under Chapter VIII. Rule 5 of the Rules. The same view has been expressed by a Division Bench of this Court in A.P. Verma and Ors v. U.P. Laboratory Technicians Association, Lucknow and Ors., 1998 (3) AWC 2264 : (1998) 3 UPLBEC 2333, wherein it has been held that no appeal is maintainable under Chapter VIII, Rule 5 of the Rules of the Court against any order passed in a proceeding under the Contempt of Courts Act as it is a self contained Code."

21. In ***Chandra Shekhar*** (supra), the Division Bench observed in paragraph 10 and 11 as follows:

"10. In A. P. Verma (supra) also the Division Bench of this Court agreeing with the view taken in the aforesaid case has held that under Chapter VIII, Rule 5 such an appeal is not maintainable and in para 6 this Court has observed as under:

... We are in respectful agreement with the view taken in the aforesaid decisions that no appeal is maintainable under Chapter VIII. Rule 5 of this Rules of the Court against any order passed in proceedings under Contempt of Courts Act as it is a self contained Code and it also provides for a remedy of appeal under Section 19 though only against specific type of orders or decisions.

11. In the present case also since the Hon'ble single Judge has refused to

entertain contempt petition, the appeal under Chapter VIII, Rule 5 of the Rules of the Court, is not maintainable and the contention of the learned Counsel for the appellant, therefore, is rejected."

22. This Court having heard the learned counsel for the parties and having gone through the judgments referred to by the learned Senior Counsel for the appellants and also Mr. Ratnesh Chandra, learned counsel appearing for the respondent no. 1, finds that the Contempt Judge has expressed a definite opinion in his judgment dated 05.01.2022 that the Writ Court order dated 07.10.2015 has been complied with, even though not in so many words, by observing that no cause of action survives and by consigning the contempt application to record. Such an order dismissing the contempt application would not be amenable to intra Court appeal under Chapter VIII Rule 5 of the Rules of the Court and there is no observation at all in the exercise of writ jurisdiction under Article 226 of the Constitution as argued by the learned Senior Counsel. In view of the judgment in the case of ***J.S. Parihar Vs. Ganpat Duggar; (1996) 6 SCC 291***, it will always be open for the appellants to challenge the orders passed by the respondents before the appropriate Forum.

23. The preliminary objection raised regarding maintainability of the special appeal is sustained and the special appeal is ***dismissed*** as not maintainable with a cost of Rs. 50,000/- which is to be paid by the appellants in the Registry of this Court within four weeks from today. In case of failure to deposit the cost as directed by this Court within the time prescribed, it shall be the duty of the Senior Registrar of this Court to inform the District Magistrate, Lucknow of the order passed by this Court and the District Magistrate shall proceed to collect the cost as arrears of land revenue from the appellants and to deposit it in this Court.

(2022)02ILR A899
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No. 15873 of 2021

Anand Bihari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vineet Kumar Singh, Sri Risabh Srivastava, Sri H.N. Singh (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Avanish Mishra, Sri M.N. Singh, Sri Nipun Singh

A. Service Law - Medical Council of India Minimum Qualification for Teachers in Medical Institutions Regulations, 1998-challenge to-appointment-unexplained delay of 4 years in filing the writ petition-post of lecturer-cum-Statistician is a specialized post in a medical fraternity and the prescription of qualification is a specialized task of the experts being academicians which cannot be made a subject matter of a judicial review, particularly when there is nothing on record to show that the rule making authority has no legislative competence to lay down the qualification-limitation does not strictly apply to proceedings under Article 32 or 226 of the Constitution of India, nevertheless, such rights cannot be enforced after an unreasonable lapse of time-delay defeats equity-it is a trite law

that where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the fact that they are similarly situated to the other candidates who obtain the benefit of the judgment.(Para 1 to 30)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. P.V. Joshi & ors. Vs Acctt. Gen., Ahmedabad & ors. (2003) 2 SCC 632

2. Sanjay Kumar Manjul Vs U.P.S.C. (2006) 8 SCC 42

3. Zahoor Ahmad Rather Vs Sheikh Imtiyaz Ahmad (2019) 2 SCC 404

4. Mah. Public Service Comm. Vs Sandeep Shriram Warade (2019) 6 SCC 362

5. PNB Vs Anit Kumar Das (2020) SCC Online SC 897

6. Deepak Singh & ors. Vs St. of U.P. & ors. (2020) All LJ 596 FB

7. Asheesh Kumar Vs St. of U.P. & ors. (2018) 3 SCC 55

8. P.S. Sadasivaswamy Vs St. of T.N. (1975) 1 SCC 152

9. SS Balu Vs St. of Ker. (2009) 2 SCC 479

10. Vijay Kumar Kaul Vs UOI (2012) 7 SCC 610

11. St. of U.P. Vs Arvind Kumar Srivastava (2015) 1 SCC 347

12. Chairman/MD U.P. Power Corp. Ltd. & ors. Vs Ram Gopal, Civil Appeal No.. 852 of 2020

(Delivered by Hon'ble Surya Prakash Kesarwani, J. &
Hon'ble Vikas Budhwar, J.)

1. Heard Sri H.N. Singh, learned Senior Advocate assisted by Sri Rishabh Srivastava, learned counsel for the petitioner, learned Standing Counsel for the respondent no. 1, Sri Nipun Singh, learned counsel for the respondent no. 2 and Sri Avanish Mishra, learned counsel for the respondent no. 3.

2. This writ petition has been filed for the following relief:-

A. Issue a writ order or direction in the nature of certiorari calling the respondents to produce the order of the State Government dated 13 December, 2017 referred in the order of the Joint Secretary U.P. Public Service Commission dated 21 December, 2017 and the Hon'ble Court may be pleased to quash the order of the State Government dated 13 December, 2017, the order of the Joint Secretary U.P. Public Service Commission dated 21 December, 2017 (Annexure-5) and all the further proceeding of selection on the post of Lecturer cum Statistician advertised by U.P. Public Service Commission by Advertisement No. 4/2014-2015 dated 17.03.2015 including interview of the said selection scheduled on 9th November, 2021.

B. Issue a writ order or direction in the nature of certiorari quashing the qualification prescribed by Medial Council of India now National Medical Commission (N.M.C.) by Minimum Qualification for Teachers in Medical Institutions Regulations, 1998 for the post of Lecturer cum Statistician in the department of Community Medicine so far it requires the experience of 3 years as Tutor/Demonstrator/Resident/Registrar/Epidemiologist/Health Officer.

C. Issue a writ order or directions in the nature of mandamus commanding the respondents to say all selection proceeding including interview of the post of Lecturer

Statistics advertised by U.P. Public Service Commission vide advertisement No. 4/2014-2015 dated 17.03.2015 during the pendency of the writ petition before the Hon'ble Court.

D. Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

E. Award the cost of writ petition.

3. The submissions of learned counsel for the petitioner are as under:-

(i) The qualification prescribed by the Medical Council of India for the post of Lecturer (Statistics) is non workable in as much as there shall be none who may have three years teaching experience from such recognized medical college as Resident/ Registrar/ Demonstrator/Tutor.

(ii) The respondents are neither adhering to the advertisement nor to the guidelines of the Medical Council of India in connection with the selection process for the post of Lecturer in Statistics, in-as-much as the prescribed qualification requiring for three years teaching experience as Resident/Registrar/Demonstrator/Tutor contractual basis is not workable and possible hence deserves to be set aside. Although, the petitioner also possesses the experience but it was acquired by him subsequent to the advertisement. The person who possess post graduate in Statistics, cannot possess the experience of Resident/Registrar/Demonstrator/Tutor, for which the qualification prescribed by the Medical Council of India is M.B.B.S. Therefore, a candidate cannot possess both the qualifications, namely, M.Sc. (Statistics) and M.B.B.S. The persons who have been short listed, do not possess the required qualification, as provided in the guidelines of the Medical Council of India and the advertisement, read with the qualification letter/impugned order dated 13.12.2017. Only the qualification as prescribed by the Medical Council of India can be made applicable for selection on the post of Lecturer (Statistics). Therefore, the persons short-listed and called for interview, cannot be selected in-as-much as they do not possess the required qualification, prescribed by Medical Council of India.

4. Sri Nipun Singh, learned counsel for the respondent no. 2 submits that interview has finally taken place today i.e. 09.11.2021 in which five candidates were called, out of which, four candidates have turned up to appear in the interview. He submits that selection has been made in accordance with the qualification and experience provided in the "Minimum Qualification for Teachers in Medical Institutions Regulations, 1998".

5. Sri Avanish Mishra, learned counsel for the respondent no. 3 submits that the petitioner participated in the entire selection process but when he was not called for interview being not illegible, only then he filed the present writ petition challenging the Regulation 1998. Thus, the relief sought by the petitioner is lead to the principle of approbate and reprobate and therefore, the writ petition deserves to be dismissed.

6. The learned Standing Counsel supports the impugned order and submits that the writ petition is hit by the principle of laches in-as-much as it has been filed to challenge the impugned order dated 21.12.2017, after more than three years, without any proper explanation for delay.

7. We have carefully considered the submissions of learned counsel for the parties and perused the record.

8. The Medical Council of India in exercise of the powers conferred by section 33 of the Indian Medical Council Act 1956 (102 of 1956) with the previous sanction of the Central Government has enacted the "Medical Council of India Minimum Qualification for Teachers in Medical Institutions Regulations, 1998" (As amended up to 08.06.2017) regulating the appointment of medical teachers, with minimum qualification and experience in various departments of medical colleges and institutions imparting graduate and post graduate education.

9. The qualification for the post of Lecturer in Statistics as well as of Tutor/ Demonstrator/ Resident/ Registrar/ Epidemiologist/ Health Officer is reproduced below:-

Lecturer in Statistics	M.Sc (Statistics)	(i)Requisite recognised postgraduate qualification in the subject. (ii) Three years teaching experience in the subject in a recognised medical college as Resident/Registrar/Demonstrator/ Tutor
Tutor/Demonstrator/Resident/Registrar/Epidemiologist/Health Officer	M.B.B.S.	

10. Thereafter, an advertisement was published by the respondent no. 2 being Advertisement No. 4/2014-15 date: 17/03/2015 inviting applications to fill up various posts in different departments in the State of Uttar Pradesh including the post of Lecturer-Statistic. The relevant extract of the advertisement is being quoted hereunder:-

"Serial No. 17. Lecturer-Statistician cum Lecturer (A) *A post graduate degree in the concerned subject recognized by University/Institute."*

11. The counsel for the respondent no. 2 has argued that there are number of candidates who had applied for the said post having the qualification so prescribed by the Medical Council of India but as on the date of advertisement the petitioner did not have three years teaching experience in the subject in a recognized medical collage as Tutor/Demonstrator/Resident/Registrar.

12. Prescription of qualification and other conditions of service is essentially and primarily the field of policy exclusively with the domain of the employer subject to the limitation envisaged in the Constitution of India and it is not for this Court while exercising its jurisdiction under Article 226 of the Constitution to arrogate to itself that function. It is neither the function nor the role of the Court to adjudge or assess the suitability or desirability of a particular qualification that may be stipulated. Equivalence of degree and educational qualification is necessarily the function

reserved for the experts in the field namely the academicians.

13. In the case of **P.V. Joshi And Others Vs. Accountant General, Ahemdabad And Others 2003 (2) SCC 632** the Hon'ble Supreme Court has held as under:-

"10.We have carefully considered the submissions made on behalf of both parties. **Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State**. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service." (Emphasis supplied by us)

14. In the case of **Sanjay Kumar Manjul v. U.P.S.C.(2006) 8 SCC 42** the Hon'ble Apex Court has held as under:-

"25. **The statutory authority is entitled to frame statutory rules laying down terms and conditions of service as also the qualifications essential for holding a particular post**. It is only the authority concerned who can take ultimate decision therefor.

26. **The jurisdiction of the superior courts, it is a trite law, would be to interpret the rule and not to supplant or supplement the same**.

27. It is well-settled that the **superior courts while exercising their jurisdiction under Articles 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post**." (Emphasis supplied by us)

15. The Supreme Court in the case of **Zahoor Ahmad Rather Vs. Sheikh Imtiyaz Ahmad (2019) 2 SCC 404** has held as under:-

*"26. ..... **The prescription of qualifications for a post is a matter of***

recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review*. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. The decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench [Imtiyaz Ahmad v. Zahoor Ahmad Rather, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the High Court was justified in reversing the judgment [Zahoor Ahmad Rather v. State of J&K, 2017 SCC OnLine J&K 936] of the learned Single Judge and in coming to the conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision [Imtiyaz Ahmad v. Zahoor* Ahmad Rather, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the Division Bench." (Emphasis supplied by us)

16. The Hon'ble Apex Court in the case of **Maharashtra Public Service Commission Vs. Sandeep Shriram Warade 2019 (6) SCC 362** has held as under:-

"*9.* ***The essential qualifications for appointment to a post are for the employer to decide.*** *The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work.* ***The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review.*** *If the language of the advertisement and the rules are clear, the court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."* (Emphasis supplied by us*)*

17. More recently three learned Judges of the Supreme Court in **Punjab National Bank Vs. Anit Kumar Das 2020 SCC Online SC 897** has observed as under:-

*"21. Thus, as held by this Court in the aforesaid decisions****, it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess.*** *A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it.* ***Qualifications are***

prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."
(Emphasis supplied by us)

18. A full Bench decision of this Court in the case of **Deepak Singh and Others Vs. State of U.P. and Others (2020) All LJ 596 (FB)** held as under:-

"The State Government, while prescribing the essential qualifications or desirable qualifications are best suited to decide the requirements for selecting a candidate for nature of work required by the State Government and the courts are precluded from laying down the conditions of eligibility. If the language in the Rules is clear judicial review cannot be used to decide what is best suited for the employer." *(Emphasis supplied by us)*

19. The proposition of law as culled out by the Hon'ble Apex Court as well as this Court clearly mandates that the Court under Article 226 of the Constitution of India cannot trench into the province which is earmarked for the rule making authority and discharge the role and the function of the experts to prescribe a particular qualification for a post to be filled namely, the academicians.

20. The submission of learned Senior Counsel for the petitioner that there is inconsistency in the prescription of the qualification provided in the advertisement in question viz a viz the qualification prescribed by the Medical Council of India in the Regulations of 1998, is thoroughly misconceived. From bare perusal of the advertisement in question, it is clear that it stipulates the condition that the qualification prescribed in the Regulations of 1998 is to be followed and a candidate is to be selected on the basis of said qualification.

21. The Hon'ble Apex Court in the case of **Asheesh Kumar Vs. State of U.P. and Others (2018) 3 SCC 55** has cautioned in para 27, as under:-

"27. ***Any part of the advertisement which is contrary to the statutory rule has to give way to the statutory prescription****. Thus, looking to the qualification prescribed in the statutory rules, appellant fulfills the qualification and after being selected for the post denying appointment to him is arbitrary and illegal. It is well settled that* ***when there is variance in the advertisement and in the statutory rules, it is statutory rules which take precedence****. In this context, reference is made in judgment of this Court in the case of Malik Mazhar Sultan & Anr. Vs. U.P. Public Service Commission & Ors., 2006 (9) SCC 507. Paragraph 21 of the judgment lays down above proposition which is to the following effect:*

"21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 01.07.2001 and 01.07.2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisements but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise ot ligible according to the Rules. The relaxation of age can be granted only of permissible under the Rules and not on the basis of the advertisement. If the

interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue onbasis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules." (Emphasis supplied by us)

22. There is another aspect of the matter which is to be taken notice of and be addressed with regard to the undisputed fact that the advertisement in question as well as the selection for the post of Lecturer in Statistics is being challenged after a period of 4 years. The advertisement itself was issued way back in the year 2015. The writ petition has been filed in the last of the month of October, 2021 whereas the date of the interview has been fixed on 09.11.2021. Neither there is any pleading with regard to the reasons for delay in approaching this Court nor any serious argument has been raised in this regard by the learned counsel for the petitioner. Thus, the writ petition is also hit by laches.

23. The Hon'ble Apex Court in the case of **P.S. Sadasivaswamy Vs. State of Tamil Nadu (1975) 1 SCC 152** has considered the question of laches and held as under:-

"2. .....if the appellant was aggrieved by it he should have approached the Court even in the year 1957 after the two representations made by him had failed to produce any result. ***One cannot sleep over the matter and come to the Court questioning that relaxation in the year 1971****. .....in effect he wants to unscramble a scrambled egg. It is very difficult for the Government to consider whether any relaxation of the rules should have been made in favour of the appellant in the year 1957. The conditions that were prevalent in 1957 cannot be reproduced now. .....It is not that 'here is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time.* ***But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extra-ordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters"*** *(Emphasis supplied by us)*

24. The Hon'ble Apex Court in the case of in **SS Balu v. State of Kerala (2009) 2 SCC 479**, observed thus:

*"17. It is also well-settled principle of law that "**delay defeats equity**". ...It is now a trite law that* ***where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the fact that they are similarly situated to the other candidates who obtain the benefit of the judgment.****"*
(Emphasis supplied by us)

25. Similarly, in the case of **Vijay Kumar Kaul v. Union of India (2012) 7 SCC 610** the Hon'ble Apex Court has held as under:-

"27. ***...It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the***

path of extinction with the passage of time." (Emphasis supplied by us)

26. The Hon'ble Apex Court in **State of Uttar Pradesh v. Arvind Kumar Srivastava (2015) 1 SCC 347**, has observed that:-

" 22.1. The normal rule is that when a particular set of employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2. However, this principle is subject to well-recognised exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim."

27. Recently, the Hon'ble Apex Court in the **Civil Appeal No. 852 of 2020** decided on **31.01.2020** in the case of **Chairman/Managing Director U.P. Power Corpporation Ltd. & others Vs. Ram Gopal** has held as under:-

"16. ***Whilst it is true that limitation does not strictly apply to proceedings under Articles 32 or 226 of the Constitution of India, nevertheless, such rights cannot be enforced after an unreasonable lapse of time. Consideration of unexplained delays and inordinate laches would always be relevant in writ actions, and writ courts naturally ought to be reluctant in exercising their discretionary jurisdiction to protect those who have slept over wrongs and allowed illegalities to fester****. Fence-sitters cannot be allowed to barge into courts and cry for their rights at their convenience, and vigilant citizens ought not to be treated alike with mere opportunists."* 7 (Emphasis supplied by us)

28. Following the principles of law laid down in the above noted judgments we find that there is unexplained delay of approximately 4 years in filing the present writ petition. Thus, the present writ petition is also barred by laches.

29. In totality of the matter this Court finds that the post of Lecturer-cum-Statistician is a specialized post in a medical fraternity and the prescription of qualification is a specialized task of the experts being academicians which cannot be made a subject matter of a judicial review, particularly when there is nothing on record to show that the rule making authority has no legislative competence to lay down the qualification.

30. Resultantly, the present writ petition is devoid of merit and is hereby **dismissed.**

(2022)02ILR A908
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 10884 of 2021

Aditya Sudhakar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Bipin Lal Sri Vinayak Varma, Sri S.K. Varma (Senior Adv.)

Counsel for the Respondents:
C.S.C.

A. Service Law - Compassionate Appointment - U.P. Dying in Harness Rules, 1974-Rule 5-Father of petitioner died due to Covid-19- mother of the petitioner submitted an application as per State Govt. Order dated 20.05.2021 for compassionate appointment-if the case of the petitioner falls within Rule 5 of notification no. 6/XII/73/Ka-2-T.C.-IV dated 22.01.2014 only then he may be provided compassionate appointment-the mother of the petitioner was employed in Kendriya Vidyalaya which is governed and administered by Central Government and Rule 5 of U.P. Dying in Harness Rules, 1974 excludes the dependent of an employee for compassionate appointment whose husband and wife, as the case may be, is employed under the Central Government or State Government-Thus, Rule 5 of U.P. Dying in Harness Rules, 1974 clearly bars the appointment of the petitioner on compassionate ground.(Para 1 to 13)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Smt. Deepa Vashishtha Vs St. of U.P. & anr.(1996) 1 UPLBEC 54

2. Home Secy., U.T. of Chandigarh & anr. Vs Darshjit Singh Grewal & ors.. JT (1993) 4 SC 387

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

1. Heard Sri S.K. Varma, learned Senior Advocate, assisted by Sri Vinayak Varma, learned counsel for the petitioner and Sri R.S. Umrao, learned Standing Counsel for the respondents.

2. The petitioner by means of present writ petition has assailed the order dated 22.07.2021 passed by the Director of the Social Welfare Department, U.P. rejecting the claim of the petitioner for compassionate appointment.

3. The case of the petitioner is that his father Harish Chandra Arya was Deputy Director in Social Welfare Department and was posted at Bareilly Division, Bareilly. His father was declared a corona positive patient on 08.05.2021. He was admitted in Khushlok Hospital, Bareilly and died on 22.05.2021 due to Covid-19.

4. The Chief Secretary of State of U.P. issued an order/letter on 20.05.2021 addressed to the District Magistrates directing them to ensure that family members of the employees of health services, Police, Urban and Rural Administration and other Government Officers who are discharging their duties with dedication to fight with Covid-19 pandemic and had died while discharging their duties be immediately granted ex-gratia amount and one dependent of such employees be provided compassionate appointment as per rules. Accordingly, mother of the petitioner submitted an

application on 03.06.2021 requesting that the petitioner be granted compassionate appointment. The respondent no.2 by order dated 22.07.2021 rejected the claim of petitioner under Dying in Harness Rules on the ground that his mother is employed in Kendriya Vidyalaya which is governed and administered by Central Government.

5. Challenging the aforesaid order, learned Senior Counsel has submitted that the order dated 20.05.2021 issued by Chief Secretary, State of U.P. is explicit and provides that the dependent of deceased employee who had died due to Covid-19 is to be given compassionate appointment in place of deceased employee.

6. Elaborating the said argument learned counsel submits that the language used in Government Order dated 20.05.2021 is explicit and discloses the intention of the Government to give employment to the dependent of the deceased who died due to Covid-19. He further submits that if that was not the intention of the Government, there was no necessity of issuing Government Order dated 20.05.2021 as there was already U.P. Dying in Harness Rules, 1974 providing for compassionate appointment. He further submits that once the Government has framed a policy to provide employment to the dependent of the deceased employee who died of Covid-19, it is bound by the said policy and it is incumbent upon the Government to scrupulously adhere to the Government Order dated 20.05.2021. It is further contended that the notification no. 6/XII/73/Ka-2-T.C-IV dated 22.01.2014 shall be deemed to have been superseded by the order dated 20.05.2021 issued by Chief Secretary, State of U.P. in respect to the employees who died of Covid-19.

7. Per- contra, learned Standing Counsel contends that the object of issuing the Government Order dated 20.05.2021 is to provide immediately ex-gratia payment and compassionate appointment to the dependents of deceased employee who died of Covid-19 as per rules without any delay. He submits that the order dated 20.05.2021 provides that the dependent of the deceased employee should be given compassionate appointment as per rules immediately. He submits that the intention behind issuance of order dated 20.05.2021 to provide immediate succour to the family of the deceased employee died of Covid-19 without any delay since such an employee had dedicated his life to fight with the menace of Covid-19 pandemic. He submits that if the rules permits only then the dependent of the employee is to be provided employment on compassionate ground. He submits that Deputy Secretary of State of U.P. wrote a letter addressed to the Director Social Welfare clarifying that if the case of the petitioner falls within Rule 5 of notification no. 6/XII/73/Ka-2-T.C-IV dated 22.01.2014 only then he may be provided compassionate appointment.

8. I have heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents and perused the record.

9. In order to appreciate the submissions advanced by learned counsel for the petitioner relevant extract of order dated 20.05.2021 issued by Chief Secretary, State of U.P. is reproduced herein as under:

"समस्त जिलाधिकारी

प्रदेश में कोविड संक्रमण के नियंत्रण एवं बचाव हेतु स्वास्थ्य सेवाओं, पुलिस, प्रशासन,

नगरीय एवं ग्रामीण स्थानीय प्रशासन सहित सभी शासकीय अधिकारी व कर्मचारी अपने दायित्यों का निर्वहन कर रहे हैं। इस दौरान अपनी ड्यूटी के समय संक्रमित होने से कुछ कर्मियों की दुःखद मृत्यु भी हुई है। यह सुनिश्चित किया जाए कि ऐसे कर्मियों को तत्काल अनुमन्य अनुग्रह राशि तथा उसके एक आश्रित को नियमानुसार सेवा में रखे जाने की कार्यवाही भी यथाशीघ्र की जानी चाहिए। यदि इस सम्बन्ध में कार्यवाही विभाग/शासन स्तर पर की जानी है तो इस सम्बन्ध में जिलाधिकारी अपनी आख्या भी तत्काल सम्बन्धित विभाग को प्रेषित करना सुनिश्चित करें।

2- समस्त विभागों द्वारा भी ऐसे मामलों में तत्काल अपेक्षित कार्यवाही सुनिश्चित की जाए तथा इसकी सूचना कार्मिक विभाग को भी उपलब्ध करायी जाए।"

10. The order dated 20.05.2021 is distinct and provides in unequivocal terms that the dependent of an employee died of Covid-19 shall be given compassionate appointment expeditiously without any delay as per rules. It further provides that as the decision is to be taken at the level of State Government, therefore, the concerned District Magistrate shall forthwith submit report to the concerned department/administration of State Government and all departments shall forthwith ensure the action on said recommendation to provide compassionate appointment. Thus, it is clear that the Government Order dated 20.05.2021 has been issued only to provide immediate relief to those employees who died of Covid-19 and had dedicated their lives to a social cause in fighting against Covid-19 pandemic. Thus, it can safely culled out from the reading of Government Order dated 20.05.2021 that it only provides preferential treatment to the dependents of deceased employee who died of Covid-19 from other deceased employees who had died in normal circumstances. Thus, the submission of learned counsel for the petitioner that once an employee died due to Covid-19, his dependent has to be given employment on compassionate ground is misplaced as the order dated 20.05.2021 is specific and unambiguous which clearly stipulates that the dependents of such an employee shall be given preference over the dependant of other deceased employees as per rules.

11. So far as the two judgments relied upon by the learned counsel for the petitioner in ***Smt. Deepa Vashishtha Vs. State of U.P. and another, (1996) 1 UPLBEC 54 and Home Secretary, U.T. of Chandigarh and Anr. Vs. Darshjit Singh Grewal & Ors., JT 1993 (4) S.C. 387*** are concerned, it is true that these judgments have elucidated that once the Government has issued a policy, it must adhere to the said policy, and if the Government deviates from the policy framed by it, then it must record reasons for doing so. But in the instant case, the order dated 20.05.2021 is specific and clearly provides that the dependents of deceased employee died of Covid-19 shall be given appointment as per rules.

12. In the instant case, it is admitted that the mother of the petitioner is employed in Kendriya Vidyalaya which is governed and administered by Central Government and Rule 5 of U.P. Dying in Harness Rules, 1974 excludes the dependent of an employee for compassionate appointment whose husband and wife, as the case may be, is employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a

State Government. Thus, Rule 5 of U.P. Dying in Harness Rules, 1974 clearly bars the appointment of the petitioner on compassionate ground.

13. Thus, for the reasons given above, the writ petition lacks merit and is, accordingly, ***dismissed***. However, there shall be no order as to costs.

(2022)02ILR A911
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 17061 of 2021

Sumit Kumar Sharma ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pradeep Kumar, Sri Krishna Nand

Counsel for the Respondents:
A.S.G.I., Sri Vivek Tripathi

A. Service Law - Compassionate appointment-dying in harness-candidate appointment rejected-father of the petitioner died in harness leaving behind his widow and son/petitioner-petitioner found unfit for post of constable on the ground that he was over age and also because of his marital status-petitioner was also considered for driver post but he failed to submit his driving license-thus the age as on the date on which the application is considered would be the relevant date, and not when the application is made-compassionate appointment is an exception to the general rule-the compassionate ground is a concession and not a right-Hence, no illegality in the impugned order.(Para 1 to 13)

B. The appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. (Para 10)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. St. of U.P. & ors. Vs Premlata, Civil Appeal No. 6003 of 2021

2. H.P. & anr. Vs Shashi Kumar (2019) 3 SCC 653

3. Govind Prakash Verma Vs LIC (2005) 10 SCC 289: 2005 SCC (L&S) 590

4. Mumtaz Yunus Mulani Vs St. of Mah. (2008) 2 SCC (L&S) 1077

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

1. Heard Sri Pradeep Kumar Kashyap, learned counsel for the petitioner as well as Sri Shashi Prakash Singh, learned Additional Solicitor General of India assisted by Sri Vivek Triapthi, learned counsel for the respondents.

2. Learned counsel for the petitioner submits that by means of present writ petition, petitioner has assailed the order dated 12.05.2021, passed by the Inspector General of Police, Central Reserve Police Force, Central Command, Vibhuti Khand, Gomati Nagar, Lucknow, whereby candidature of the petitioner for compassionate appointment on one of the various posts in the CRPF have been rejected.

3. It is next submitted by learned counsel for the petitioner that his father was

posted as Assistant Sub Inspector at 63 Battalion, CRPF and he died on 18.05.2016 in harness leaving behind his widow wife an petitioner himself as his legal heirs. Petitioner's father was the only bread earner of the family and consequently the petitioner made an application for being appointed under the dying-in-harness rules applicable to the said Organisation, for the posts which have been earmarked for the same.

4. The petitioner was asked to appear for physical test on 13.05.2019, at NOIDA, and which he could not clear and consequently was found unfit for being appointed on the post of constable.

5. Consequently, case of the petitioner was also considered on the post of Hawildar/Ministerial or Assistant Sub-Inspector, but his candidature was again rejected on the ground that he was over age and also because of his marital status.

6. Subsequently, the petitioner was also considered to be appointed on the Post of Driver but the same could not be considered as the petitioner has not submitted any driving license and while rejecting the said the application of the petitioner, it has been stated that they have considered the application for appointment but due to the aforesaid reasons, compassionate appointment cannot be given to the petitioner.

7. It has been submitted by learned counsel for the petitioner that he had made the application for compassionate appointment in the year 2016 and consequently his age as in 2016 should have been considered while considering him for appointment and therefore his application should not have been rejected on the ground of over age.

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

9. It has been noticed that age of the petitioner on the date of consideration of his application for compassionate appointment would be a relevant consideration. For compassionate appointment, there are several applications and when ever vacancy is offered to a candidate, his qualifications and eligibility has to be considered according to the post against which he/she is being considered and therefore the age as on the date on which the application is considered would be the relevant date, and not when the application is made.

10. In this connection reference may be made to the observations of Hon'ble Supreme Court in the case of ***The State of Uttar Pradesh and others Vs. Premlata*** in Civil Appeal No.6003 of 2021 as under:-

8.While considering the issue involved in the present appeal, the law laid down by this court on compassionate ground on the death of the deceased employee are required to be referred to and considered. In the recent decision this court in Civil Appeal No.5122 of 2021 in the case of the Director of Treasuries in Karnataka & Anr. vs. V. Somashree, had occasion to consider the principle governing the grant of appointment on compassionate ground. After referring to the decision of this court in N.C. Santhosh vs. State of Karnataka and Ors. reported in (2020) 7 SCC 617, this Court has summarized the principle governing the grant of appointment on compassionate ground as under:

(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.

9.As per the law laid down by this court in catena of decisions on the appointment on compassionate ground, for all the government vacancies equal opportunity should be provided to all aspirants as mandated under Article 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right.

9.1 In the case of State of ***Himachal Pradesh and Anr. vs. Shashi Kumar reported in (2019) 3 SCC 653****, this court had an occasion to consider the object and purpose of appointment on compassionate ground and considered decision of this court in case of* **Govind Prakash Verma vs. LIC reported in (2005) 10 SCC 289**, *in para 21 and 26, it is observed and held as under:*

"21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289, has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] . The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract:

(Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] , SCC pp. 13940, para 2)

"2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole

object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in nonmanual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

"26. The judgment of a Bench of two Judges in ***Mumtaz Yunus Mulani v. State of Maharashtra [Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384 : (2008) 2 SCC (L&S)*** *1077] has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case."*

10.Thus as per the law laid down by this court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give such family a post much less a post held by the deceased."

11. In case, the post offered to the petitioner, according to him, may not be a suitable post, it is open for him to make a

representation to the respondents, who needless to say, would consider the same and dispose of in accordance with law.

12. Also looking into the fact that a very limited number of vacancies are available on which candidates are to be considered for compassionate appointment therefore a very long duration of time may be consumed for an individual's application to be considered and needless to say that eligibility conditions are also a relevant criteria for appointments and have to be fulfilled and therefore the eligibility on the date of consideration of the applications would be relevant, and the petitioner admittedly was overage on the said date.

13. This Court does not find any illegality or infirmity in the impugned order. There is no merit in the arguments raised by learned counsel for the petitioner. Accordingly, present writ petition being devoid of merits is **dismissed.**

14. However, in case there are other vacancies available with the respondents for which physical criteria or age can be relaxed, then it is open for the respondents to consider the case of the petitioner. Let such consideration be made within a period of three months from the date of presentation of a copy of this order and the decision shall be communicated to the petitioner.

15. It is needles to say that any decision by the respondents in the matter of petitioner, shall be taken in accordance with law.
